IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.09.2017

\+ **O.M.P. (COMM) 269/2016**

DELHI STATE INDUSTRIAL DEVELOPMENT CORPORATION LTD ..... Petitioner

versus

BRIJ GOPAL CONSTRUCTION CO. PVT. LTD ..... Respondent

Advocates who appeared in this case:

For the Petitioner :Mrs Biji Rajesh and Mr Gaurang Kanth.
For the Respondent :Mr Bhupesh Narula.

AND

\+ **O.M.P. (COMM) 279/2016**

BRIJ GOPAL CONSTRUCTION CO. PVT. LTD ..... Petitioner

versus

DELHI STATE INDUSTRIAL DEVELOPMENT CORPORATION LTD ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Bhupesh Narula.
For the Respondent : Mrs Biji Rajesh and Mr Gaurang Kanth.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), impugning the arbitral award dated 31.12.2015 (hereafter 'the impugned award'), made

and published by the Ld. Sole Arbitrator, Mr H.S. Dogra, Director General, CPWD (Retd.), in relation to the disputes that had arisen between the parties. While OMP (COMM) 269/2016 has been preferred by the Delhi State Industrial & Infrastructure Development Corporation Limited (hereafter as 'DSIIDC'), OMP (COMM) 279/2016 has been filed by M/s Brij Gopal Construction Company Private Limited (hereafter as 'BGCC').

2. By the impugned award, the arbitrator has accepted the claims made by BGCC (Claim nos. 1, 2, 3, 5, 6 and 7) and, has awarded a total amount of ₹3,61,06,878/- in its favour.

3. DSIIDC impugns the decision of the Sole Arbitrator awarding certain claims in favour of the BGCC. BGCC has also challenged the impugned award to the limited extent that its claim for excavation of fly ash (included in claim no.3) has been rejected.

4. Briefly stated, the relevant facts to address the aforesaid controversy are as under :

4.1 BGCC was awarded the work for "*Construction of Relocation of Industries Project at Bhorgarh (Bhawana Ph-II) sub head: Construction of 60 MTR ROW Road including storm water drainage in the new Industrial Area at Village Bhorgarh (Bawana Phase- II)*" (hereafter 'the works') by DSIIDC for the tendered amount of ₹10,19,44,540/- and an agreement dated 03.07.2009 (agreement no. DSIIDC/ EE (CD)/ XIII/AGT/06/2009-10) (hereinafter as 'the agreement') was also executed between BGCC and the Executive Engineer, CD XIII, DSIIDC Limited. The works, *inter alia*, included construction of a new road with 60 meter right of way along with storm water drainage, culverts, etc. The letter of acceptance was issued by

DSIIDC on 18.05.2009 and, thereafter, BGCC submitted a performance guarantee by a letter dated 03.06.2009, for a sum of ₹51,00,000/-. DSIIDC issued the letter of commencement of work on 26.06.2009. As per the said letter of commencement, the stipulated date of start of work was 27.06.2009 and, the stipulated date of completion was 26.03.2010, that is, 9 months from the date of start of the work. BGCC also issued letters dated 26.06.2009, whereby DSIIDC was intimated about the deployment of machinery and technical persons at the site

4.2 It is the admitted case of the parties that the works were completed by BGCC on 15.11.2009. Thereafter, a completion certificate dated 18.11.2009 was issued by the Executive Engineer, DSIIDC, certifying the date of completion as 15.11.2009.The Office of Superintending Engineer also submitted a completion certificate dated 23.11.2009, whereby it certified that the works were completed on 15.11.2009.

4.3 It was claimed by BGCC that it submitted five RA Bills to DSIIDC for the work done, against which no payment was received by it.

4.4 After completion of works, BGCC issued a letter dated 30.11.2009, requesting DSIIDC to return the Performance Bank Guarantee submitted by it as the works were successfully completed on 15.11.2009. BGCC further stated that since no payment was made by DSIIDC for the work done, it was facing undue financial crisis for want of funds. It is claimed by BGCC that DSIIDC by a letter dated 02.11.2010, requested BGCC to extend the said bank guarantee. In response to the said letter, BGCC requested DSIIDC to review the decision for extension of the bank guarantee. BGCC further demanded that payment of ₹44,51,578/- on account of bonus payment, be released along with interest at the earliest.

