

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

% *Judgment delivered on: 9th August, 2016*
Judgment pronounced on: 17th August, 2016

+ **O.M.P. (COMM) 89/2016 & I.A. No.23472/2015**

UNION OF INDIA Petitioner
Through Mr.Ripu Daman Bhardwaj, CGSC
with Mr.T.P.Singh, Adv.

versus

ASSOCIATED CONSTRUCTION CO. Respondent
Through Dr.Amit George, Adv. with
Mr.Swaroop George, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for setting aside the impugned award dated 26th June, 2015.
2. The admitted and relevant facts of the case are that the petitioner and the respondent entered into a contract dated 28th February, 2009 for provision of OTM Accommodation for CASD at Delhi Cantt-10, CA No.CEDZ-27 of 2008-09 (hereinafter referred to as the 'contract').
 - 2.1 The estimated contract price was for an amount of Rs.6,20,75,026.71/-.

2.2 The period of completion of the work was 15 months; with the scheduled date of start of the work being 14th March, 2009 and the scheduled date of completion being 13th June, 2010.

2.3 The period of completion of the work was subsequently extended by the respondent and the work was actually completed on 21st February, 2012.

2.4 Certain disputes and differences arose between the parties during the execution of the work.

2.5 In terms of the conditions of the contract entered into between the parties, the Engineer-in-Chief, Army HQ, New Delhi vide letter No.23600/WC/895/07/E8 dated 5th March, 2013 appointed a serving Chief Engineer (Contracts) of the respondent as the Arbitrator to adjudicate the controversy between the parties.

2.6 After hearing both the parties and perusing the evidence on the record, by means of the impugned arbitral award dated 26th June, 2015, few claims of the respondent i.e. Claim Nos. 1, 2, 3, 5 and 11 have been partially allowed by the Arbitrator whereas Claim Nos. 4, 6, 7, 8, 9, 10 and 12 have been rejected. The Arbitrator has also partially allowed the counter-claim of the petitioner, however the counter-claim is not the subject matter of the present petition.

3. During the hearing held on 18th July, 2016, the learned counsel for the petitioner had restricted the challenge to the arbitral award to the amounts awarded by the Arbitrator under Claim Nos.5 and 11 only. Counsels for both the parties were therefore heard on the said date in relation to Claim Nos. 5 and 11.

4. The Claim No.5 pertains to the claim for material and labour escalation raised by the respondent whereas Claim No. 11 pertains

to the claim for past, *pendente-lite* and future interest as claimed by the respondent.

5. The Arbitrator by means of the impugned arbitral award dated 26th June, 2015 had partially awarded the aforesaid claims in favour of the respondent.

6. Claim No. 5 as preferred by the respondent relates to the component of escalation. It is not in dispute that Clause 63 of IAFW-2249 forming part of the Contract agreement contemplates adjustment of the contract price in the light of increase in prices. The relevant portion of the said clause has been reproduced here as under:

"63. Reimbursement/refund on variation in price-if during the progress of the works the price of any materials required to be incorporated in the Works (not being a material supplied from the G.E's stores in accordance with condition 10 hereof) and/or wages of labour increases as a direct result of the coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such increase exceeds ten per cent. Of the price and/or wages prevailing at the time of acceptance of the tender for the Work and the contractor (hereupon necessarily and properly pays, in respect of that material (incorporated. In the Works) such increased price and/or in respect of labour required for and engaged on the execution of the work such increased wages, then the amount of contract shall accordingly be varied protanto , provided always that any increase so payable is not in the opinion of the C.W.E (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the Contractor.

Provided, however, no re-imbursement shall be made, if the increase is not more than 10% of the said prices. Wage and if so, the re-imbursements shall be made only on the

excess over 10% and provided further that any such increase shall not be payable if such increase has become operative after the contract or extended date of completion of the 'work in question.

