

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

+ **OMP (COMM) 229/2016 & IAs 13462-63/2017**

Reserved on: 2nd February, 2018

Date of decision : 23rd April, 2018

UNION OF INDIA & ORS.

.....Petitioners

Through: Mr.Kirtiman Singh, CGSC with
Mr.Shailendra Kr. Mishra, Mr.Waize ali Noor,
Mr.Prateek Dhanda and Mr.Saeed Qadari,
Advs. Along with Mr.Anil Mehta, Ex. Engineer
(Retd.)

Versus

GARG ASSOCIATES

.... Respondent

Through: Mr.Raman Kapur, Sr. Adv. with
Mr.R.P.Singh, Mr. Dhiraj
Sachdeva, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present petition has been filed by the petitioner challenging the order dated 17th April, 2015 and the Arbitral Award dated 19th May, 2015 passed by the Sole Arbitrator awarding certain claims in favour of the respondent.

2. At the outset, it is noted that the order dated 17th April, 2015 was merely an order passed in the course of the arbitration proceedings and is not an Arbitral Award in terms of Section 31 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'). However, the said order, as would be evident from the discussion below, is

intrinsically linked with the Impugned Arbitral Award dated 19th May, 2015 as the award, to a large extent is based on this order and so is equally the challenge thereto by the petitioner.

3. The brief factual background leading up to the Impugned Arbitral Award is noted as under:-

4. The petitioner had issued a Letter of Acceptance dated 26th July, 2008 awarding the tender for the work of modernization of Sena Bhawan, New Delhi to the respondent. The stipulated date for completion of the work was 6th February, 2010. The work was actually completed on 15th June, 2012. There were disputes between the parties on the reason for the delay and consequent claims of the respondent. The said disputes were referred to arbitration by a Sole Arbitrator, *vide* order dated 22nd April, 2014 passed by this Court in Arbitration Petition No.480/2013.

5. Upon completion of the pleadings, the Arbitrator commenced hearing of the oral submissions on 8th January, 2015. The claimant /respondent concluded its arguments on that date. On 5th February, 2015, the petitioner herein commenced its arguments. The order passed on 5th February, 2015 records the objection of the petitioner herein to various claims raised by the respondent. As far as claim no.3, which is with respect to extra items, substituted items and deviated items beyond deviation limit, the order records that the respondent has withdrawn its claim in respect of extra items indicated in Para A of its Claim no.3 at page 7 of its rejoinder to the reply of the petitioner. As far as Claim no.4 is concerned, which was for the amounts withheld by the petitioner, the

Arbitrator, after recording the submissions of the parties, further recorded as under:-

“The parties have agreed to undertake a joint inspection of the defects in items of work listed out in the S.E’s letter and reconcile the gaps in their claims and file a joint report before the next date of hearing. In case the Respondent succeeds in convincing the Claimant that certain defects were not rectified, the Respondent would be entitled to deduct proportionate amount from the withheld amount and release the balance sum. However, if it is found during the inspection that the Claimant had attended to all the defects, it may be entitled to receive the balance amount. This exercise should be completed within two weeks and a joint report submitted to the Tribunal.”

6. As far as Claim no.5, which is a Claim under clause 10 (C) of the agreement for payment on account of increase in prices /wages due to statutory order(s), the parties agreed to further deliberate on the issue and work out the labour element required in each sub-component of the project and revise the claim accordingly. Two weeks’ time was given to the parties to report the result of such an exercise. The parties further agreed that as far as Claim nos.7,8,9 and 10 are concerned, the same would have to be decided by the Arbitrator.

7. I have given a reference to the above order in detail as there is some dispute between the parties as to whether they had arrived at any settlement with respect to claim nos.3 and 5.

8. By the subsequent order dated 5th March, 2015, the parties reported that they had done the joint inspection and found that except for deduction in respect of water proofing, the other amounts were payable

by the petitioner to the respondent. As noted above, this was claim no.4 of the respondent. As far as Claim no.5 is concerned, the parties were allowed further four weeks' time to sort out the issue and file their report. As far as Claim no.3 was concerned, the respondent agreed to file a comprehensive note listing out the sums claimed against each item along with analysis as to how the amounts have been worked out.