4.5 By a letter dated 08.09.2011, BGCC submitted various claims to the Director (Works), DSIIDC, and stated that if the said claims are not settled within 15 days, BGCC would be constrained to invoke the arbitration clause. In reply to the letter dated 08.09.2011, the Chief Project Manager of DSIIDC rejected the claims made by BGCC as being false and baseless.

4.6 Consequently, BGCC, by a letter dated 21.04.2012, invoked the arbitration clause and requested the Director (Works), DSIIDC to appoint an arbitrator in terms of clause 25 of the agreement. BGCC also submitted the claims to be adjudicated by the arbitrator. Thereafter, by a letter dated 03.08.2012, Chief Engineer, DSIIDC appointed the Sole Arbitrator to adjudicate the claims submitted by BGCC for adjudication.

5. In its statement of claims filed before the Sole Arbitrator, BGCC raised the following claims: claim no. 1 - ₹84,96,000/- as interest for delay in payment of the running bills; claim no.2 - an amount of ₹50,97,227/- towards incentive for early completion of the works as per clause 2 of the agreement; claim no.3- for an amount of ₹3,16,30,000/- for excavation of consolidated earth and fly ash; claim no.4 - for an amount of ₹2,12,152,757/-, based on market rates of the items, for quantities in excess of the agreed quantities; claim no.5- ₹3,25,000/- towards testing charges; claim no. 6 - an amount of ₹2,74,03,588/- as interest towards delay in settlement of claims from 15.11.2009 to 30.08.2011; claim no.7 - claim of interest at the rate of 18% per annum compounded monthly from 31.08.2011 till realization; and claim no.8 - sum of ₹10 lakhs as cost of arbitration proceedings.

6. The arbitrator awarded an aggregate sum of ₹3,61,06,878/- which comprised of ₹30,66,568/- against claim no.1; ₹50,97,227/- against claim

no.2; ₹1,17,03,402/- against claim no.3; ₹3,25,000/- against claim no.5; ₹54,51,893/- against claim no.6 and ₹1,04,62,788 against claim no. 7. In addition, the arbitrator also directed that future interest at the rate specified under Section 31(7) of the Act would be payable if the amounts awarded were not settled within a period of three months from the date of the award.

Submissions

7. Ms Biji Rajesh, learned counsel appearing for DSIIDC submitted that the sum of ₹30,66,568/- awarded by the arbitrator as interest at the rate of 12% per annum for delayed payment of running bills, was patently erroneous and without evidence. She contended that DSIIDC had not received the five running bills (RA Bills) claimed to have been submitted by BGCC and, therefore, the question of any delay in payment of the said bills did not arise. She contended that DSIIDC had received only two RA Bills. She claimed that the first RA Bill was submitted on 11.12.2009 and was for an amount of ₹11.02 crores. Out of the aforesaid amount, a sum of ₹8 crores was paid on 29.12.2009 and, for the remaining payment, the RA Bill was sent back to the claimant for correction. The corrected RA bill was, thereafter, submitted on the same date - that is, on 29.12.2009 - for an amount of ₹10,67,07,323/- and since the amount of ₹8 crorers had been released earlier, a further amount of ₹2,67,07,323/- was released on 18.03.2010. She contended that the second RA Bill was submitted on 02.04.2010 for an amount of ₹2,02,06,455/- (plus incentive for early completion). The said RA Bill, excluding the amount of incentive, was paid on 03.05.2010. She contended that, thus, the fundamental basis for awarding claim no.1 was flawed. She further submitted that the onus to produce evidence regarding submission of bills was with BGCC and it had

failed to provide any evidence of submission of the bills in question. She also referred to various discrepancies in the statement of claims and the documents relied upon by the arbitrator. She pointed out that the RA Bills as indicated in the statement of claims were materially different from the documents produced by the respondent, and that too at a belated stage.

8. In respect of award of claim no.2, she submitted that according to DSIIDC, BGCC was entitled for an incentive for early completion only to the extent of 131 days and, the arbitrator had incorrectly calculated the time consumed for additional work for the purposes of calculation of the incentive payable.