If during the progress of the Works, the price of any material incorporated in the Works (not being a material supplied from the G. E.'s stores in accordance with Condition 10 hereof) and/or wages of labour is decreased as a result of coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such decrease exceeds ten per cent of the prices and/or wages prevailing at the time of acceptance of the tender for the Work, Government shall in respect of materials incorporated in the Works (not being materials supplied from the G.E's stores in accordance with Condition 10 hereof) and/or labour engaged on the execution of the Work after the date of coming into force of such law, statutory rule or order be entitled to deduct from the dues of the Contract such amount as shall be equivalent to difference between the prices of materials and/or wages as they prevailed at the time of acceptance of tender for the Work minus ten percent thereof and the prices of materials and/or wages of labour on the coming into force of such law, statutory rule or order.

The Contractor shall, for the purpose of this condition keep such books of account and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorized representative of Government, and further shall, at the request of the Garrison Engineer furnish, verified in such a manner as the Garrison Engineer may require, any documents so kept and such other information as the G. E. may require.

The Contractor shall, within a reasonable time of his becoming aware of any alteration to the prices of any such

material, and/or wages of labour, give written notice thereof to the G. E. stating that the same is given pursuant to this condition together with all information relating thereto which he may be in a position to supply."

7. It is submitted on behalf of the petitioner that the sole Arbitrator passed the impugned award in conflict with the public policy, as it is a contractual matter. The terms and conditions of the contract are applied strictly but the Arbitrator in the impugned award had failed to correctly incorporate the clause 63 of IAFW 2249 (General Condition of Contract) and instead of applying clause 63 (General Condition of Contract) while considering the correctness of claim No. 5 of the respondent, had applied formula as to be applied in some other contracts. Counsel for the petitioner in support of his submission has referred clause 63 of the General Condition of Contract which has been mentioned above.

8. It is submitted by the counsel for the petitioner that the Ld. Arbitrator erred in awarding a sum of Rs.49,25,240/- against claim No.5 of contractor/respondent on account of increase in labour wages.

It is stated by him that as per condition 63 of IAFW-2249, if during the progress of the works, the wages of labour increases as a direct result of the coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such increase exceeds ten percent of the wages prevailing at the time of acceptance of the tender for the work and the contractor thereupon necessarily and properly pays such increased wages in respect of labour required for and engaged on the execution of the work; then the reimbursement shall be made only on the excess over 10% and

no reimbursement shall be made if the increase is not more than 10% of the said wages.

9. It is also submitted on behalf of the petitioner that the said condition also provides that "The contractor shall, for the purpose of this condition keep such books of accounts and other documents as are necessary to show the amount of any increase claimed and shall also allow inspection of the same by a duly authorised representative of Government and further shall, at the request of Garrison Engineer furnish, verified in such a manner as the GE may require, any documents so kept and such other information as the Garrison Engineer may require". Thus, following pre-requisites are supposed to be fulfilled before entertaining a claim relating to reimbursement on account of increase in labour wages under condition 63 of IAFW-2249:-

(aa) The contractor is supposed to prove that the wages of labour as actually prevailing in the market and being paid by him had increased pursuant to revision of/increase in the minimum fair wages by the competent authority of State Govt/Central Govt. If the contractor was paying labour wages higher than the minimum fair wages prescribed by the Govt (which often happens) and the revision of/increase in minimum fair wages by Govt w.e.f. some date did not have any effect on the labour wages being paid by contractor (as prevailing prior to revision), or else if the increase was not exceeding 10% in case of a particular category of labour, then no reimbursement becomes due to contractor under said condition 63 of IAFW-2249. Needless to say, this aspect can be verified only by means of the documents relating to payment of wages to various categories of labour prior to and subsequent to revision in minimum fair wages by Central/State Govt. Accordingly, during arbitration proceedings the Sole Arbitrator was

requested to direct the contractor to file the requisite documents. However, the Sole Arbitrator made no order to that effect and he has awarded the claim in favour of contractor without it being established that the wages of labour as actually prevailing in the market and being paid by contractor prior to revision in minimum fair wages had increased beyond 10% in respect of all categories of labour subsequent to the revision in minimum fair wages. Thus the award is vitiated on this account.