9. The matter thereafter came before the Arbitrator on 17th April, 2015 and the Arbitrator passed the following order:-

“1. In the last hearing held on 05/03/2015, the parties had sought further four weeks' time for reconciling the discrepancies pointed out in the claims under various heads/items and filing a comprehensive report.

*2. The parties submitted a joint report (**Marked as Exb.CX/3- Colly**) listing out the final agreed amounts of claims viz. Claims No.1,2,3,4 & 6 accepted by the parties as well as Claims No.5,7,8,9 and 10 where the parties had different views and left the matter to be decided by the Arbitral Tribunal. The documents submitted by the parties including (**Exb.CX/3 Colly**) which is jointly signed by both parties with notes of dissent of the Respondent, wherever applicable, and the document(**Marked as Exb.RX/1-Colly**) containing four statements of calculations regarding amounts acceptable to the Respondent towards escalation in labour wages under Clause 10C of the Agreement have been taken on record.*

3. With the above mentioned documents taken on record and the parties having closed their oral arguments, the arbitral proceedings stand concluded. Order is reserved.”

10. As noted above, the petitioner has challenged the said order in the present proceedings. It is submitted by the counsel for the petitioners that the alleged 'joint report' marked as Ex.CX/3 by the Arbitrator was in fact

the submissions made by the respondent in compliance with the direction issued by the Arbitrator in the hearing held on 5th March, 2015. This was not a joint report at all. He further submits that the signatures of the representative of the petitioner present in the arbitration proceedings were taken by the Arbitrator on this document merely as a token of receipt of the same and by putting such signatures as such, it cannot be said that the petitioner was bound by the contents of the document or that this can be treated as a joint report by the parties. He further draws my attention to the remark given by the person signing this document on behalf of the petitioner to the following effect:-

“subject to the decision of the Arbitrator”

11. He further submits that merely because this remark is not put on every page of this document, it does not mean that where such remark is not put, the contents of the document are deemed to have been unconditionally accepted by the petitioner. He further submits that this order was received by the petitioner on 18th April, 2015 and even before the petitioner could lodge its protest, the Impugned Award was passed by the Sole Arbitrator on 19th May, 2015, referring to these submissions of the respondent as a joint report.

12. As far as Claim No.3 in respect of Extra items, Substituted items and Deviated items, the Arbitrator in his Impugned Award has granted a sum of Rs.7,50,746/- in favour of the respondent solely on the basis of this alleged joint report marked as Ex.CX/3. He in fact records as under:-

Thus, as per agreement reached by the parties and reflected in the joint report (Exb. CX/3), the Claimant has accepted the reduction in claim No.3 from Rs.22,90,050 to Rs.7,50,746/- only.

27. In view of the position stated in the previous paragraph and the parties having reached an amicable settlement, Claim No.3 is, thus, accepted to the extent of Rs.7,50,746/- only. ”

13. Counsel for the petitioners, in my opinion rightly so, submits that the Arbitrator has completely misdirected himself in relying upon the document dated 15th April, 2015 CX/3 as a settlement. This document clearly was the submission made by the respondent to the Arbitrator and not a joint report of the parties or some kind of settlement between the parties with respect to amounts claimed by the respondent under Claim no.3. Even a bare reading of the contents of this document shows that there was no agreement between the parties in relation to Claim no.3. In fact, the petitioner had resisted the said claim of the respondent and the respondent had made the submissions in order to amicably settle its claim with respect to the extra items, substituted items and deviated items. This was a unilateral offer of the respondent. The contents of the document CX/3 in this regard are reproduced hereunder:-

“Claim No.3 Rs.22,90,050/-

The details of Rs,22,90,050/- under different heads is given as under:

i) Extra Items

*The details given vide Annexure C-5,
Page -80 and 81 of S.O.F.*

› Rs.43,914/-

ii) Substituted Items

*Vide Annexure C-6
Page 82 & 83 of S.O.F.*

› Rs.13,50,580/-

iii) Deviated Item

Vide Annexure C-7,

Page 84 & 85 of S.O.F.	› <u>Rs.8,95,56/-</u>
Total	› <u>Rs.22,90,050/-</u>

However, to narrow down the dispute the matter was mutually discussed at length with the respondent who insisted to withdraw the under mentioned items from Claim No-3:-