9. Next, she contended that the claim for excavation of consolidated earth had been incorrectly awarded by the arbitrator as in terms of the agreement the contractor was responsible for arranging the earth and, DSIIDC was not concerned whether the earth was excavated or purchased. She earnestly contended that the rates of the said item under the contract was all inclusive and was not limited to mere transportation of earth.The arbitrator had, thus, proceeded on an erroneous assumption that additional payment was payable for excavation of soil.

10. She further submitted that the amount of ₹3,25,000/- awarded against testing charges was also without sufficient proof and the said amount had not been included in the final bill. In addition, Ms Biji also contested the interest as awarded by the arbitrator.

11. Mr Narula, learned counsel appearing for the BGCC countered the submissions made by Ms Biji Rajesh. He further submitted that the arbitrator had grossly erred in not awarding the excavation charges in

relation to fly ash. He pointed out that whereas the arbitrator had awarded additional amount for excavation of earth, he had rejected BGCC's claim for additional amount for excavation of fly ash on the ground that the analysis of rates for transportation of fly ash included wages of six *beldars*, which the arbitrator assumed were not provided in the analysis of rate for excavation or earth work. He submitted that on the aforesaid erroneous premise, the arbitrator concluded that the additional cost of six *beldars* would have been provided for excavation of fly ash. Accordingly, the arbitrator determined the additional amount payable for excavation of earth work, but rejected BGCC's claim for additional payment for excavation of fly ash. Mr Narula pointed out that the assumption that cost of wages of six *beldars* had not been included in the analysis of transportation of earth work was ex-facie erroneous. He referred to the analysis of rates for transportation of earth work on the basis of which the tender had been awarded. The said analysis in turn referred to DSR 2007 (CPWD analysis of rates for Delhi); and, the said analysis also included the costs of six *beldars* at the rate of ₹811.50 per day.

Reasoning and Conclusion

12. Before the arbitrator, BGCC raised a claim of ₹84,96,000/- towards interest at the rate of 18% per annum on account of delay in payment of RA Bills (Claim no.1). It was BGCC's case that DSIIDC had delayed the payment of the five RA Bills on account of non-availability of funds and other unknown reasons and, therefore, it was liable to pay interest to BGCC for payments, which were withheld from July, 2009 to December, 2009.

13. In its statement of claims the BGCC had set out the following statement, indicating the dates of the bills, the amount and the actual date of payment:-

Bill Date	Bill amount due for payment (in crores	Due date for payment	Actual date of payment	Delay
15.7.2009	2.00	14.08.2009	24.12.2009	163 days
21.09.2009	5.00	20.10.2009	24.12.2009	96 days
30.09.2009	1.00	29.10.2009	24.12.2009	86 days
15.10.2009	2.67	14.11.2009	18.03.2010	158 days
15.11.2009	2.01	14.12.2009	04.05.2010	204 days

14. BGCC further claimed that the said RA Bills were scrutinized, test checked by DSIIDC and, even the review notes were filed by DSIIDC. BGCC claimed that when the funds were available with DSIIDC, it asked BGCC to submit a consolidated 1st RA Bill. DSIIDC, thereafter, released an *ad-hoc* payment of ₹8,00,00,000/- on 24.12.2010. BGCC further alleged that DSIIDC requested it to submit a consolidated 2nd and final bill by a letter dated 18.02.2010, for an amount of ₹5.05 crores including the bonus for early completion of the works and, thereafter, an amount of ₹2,67,00,000/- was released on 18.03.2010. Thereafter, BGCC on 02.04.2010 - at request of DSIIDC - resubmitted the 2nd and final bill and a payment of ₹2,02,00,000/- was made by DSIIDC on 03.05.2010. Thus, BGCC claimed that it was entitled to interest for delay in payment by DSIIDC.