(ab) The contractor is supposed to produce the books of accounts and documents such as paid muster roll, wage book, wage slips and Register of Fines and deductions (as per Annexure 'A' (MES Contractor's labour regulations) to IAFW-2249) in support of his claim for reimbursement on account of increase in labour wages. During arbitration hearing, the Sole Arbitrator was requested to cause filling of all these documents by contractor as required under condition 63 of IAFW-2249. However, the Sole Arbitrator made no order to that effect and he has awarded the claim in favour of contractor based on some empirical formula not forming part of CA without any substantiating documents having been brought on record as required under condition 63 of IAFW-2249 and hence his award is vitiated on this account.

(ac) The contractor is supposed to prefer his claim for reimbursement on account of variation in the wages of only those categories of labour, in respect whereof the increase is more than 10%. However, this aspect has not been given any cognizance by Sole Arbitrator despite having been pointed out during arbitration hearing and the claim has been awarded based on an empirical formula (not forming part of CA), which allows reimbursement on a flat basis (considering labour component to be 20% of the total cost of work) in respect of all categories of labour and thus the award is vitiated on this account.

10. It is submitted that sole Arbitrator had erroneously justified his award in respect of claim No. 5 on the following grounds as per his statements in para 173 of award which have been reproduced herein below:-

(aa) The empirical formula is approved by Government and forming part of various contract agreements concluded by MES.

(ab) The formula is very rational.

(ac) No comments were received from UOI.

As regards the first and second reasons of the sole Arbitrator, it is submitted by him that same are simply untenable, malicious and misleading, because a formula approved by Government and forming part of other contracts, cannot override and replace the express provisions of this contract which has got a specific condition for reimbursement on account of increase in labour wages in the form of condition 63 of IAFW-2249, when no irrationality has been recorded by sole Arbitrator with respect to said conditions. Pertaining to the third reason of sole Arbitrator, the same is also misleading as all the points brought out in the preceding paras were pleaded before the sole Arbitrator during the arbitration hearing when claim No.5 of contractor was being discussed. It is admitted that no comments with reference to details of contractor's claim based on empirical formula (not forming part of CA) were submitted subsequent to arbitration hearing as it was thought that the same may be considered as acceptance of the methodology adopted for pricing the claim, however, during the arbitration hearing the petitioner had refuted this claim based on a formula which did not form part of CA and which contemplated a different scheme of

reimbursement as opposed to the one contained in condition 63 of IAFW-2249. But the sole Arbitrator upheld this claim of contractor despite of express conditions of contract and the pleadings as advanced above during arbitration proceeding by the petitioner without application of judicial mind and hence, this claim is liable to be set aside.

11. The only question is as to whether this formula was so *de-hors* Clause 63 of the contract so as to render the award patently illegal?

The learned counsel for the petitioner during the course of arguments has not denied that there was an upward revision in minimum wages during the currency of the contract and that the respondent may be entitled to reimbursement on that score. His only contention is that the Arbitrator has not awarded the said claim in terms of Clause 63 of the contract between the parties. It is the submission of the learned counsel for the petitioner that the formula/methodology adopted by the Arbitrator is *de-hors* Clause 63 of the contract and the requirements of the said Clause have been overlooked by the Arbitrator.

12. Counsel for the respondent submits that the major objection of the petitioner to the award of the claim is that the Arbitrator proceeded to use a certain formula to quantify the amount to be awarded under the claim. Learned counsel for the respondent has supported the finding arrived at in the impugned award. Counsel has also filed the written submission. From the pleadings, documents and arguments addressed on behalf of both the parties, it is now to be considered as to whether the impugned award is sustainable or not in view of rival submissions of the parties.

13. The special conditions in the contract entered into between the parties, namely clause 30 thereof dealing with reimbursement/refund of variation in price, also simplicitor stipulates that Clause 63 of the General Conditions of Contract (IAFW-2249) is to be referred while calculating the price escalation.

14. The claim of the respondent before the Arbitrator was for an amount of Rs.1,25,81,912/- encompassing escalation on materials as well as labour, the Arbitrator had sought fit to only partially award escalation on the component of labour amounting to Rs.49,25,240/-.