15. DSIIDC, in its reply, denied that any of the above-mentioned RA Bills were ever submitted by BGCC. It stated that only two RA Bills were submitted by BGCC. DSIIDC stated that the first RA Bill was raised on

11.12.2009 for an amount of ₹11.02 crores against which an *ad-hoc* payment of ₹8,00,00,000/- was made on 24.12.2009 and, the bill was sent back to BGCC for correction. DSIIDC claimed that BGCC resubmitted the 1st RA Bill on 29.12.2009 for an amount of ₹10.67 crores against which the balance payment of ₹2.67 crores was made on 18.03.3010. The Second RA & Final Bill was raised on 02.04.2010 for an amount of ₹2.02 crores plus ₹44 lacs on account of early completion incentive. It was stated that the said bill was also cleared on 03.05.2010, without the payment of incentive. It was DSIIDC's case that payments were delayed on account of delay on the part of BGCC in submission and resubmission of the RA Bills, as well as the Final Bill. DSIIDC further stated that the onus to prove the authenticity of the five RA Bills was on BGCC and, further contended that the said bills were forged and fabricated.

16. It is relavant to note that BGCC did not provide any evidence of submission of bills along with the statement of claims. However, at a much belated stage, BGCC submitted copies of certain bills, which allegedly also bore the signatures of the officers of DSIIDC (EE and AE). Although, these RA bills were also dated as the dates indicated in the tabular statement set out in the statement of claims (and as reproduced above), the amounts were different. Ms Rajesh contended that the said discrepancy clearly indicates that no such bills as claimed in the statement of claims had in fact been submitted and, the bills produced were not available on the record.

17. A statement indicating the copies of bills produced subsequently is set out below:-

Bill No.	Amount (Gross)	Dated
First RA Bill	₹2,99,10,200	15.07.2009
Second RA Bill	₹7,03,02,863/-	21.09.2009
Third RA Bill	₹8,19,15,820	30.09.2009
Fourth RA Bill	₹10,77,78,225/-	15.10.2009
Fifth RA Bill	₹12,68,68,454/- + ₹50,97,227/- (Bonus)	15.11.2009

18. The arbitrator rejected the contentions advanced by DSIIDC and, allowed claim no. 1 of BGCC and awarded a sum of ₹30,66,568/- (being interest at the rate of 12% per annum on the amount withheld) in favour of BGCC. The arbitrator held that, in fact, five RA Bills were submitted by BGCC and, DSIIDC had not made the requsite payments against those monthly bills (5 RA Bills) in terms of the agreement. The relevant extract of the impugned award is set out below:

> "If the entire work was indeed completed on 15 November 2009, it defies reason as to why a claimant contractor would submit 1st RA bill in the month of December 2009(as claimed by the respondent) almost a month after completion of the entire work.
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> *** *** ***
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> Similarly there is no plausible explanation as to why a contractor would invest more than 12.68 crores out of his own funds without submitting even a single running account bill during the currency of work? As per the standard civil engineering trade practice, contractors regularly submit monthly bills to recoup their invested capital. No contractor generally invests his own funds without getting monthly payments as the capital investment has its own costs. In view of any reasonable explanation or clarifications to these

> and all the apparent factors, the statement of the respondent does not inspire any confidence and therefore does not appear to be correct."

19. The arbitrator also rejected the contention of DSIIDC that the said RA Bills were forged and fabricated. He held that the value of the work was test checked and, the dates of checks matched with the dates of the submission of RA Bills by BGCC. The arbitrator also referred to the monthly fund demand letters sent by DSIIDC to its higher authorities, which showed the value of work done by BGCC. The said demands also indicated that no payment had been made to BGCC. In view of the above, the arbitrator observed that the sequence of events, as apparent from the documents, were in conformity with the contentions advanced by BGCC and, therefore, held that the documents placed on record by BGCC were not forged and concocted as alleged by DSIIDC

20. The arbitrator further held that there was no clause in the agreement, which specifically barred payment of interest on the withheld/delayed payment.

21. It is apparent that there is a serious dispute regarding the submission of RA Bills. Concededly, the bills as stated in the statement of claims have not been produced and, instead other bills for slightly differrent amounts have been produced. This, indisputably, raises serious question as to the authenticity of the bills submitted. However, it is seen that the arbitrator had weighed the rival contentions. Concededly, BGCC had maintained the pace of performance; the work executed is recorded in the Measurement Book (MB). Although the submission of RA Bills is disputed, it is not disputed that RA Bills (as claimed by the BGCC) conformed to work recorded in the MB and the quantum of work as stated in those RA Bills

was in fact executed. Further it is also not disputed that in terms of clause 7 of the agreement, BGCC was entitled to monthly payments. It was also expressly agreed that if the contractor does not submit the bills, the Executive Engineer is required to prepare the same. The arbitrator had further also taken note of the fact that requisition of funds was made by DSIIDC for the work done; thus, establishing that it was accepted by DSIIDC that it was required to make payments to BGCC.

22. It is apparent from the above that the arbitrator has based his decision on the material on record. And, although, this Court on appreciation of evidence, may have come to a different conclusion, the scope of judicial review under Section 34 of the Act, does not permit such interference with an arbitral award. This is not a case where the arbitrator's decision is not founded on any material and, this Court cannot supplant its opinion over that of the arbitrator.(See: ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***).

23. BGCC also claimed a sum of ₹50,97,227/- towards incentive for earlier completion of works as per clause 2A of the agreement (Claim no.2). BGCC, after adjusting the time allowed for executing the additional work, claimed that the work was completed 219 days earlier than the scheduled date of completion and, therefore, was entitled to incentive at the rate of 5% of the tendered value (0.05 x 10,19,44,540) as per clause 2A of the agreement. DSIIDC disputed the said claim stating that the date of completion of the entire work was incorrect and, therefore, the amount as calculated by BGCC was also incorrect. DSIIDC also stated that the matter of bonus/incentive required multiple level scrutinies and, the same was under consideration.

24. The arbitrator noted that the completion certificates were not disputed by DSIIDC and, therefore, held that BGCC completed the work 131 days earlier than the scheduled date of completion (26.03.2010). The arbitrator, after referring to clause 12.1 of the agreement, held that BGCC was also entitled for time for the additional work while calculating the incentive. Consequently, the arbitrator allowed the claim of BGCC for incentive for early completion of the works by 215 days, which included the time for early completion of the additional work. He held that as per clause 2A of the agreement, BGCC was entitled to incentive of a maximum of 5% of the tendered value, that is, at ₹50,97,227/-.

25. Undisputedly, the scope of work had increased and, the arbitrator was of the view that proportionate time for completion of additional work ought to be accounted for. On a proportionate basis, additional time required for completion of additional work was determined at 84 days. Accordingly, the arbitrator held that BGCC would also be entitled to the incentive for further 84 days which would have been required to complete the additional work. The said view cannot by any stretch be stated to be perverse or patently illegal. The arbitrator has interpreted the agreement, which is within his jurisdiction. In ***Mcdermott International Inc. v. Burn Standard Co. Ltd. & Ors.***: ***(2006) 11 SCC 181***, the Supreme Court had observed as under:

> "112 ….The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a

> matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* and *D.D. Sharma v. Union of India*).
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> 113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

26. Thus, no interference with the impugned award is warranted on this ground.

27. BGCC claimed ₹3,16,30,000/- on account of additional costs incurred by it for excavation of consolidated earth and fly ash at burrow pits(Claim no.3). It was contended by BGCC that the nomenclature of item no. 2 and 4 of the schedule of quantities for roads and embankment of the agreement suggested that the said work was for loading and unloading of earth and fly ash and carriage by mechanical transport and, did not include its excavation. Before the arbitrator, it was contended that uploading of earth and fly ash required dedicated excavation process by bulldozers, excavators, etc., for which there was no provision in the agreement. DSIIDC disputed BGCC's contention by stating that earth and fly ash was supposed to be arranged, carried, loaded, unloaded, etc. by BGCC at tendered rates only and if, in the process, any excavation was carried out by BGCC, the same was not chargeable.