15. The respondent filed the relevant statutory notifications before the Arbitrator, which displayed the increase in the minimum wages which resulted in an increase in its expenditure towards the head of labour and sought for payment of escalation. The relevant statutory notifications are reflected in the award and the factum of the existence of the said notifications has not been denied by the petitioner.

16. The Arbitrator has only allowed the component of increase in the labour charges which is supported by the relevant statutory notifications in the following words:

"Though increase in wages was more than 10% still the same has not been reimbursed in terms of agreed conditions of the contract. The contractor has claimed net escalation as Rs. 54,72,489.40 and details are enclosed as serial page 121-123 along with the award. Contractor is required not to pay less than minimum fair wages in terms of Condition as of IAFW-2249 (for short GCC). However contractor has not deducted element of 10% increase which he is required to absorb in his quoted rates in terms of Condition 63 of IAFW-2249 forming part of Contract agreement. The Claimant has submitted details of Labor escalation as per empirical

formula approved by Government and forming part of various contract agreements conclude by MES only. The formula is very rational and is related to value of work done in particular quarters. In the light of above and no comments from Union of India, I consider the details submitted by contractor as correct, Thus the Contractor is entitled to Rs. 49,25,240.00."

The methodology followed by the Arbitrator in arriving at the amount of escalation under the head of labour can be seen from the calculation chart annexed by the Arbitrator to the arbitral award dated 26th June, 2015. The relevant portion of the said sheet has been reproduced here as under:

DETAILS IN SUPPORT OF AN ARBITRAL AWARD ON ESCALATION IN PRICE WAGES FOR LABOUR

Value of Bill: 33 (Twenty thousand)
Value of Work: 14,610 (Four thousand six hundred and ten)
(As per Annex-1)
Date of Receipt of Work: 14.12.2005

Date of receipt of work: 14 Feb 2006
Date of Completion: 12 Mar 2006
Actual Date of Completion: 01 Feb 2012

Sl. No.	Period	Value of Bill	Cost Value of Work done Vg.	Escalation Vg. 100%	Amount	Remarks
A	1 st Quarter (Jan to Mar 2006)	14,610	22,55,00.00	$22,55,00.00 \times 21.67/100 = 4,884.40 = E$	408	1 st Qtr. Escal. 20/06/09
B	2 nd Quarter (Apr to Jun 2006)	15,100 (As per Govt. Notification, As per Agg. R)	22,86,000 = 10,25,00.00	$22,86,000 \times 21.67/100 = 4,947.66 = E$	1,20,761.81	2 nd Qtr. Escal. 19 Sep 2009
C	3 rd Quarter (Jul to Sep 2006)	15,100 (As per Govt. No. 15/04/06 As per Agg. R)	17,85,00.00 = 1,26,33,00.00 = 4,22,30,00.00	$17,85,00.00 \times 21.67/100 = 3,861.89 = E$ $1,26,33,00.00 \times 21.67/100 = 2,72,71,20.14 = E$	3,05,41,20.03	3 rd Qtr. Escal. 15 Nov 2009
D	4 th Quarter (Oct to Dec 2006)	15,100 (As per Govt. No. 15/04/06 As per Agg. R)	22,50,00.00 = 1,08,50,00.00 = 82,14,20.00	$22,50,00.00 \times 21.67/100 = 4,874.25 = E$ $1,08,50,00.00 \times 21.67/100 = 2,34,84.40 = E$ $82,14,20.00 \times 21.67/100 = 1,78,12,01.14 = E$	5,25,24.35	4 th Qtr. Escal. 18 Feb 2015
E	5 th Quarter (Jan to Mar 2007)	22,30,00.00 (As per Govt. Notification, As per Agg. R)	13,13,40,00.00 = 2,21,93,00.00 = 1,01,54,00.00	$13,13,40,00.00 \times 21.67/100 = 2,84,71.18 = E$ $2,21,93,00.00 \times 21.67/100 = 4,80,24.42 = E$ $1,01,54,00.00 \times 21.67/100 = 2,19,97.12 = E$	8,06,27.18	5 th Qtr. Escal. 26/06/11