28. Descriptions of items 2 and 4 as set out in the agreement are relevant and are quoted below:-

> "Item no.2:- Carriage of fly ash /pond ash including loading & unloading from approved sources of Thermal Power Station

> dumping sites to the site of work at Bhorgarh for all leads and lifts as per directions of Engineer-in-Charge."
>
> "Item no.4:- Carriage of earth from approved source and having minimum soaked CBR value of 6% to be arranged by the contractor i/c loading, unloading to the site of work for all leads and lifts including royalty as per direction of Engineer-in-Charge:"

29. The arbitrator referred to the description of the above items and observed that the said entries provided for carriage of fly ash and earth, including its loading and unloading; he noticed that the said entries did not mention about "excavation" of fly ash or earth from the source or burrow pits before transportation.

30. To determine the question whether cost of excavation was included in the aforesaid items, the arbitrator had examined the analysis of rates on the basis of which tender was invited. He found that the analysis of rates for transportation of earth was based on CPWD Delhi schedule of rates 2007 (hereafter 'the CPWD Rates'). The arbitrator relying on the CPWD Rates held that the cost of excavating the earth and fly ash from the source and burrow pits was also not included in the CPWD Rates. The arbitrator held that there was no provision in the agreement which provided for excavation of earth and fly ash. He, thus, concluded that item work of excavation of earth was an additional item for which an appropriate rate was required to be determined.

31. The arbitrator referred to the analysis of rates of non-schedule items as adopted by DSIIDC - procured by BGCC through RTI - and noted that although, in the case of fly ash, cost element of 6 *beldars* was included, however, there was no provision of *beldars* for excavation in the case of

earth work. The arbitrator, relying on item no. 2.36 of the CPWD Rates, awarded a sum of ₹1,17,03,402/- in favour of BGCC as amounts payable for extra item for excavation of earth under item 4 of the agreement. The said amount was arrived at after deducting the element of levelling and neatly dressing the earth and adding the cost index at the rate of 19%.

32. Ms Rajesh Biji had earnestly contended that item no.4 expressly provided that the contractor would arrange the earth from approved sources and thus, no additional payment for excavation was warranted. The said contention was not accepted by the arbitrator. The analysis of rates on which the tenders were issued also did not indicate that any value for procurement earth was accounted for but were based solely on the CPWD rates for transportation of earth. Thus, the arbitrator was of the view that item no. 4 only provided for transportation and, did not provide for excavation, which was necessary and, thus, BGCC would be entitled to the costs for the same.

33. This Court finds no infirmity in the aforesaid view. It is well settled that the question as to interpretation of an agreement lies squarely within the jurisdiction of the arbitrator and, unless such interpretation is found to be perverse or unreasonable on the touch stone of the *wednesbury principle*, no interference would be warranted. Ms Biji is unable to contest the finding that the analysis of rates on the basis of which the tender was floated by DSIIDC did not include escavation of earth; she only relied on the plain language of the clauses to contend that the escavation of earth and fly ash was included in the item rates. There is enough ambiguity in the description of the relevant item rates for the arbitrator to have examined the basis of which the tenders for those item rates were invited. Thus, this

Court is not inclined to accept that any interference with the award of additional amount for excavation would be warranted.

34. In so far as the denial of additional cost for excavation of fly ash is concerned, the reason provided by the arbitrator for rejecting BGCC's claims for excavation of fly ash is patently erroneous and the same is apparent from the record. The arbitrator had sought to draw a distinction between the CPWD Rates for transportation of earth work (which were adopted for, by DSIIDC for fixing the rates for transportation of earth work) and the analysis of rates adopted by DSIIDC for determining the rates for transportation of fly ash. The arbitrator had concluded that whereas the analysis of rates for transportation of fly ash included provision of Six *Beldars*, the CPWD Rates for transportation of earth did not include any such provision. He, thus, reasoned that the provision of cost of six *beldars* in the rates for transportation of fly ash was to account for excavation of earth work and, accordingly, rejected BGCC's claim for the same by holding that the rates fixed by DSIIDC also accounted for excavation of fly ash. However, analysis of the rates adopted by DSIIDC for the tender in question indicates that DSIIDC had adopted DSR rates for transportation of earth work. The data sheet of the CPWD Rates indicates that CPWD had taken into account the costs of Six *Beldars* at the rate of ₹811.50 per day and, this cost was taken into account by determining the cost of trip at ₹425.65 (which translated to ₹76.48 per cubic meter). Thus, the arbitrator was plainly wrong in proceeding on the basis that cost of six beldars per day had been provided in addition to the rates for transportation for fly ash which were not accounted for while determining the rates for transportation of earth work. Thus, the rejection of BGCC's claim for

excavation of fly ash is for an *ex facie* incorrect reason and, the impugned award to that extent is liable to be set aside.

35. Claim no. 4 was for an amount of ₹2,12,52,757/- on account of the quantities which exceeded from the agreement quantities. BGCC by a letter dated 08.07.2009, requested DSIIDC to make payments for the quantities exceeded, from the quantities that were agreed to in the agreement. The said request was rejected by DSIIDC on 12.08.2009. It was the case of DSIIDC that as the deviation limit was 100% for foundation works, clause 12.2 and 12.3 of the agreement, which provided for payment for quantities beyond the quantity mentioned in the agreement, would not be applicable. The arbitrator rejected the said claim of BGCC by holding that the work done was not beyond the scope of the works as the deviation limit was only 25% of the tendered amount and not 100%. This court finds no infirmity with the aforesaid reasoning.

36. BGCC claimed ₹3,25,000/- towards reimbursement of testing charges (Claim no. 5). DSIIDC opposed the said claim on the ground that while presenting the final bill, BGCC did not claim such amount and therefore, such a claim was an afterthought. The arbitrator accepted the contention of BGCC and held that serial no 12 of the Special Conditions of Contract provided that the expenses for tests carried out from any outside laboratory would be borne by DSIIDC, if the test conformed to the relevant specifications. Consequently, the arbitrator held that BGCC was entitled to reimbursement of the amount spent on testing of materials which were found to be acceptable as per relevant specifications. The arbitrator also held that testing charges was "*not a case of a claim but a matter of reimbursement*". This Court finds no infirmity in the decision of the

arbitrator to allow BGCC's claims for reimbursement of testing charges and interest.

37. BGCC further claimed ₹2,74,03,588/- (claim no. 6) on account of interest on delayed settlement of claim nos. 1, 2 and 5 from 15.11.2009 to 30.08.2011 and claim nos. 3 and 4 from 15.09.2011 to 30.08.2011(pre suit interest). BGCC claimed that DSIIDC withheld its legitimate dues for no justified reason and, therefore, was liable to pay interest on such delayed payments at the rate of 18 % per annum. DSIIDC denied the aforesaid claim of BGCC as well, by stating that it was not responsible for the delayed payments to BGCC. DSIIDC further stated that there was no clause in the agreement which provided for extra payment on account of delayed settlement of claims. The arbitrator accepted the said claim of BGCC and, held that award of interest is within the sole discretion of the arbitrator as per Section 31(7) of the Act. The arbitrator further held that there was no provision in the agreement which prohibited the payment of pre-suit interest. In the circumstances, the arbitrator directed DSIIDC to pay interest on amounts awarded in respect of claim no 1, 2, 3 and 5 at rate of 12 % from the date when DSIIDC paid the final bill (04.05.2010) ,till the date of appointment of the arbitrator (03.08.2012) which was calculated at ₹54,51,893/-.

38. Claim no. 7 was related to *pendente-lite* and future interest on the awarded amounts. The arbitrator awarded an amount of ₹1,04,62,788/- on account of *pendente-lite* interest at the rate of 12 % p.a from 04.08.2015 till the date of the award (30.12.2015). The arbitrator further held that if the payment is settled by DSIIDC within 3 months of the award, no future interest shall be payable, failing which interest as specified in section 31(7) of the Act shall be payable.

39. This court does not find any reason to interfere with the award of interest (Claim nos.6 and 7). Claim no.8 was for costs of arbitration, which was rejected by the arbitrator.

40. In view of the above the petition filed by DSIIDC (OMP (COMM) 269/2016) is dismissed. However, the Petition filed by BGCC (OMP (COMM) 279/2016) is allowed to a limited extent. The impugned award in as much it rejects BGCC's claim for excavation of fly ash, is set aside.

VIBHU BAKHRU, J

SEPTEMBER 13, 2017
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