F	1 st Qtr. Working from 15/02/10 to 15/03/2010	224.00 (As per Govt. Notification Atan Appo-2)	$(1.75 \times 5,392.50) = 9,426.875000$ $(1.12 \times 5,392.50) = 6,037.500000$	$EL = 30 \times 100 \times 39,63,000 \times 224 \div 42 \div 140 = 7,29,500 \times 10 \div 140 = 5,21,357.142857$	4,27,332.00	5 th Qtr. Award dated 18/05/2011
G	2 nd Qtr. Working from 15/03/2010 to 16/04/2010	224.00 (As per Govt. Notification Atan Appo-2)	$(1.75 \times 5,392.50) = 9,426.875000$ $(1.12 \times 5,392.50) = 6,037.500000$	$EL = 30 \times 100 \times 40,83,000 \times 224 \div 42 \div 140 = 3,76,000 \times 10 \div 140 = 2,68,571.428571$	5,63,252.11	2 nd Qtr. Award dated 18/05/2011
H	3 rd Qtr. Working from 15/04/2010 to 16/05/2010	224.00 (As per Govt. Notification Atan Appo-2)	$(1.75 \times 4,50,000.00) = 7,87,500.00$ $(1.12 \times 4,50,000.00) = 5,04,000.00$	$EL = 30 \times 100 \times 51,12,000 \times 224 \div 42 \div 140 = 2,22,000 \times 10 \div 140 = 1,58,571.428571$	5,32,140.84	3 rd Qtr. Award dated 20/05/2011
I	4 th Qtr. Working from 15/05/2010 to 16/06/2010	224.00 (As per Govt. Notification Atan Appo-2)	$(1.75 \times 5,00,000.00) = 8,75,000.00$ $(1.12 \times 5,00,000.00) = 5,60,000.00$	$EL = 30 \times 100 \times 53,32,000 \times 224 \div 42 \div 140 = 2,11,000 \times 10 \div 140 = 1,50,714.285714$	7,18,735.00	4 th Qtr. Award dated 20/05/2011
J	5 th Qtr. Working from 15/06/2010 to 16/07/2010	224.00 (As per Govt. Notification Atan Appo-2)	$(1.75 \times 5,20,000.00) = 9,10,000.00$ $(1.12 \times 5,20,000.00) = 5,82,400.00$	$EL = 30 \times 100 \times 54,16,000 \times 224 \div 42 \div 140 = 2,07,000 \times 10 \div 140 = 1,47,857.142857$	7,11,250.00	5 th Qtr. Award dated 20/05/2011
K	6 th Qtr. Working from 15/07/2010 to 16/08/2010	224.00 (As per Govt. Notification Atan Appo-2)	$(1.75 \times 5,50,000.00) = 9,62,500.00$ $(1.12 \times 5,50,000.00) = 6,16,000.00$	$EL = 30 \times 100 \times 55,12,000 \times 224 \div 42 \div 140 = 2,09,000 \times 10 \div 140 = 1,49,285.714286$	7,13,235.00	6 th Qtr. Award dated 23/05/2011
L	7 th Qtr. Working from 16/08/2010 to 21/09/2010	224.00 (As per Govt. Notification Atan Appo-2)	$(1.75 \times 5,70,000.00) = 10,07,500.00$ $(1.12 \times 5,70,000.00) = 6,38,400.00$	$EL = 30 \times 100 \times 55,57,000 \times 224 \div 42 \div 140 = 2,08,000 \times 10 \div 140 = 1,48,571.428571$	7,11,400.00	7 th Qtr. Award dated 20/11/2011

17. The Arbitrator proceeded to award the claim only after coming to a finding that it had been established on the record, in light of the statutory notifications directing increase in the minimum wages, that there had indeed been an escalation in the labour wages which the respondent had to contend with during the execution of the work. Thus, the claim was partly allowed by the Arbitrator after being satisfied as admittedly there was an escalation in the labour wages. The formula/methodology adopted by the Arbitrator was based on a rational basis of the value of work actually executed by the respondent on the site.

18. The petitioner has not even raised the issue that there is any illegality/error in the formula/methodology that has been adopted.

The Arbitrator had based his formula/methodology only on the relevant statutory notifications evidencing the increase in minimum wages and RAR bills, to evidence the work actually executed, which have admittedly been certified by the petitioner itself at different stages of the work.

19. The Arbitrator had satisfied himself that the broad requirements of Clause 63 have been met i.e. after examining the relevant documents and other records maintained by the contractor, it has been found that there has been a statutory escalation in the price of labour and that the escalation and consequent extra expenditure incurred by the respondent has been rationally established with reference to the work actually undertaken by the respondent during the currency of the contract between the parties. The Arbitrator had also deducted the element of 10% increase which the respondent was required to absorb in terms of Clause 63.

20. In view of the finding of the Arbitrator, it appears that the Arbitrator had awarded the claim of labour escalation after taking into account all the relevant aspects of the matter. The relevant statutory notifications evidencing increase in the labour wages were available before the Arbitrator and he had duly considered the same. The Arbitrator had arrived at a finding of fact as to the increase in the labour wages and had then proceeded to interpret and apply Clause 63 of the contract. The findings are arrived at on the basis of plausible view taken within the ambit of the Arbitrator's jurisdiction and the Court is not expected to sit in appeal over the said findings in exercise of jurisdiction under Section 34 of the Act.

21. It is not disputed by the petitioner that almost a similar controversy has already been adjudicated upon by this Court in the

case titled as ***Mahesh Bansal v. Executive Engineer*** (FCD. 1) 1995 (34) DRJ 249. Single Judge of this Court in the said case was concerned with a similar claim for labour escalation under a similar clause as in the present case, and proceeded to deal with the objections to the arbitral award in the said case as under:

"8. So far as Claim No.3 is concerned, the claimant had claimed increase in the cost of labor due to increase in labor wages on account of Delhi Administration Notification. Minimum labor rates were quoted at the time the tenders were submitted. These rates were revised w.e.f. 1st June, 1984 by Delhi Administration. Hence the petitioner was duly bound to pay the revised wages to his labor. The only objection taken by the respondent is that notice as required under Clause 10(c) had not been served on the respondent before making this claim. Secondly record had not been produced to substantiate the same. Both these objections have been turned down by the arbitrator primarily on the ground that the respondent submitted a statement showing the amount of work done after 1st June 1984 i.e. exhibit 'R-11'. He also took into consideration the labor component from exhibit 'R11' which worked out to be 23.5% as per the norms of C.P.W.D. Therefore, he concluded that the petitioner would be justified to claim escalation as worked out on the basis of exhibit 'R-11' while absorbing 10% and, therefore, concluded that award of Rs.3,620.00 would be just as against the claim of Rs.20,700.00. So far as serving of notice is concerned, admittedly Clause 10(c) provides that notice had to be given but that by itself is no ground to reject the claim if otherwise found due. Clause 10(c) does not stipulate that if notice is not given then statutory increase in labor wages paid by the contractor would not be given. In the absence of any bar, the arbitrator was within his right to conclude that the contractor having paid the revised wages which he calculated on the assumed labor component of 23.5%; as per the norms of the C.P.W.D. and therefore, relying on the document filed by the respondent exhibit 'R-11' he calculated the escalation of

the labor component and awarded the amount. I see no reason to interfere in the same.”

22. A reading of the aforesaid judgment would show that similar objections to the award have been raised by the petitioner in the present case have been repelled. The approach taken by the Arbitrator in the present case is similar to the approach that has been upheld by this Court in the aforesaid case.

23. It appears from the record that the Arbitrator has gone strictly by the admitted amount of work done in the present contract by the petitioner and extracted the labor component from the same. As already noted hereinabove, the Arbitrator has thus based his formula/methodology only on the relevant statutory notifications evidencing the increase in minimum wages and RAR bills, to evidence the work actually executed, which have admittedly been certified by the petitioner itself at different stages of the work.

24. It is not the case of the petitioner that the subject contract provide for a different formula to be applied in order to arrive at the quantification of the escalation due. It is the petitioner who had appointed the Arbitrator, who is not only a technical person but is also incidentally a serving officer of the petitioner. The very purpose behind the appointment of technical persons as Arbitrators is that they may use their expertise and experience in the field to be able to resolve technical and trade-specific disputes between the parties. Once such a technical and factual determination has been carried out, it is not open to the petitioner to make a grievance about the same merely because the said determination was not to its liking. Single Judge of this Court in the case of **P.C. Sharma and Co. v. Delhi Development Authority** in CS(OS) No. 2057A/1996 decided on 2nd July, 2010 in this regard has opined as under:

"...The respondent DDA had the choice to appoint an Arbitrator and appointed a technical person rather than a legal person. The sole purpose of appointment of a technical rather than a legal person as an Arbitrator is to take benefit of the special knowledge of the Arbitrator relating to the matters in dispute."

25. In light of the above, the challenge by the petitioner to the findings of the Arbitrator under Claim No.5 has no force and this Court is not inclined to interfere with the said findings.

26. Pertaining to Claim No. 11, as preferred by the respondent, in relation to interest, the Arbitrator has dealt with the same in the following words:

"224. I have heard, examined and considered the submissions and arguments of both the parties. There is no provision in the contract which debars the Claimant to claim past, pedente-lite and future interest. Condition 51 of IAFW-2249 (GCC) stipulates that contract shall be governed by Indian Laws for time being in force. Claim and award of interest in arbitral references is justified where legitimately due payments of one party are unauthorizedly held back or denied or delayed by the second party thereby inflicting financial injury. Hon'ble Supreme Court of India in case of Secretary Irrigation Department Government of Orissa versus GC Roy & Regunath Mohapatra (AIR 1992 SC732) after critical analysis had held that in situations where agreement does not provide for grant of interest nor does it prohibit such grant, the interest may be awarded on the following principle:-

(a) A person deprived of the use of the money to which he is legitimately entitled has a right to compensation for deprivations call it by any name it may be called interest, compensation or damages. The interest is an implied term of the agreement between the parties and

therefore when the parties refer all their disputes or refer the disputes as to the interest as such to the arbitrator, he shall have power to award the same.

(b) An Arbitrator is an alternative forum of resolution of disputes arising between the parties and hence arbitrator has powers to award the interest to avoid the multiplicity of proceedings.

(c) An arbitrator is the creature of an agreement and hence open to the parties to confer upon him such powers.

(d) For doing the justice between the parties such powers should be exercised by the Arbitrator.

225. An Arbitrator has powers to award interest for pre-reference period i.e. period commencing from date of dispute till the arbitrator enters upon reference in terms of Hon'ble Supreme Court Judgment in State of Orissa versus B N Agarwalla & others (AIR 1997 SC925). Principle as brought out in above referred court rulings has been supported by various other court rulings of Hon'ble Supreme Court/ High Courts. Further interest rate of 18% per annum mentioned in Section 31 (7) of Arbitration & Conciliation Act 1996 refers to when nothing is mentioned in the award in this regard. As regards objection of Union of India regarding rate of interest claimed by Contractor, it is noticed that Union of India themselves have claimed interest at the rate of 18% per annum on their claims under Claim No.4. Thus they cannot say that the rate of interest claimed by the Contractor is very high.

226. I have examined the circumstances leading to dispute in the light of above analysis. Keeping in view the above aspect I make the following award: (a) Past & Pending elite interest is awarded on the amount of arbitral award against claim Nos.1(A), 1(B), 1(C), 1(D) & 1(E), 1(a), 1(b), 1(c), 1(s), 1(f), 1(g), 1(h), 1(j), 1(i),

1(m), 1(p) and 5 at the rate of 12% (TWELVE PERCENT) Simple Interest per annum w.e.f. 21 Nov 2012 a day after due date of payment of final bill to date of award.

(b) Since the net award is in favour of Contractor, a period of three months is allowed to Union of India for making payment in terms of this award. If the payment is not made by this date, then the awarded amount under (a) above in favour of Contractor shall carry future interest @12% (TWELVE PERCENT) per annum from a day after date of publication of award to the date of actual payment."

27. The petitioner submits that the Arbitrator erred in awarding the past and *pendent lite* interest @12% p.a. on contractor's claim No. 1(B) and claim No. 5 amongst others while adjudicating claim No.11. It is submitted that contractor's claim No. 1(B), the claim amount in respect whereof was revised from Rs.61,342.30/- to Rs.1,48,171.28/- during arbitration hearing (based on some provision in IS-1200) had neither been preferred during the execution of work nor at the stage of final bill. Therefore, no past and *pendent lite* interest ought to have been awarded in respect thereof. Similarly, as regards claim No.5, it is submitted that this claim had been preferred by contractor at final bill stage, but it was not admitted as it was a claim based on an empirical formula not forming part of CA and was in contravention of condition 63 of IAFW-2249, forming part of CA. Thus, even if the sole Arbitrator allowed this claim in his award, he should not have awarded past and pendent lite interest because this claim of contractor took shape during arbitration proceedings. Therefore, past interest awarded under contractor's claim No. 11, in so far as it pertains to past and pendent lite component of interest on contractor's claim No. 1(B)

and 5 is liable to be set aside. The interest rate awarded viz. 12% p.a. is also considered to be high.

28. It appears from the contention of the petitioner that the Arbitrator was not justified in awarding past and *pendente-lite* interest on the claims and should have awarded only future interest from the date of the award. The said submission is without merit in as much as the claims admittedly arose during the currency of the contract but were contested by the respondent which refused to make payment of the same to the petitioner.

29. The respondent was deprived of the claim amount owed to it for the past and *pendente-lite* period as well. In fact, the Arbitrator had restricted the period from which the past and *pendente-lite* interest would run from 21st November, 2012 i.e. a day after due date of payment of final bill, till the date of the award.

30. The Supreme Court in the case of ***Indian Hume Pipe Co. Ltd. Vs. State of Rajasthan*** reported as (2009) 10 SCC 187, while reiterating the principle that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation in the form of interest, has further been pleased to hold that unless there is any embargo or legal hurdle in awarding interest, then interest should normally be awarded for all three stages i.e. past, *pendente-lite* and future. The relevant findings in this regard are as under:

"13. Learned Single Judge also committed a grave error in coming to the conclusion that even though arbitrator was competent to award interest but it was not mandatory on his part to do so. The said reasoning does not appeal to be legally tenable and convincing, for the simple reason, if the amount has been withheld wrongly and without any justification then of course the aggrieved party would be fully justified in claiming

interest. This is the mandate of Section 34 of the Code of Civil Procedure as also Section 29 of the Act. Both the aforesaid provisions make it abundantly clear that power to award interest at all stages vests with the arbitrators. Arbitrators are bound to make the award in accordance with law and if there is no embargo or legal hurdle in awarding interest for the aforesaid three stages mentioned hereinabove then there cannot be any justifiable reason to deny the same."

31. The findings of the Supreme Court emanated from a case arising out of the Arbitration Act, 1940. The position is made even more explicit under Section 31(7) of the Act which applies to the present case and expressly empowers the Arbitrator to award interest for all periods i.e. past, *pendente-lite* and future.

32. The Arbitrator has noted the fact that there is no provision in the contract that bars the payment of interest. He has also noted the settled law that the Arbitrator has full power to award interest on claims in terms of Section 31(7) of the Act.

The Arbitrator has accordingly awarded the respondent simple interest at the rate of 12% per annum. The rate of interest awarded by the Arbitrator cannot be said to be excessive or without authority of law. Yet further, Division Bench of this Court in the case of ***Bihar Sponge Iron Ltd. v. Rail India Technical & Economic Services Ltd.*** (2006) 132 DLT 489 and ***MMTC Ltd. v. Sineximco Pte. Ltd.*** 2009 V AD (Delhi) 748 have upheld award of interest at the rate of 12% per annum.

33. In view of the above, the challenge by the petitioner to the findings of the Arbitrator under Claim No. 11 is also not sustainable.

34. In view of the above, the findings of the Arbitral Tribunal are in consonance with the contract between the parties as well as per the

law. The objections of the petitioner in relation to Claim Nos. 5 and 11 are thus, without any merit and the same are dismissed.

35. No costs.

(MANMOHAN SINGH)
JUDGE

AUGUST 17, 2016