- | | | |
|------|--|-----------------------------------|
| i) | Extra item claimed vide annexure C-5 page -81 | Entire amount |
| ii) | Substituted items vide annexure C-6 page 82-83 of S.O.F. | Item No.2/1 & 2/2 |
| iii) | Deviated item vide annexure C-7 page-84 & 85 | Item No.5(b), 27(a), 34(a), 87(a) |

Taking overall view and to settle the matter amicably, the claimant agree to withdraw the above amount from claim no.3 to settle the dispute subject to the condition that the respondent has no objection against reduced amount claimed by of the claimant and claim for the remaining items as under:-

Extra item	Nil
Substituted item	80,853/-
Deviated items	<u>6,69,893/-</u>
Total	Rs. <u>7,50,746/-</u> ”

The revised substituted item and deviated items are enclosed as per annexure C-118.” (emphasis supplied)

14. Counsel for the petitioners has also drawn my reference to a letter dated 15th July, 2015 addressed by the respondent to the petitioners admitting that there was in fact, no settlement reached between the parties on this issue and the withdrawal of the claim on certain items was made by the respondent unilaterally and not due to any settlement. I quote from the letter dated 15th July, 2015 in this regard as under:-

“Claim no.3 – After Lengthy arguments during the hearing the Ld. Arbitrator directed both the parties to discuss mutually and try to resolve the issue to the extent possible.

Accordingly during discussion you requested us to withdraw Claim no.3 in total. However after discussion we agreed to withdraw the undermentioned items from Claim no.3.

- | | | |
|----|----------------------------------|--|
| 1. | <i>Extra item vide C-5</i> | <i>Entire Claim</i> |
| 2. | <i>Substituted item vide C-6</i> | <i>Item no.2/1 & 2/2</i> |
| 3. | <i>Deviated item vide C-7</i> | <i>Item no.5(b), 27(a)
& 87a</i> |

It is clarified that it was our own decision to withdraw the above items and it was not a joint decision.

(emphasis supplied)”

15. Learned senior counsel for the respondent, however, tried to defend the Impugned Award by stating that claim no.3 had also been settled between the parties as the petitioner was opposing certain items in this claim and the respondent in order to amicably resolve the said dispute, agreed to give up its claim on these items. He submits that in this form, a settlement was reached between the parties and the petitioner cannot be allowed to resile out of the same by raising technical pleas.

16. I am unable to agree with the said submission of the learned senior counsel for the respondent. As noted above, the submissions dated 15th April, 2015 marked as Ex.CX/3 were the submissions of the respondent to the Arbitral Tribunal and not a joint report. This had been duly accepted by the respondent even in its letter dated 15th July, 2015. Though, counsel for the respondent submits that the letter dated 15th July, 2015, being subsequent to the passing of the Impugned Award, cannot be taken cognizance of by this Court, in my opinion, the admission made by

the respondent on the purport and effect of the purported joint report cannot be discarded as it has a nexus with the facts constituting the award. Excluding this letter from consideration would in fact defeat the principles of due process and would be opposed to the concept of public policy. I draw my support in this regard from the judgment of the Supreme Court in ***Venture Global Engineering vs. Satyam Computer Services Ltd & Anr.*** (2010) 8 SCC 660, wherein the Supreme Court, has held as under:-

39. *Therefore, this Court is unable to accept the contention of the learned counsel for the respondent that the expression “fraud in the making of the award” has to be narrowly construed. This Court cannot do so primarily because fraud being of “infinite variety” may take many forms, and secondly, the expression “the making of the award” will have to be read in conjunction with whether the award “was induced or affected by fraud”.*

40. *On such conjoint reading, this Court is unable to accept the contentions of the learned counsel for the respondents that facts which surfaced subsequent to the making of the award, but have a nexus with the facts constituting the award, are not relevant to demonstrate that there has been fraud in the making of the award. Concealment of relevant and material facts, which should have been disclosed before the arbitrator, is an act of fraud. If the argument advanced by the learned counsel for the respondents is accepted, then a party, who has suffered an award against another party who has concealed facts and obtained an award, cannot rely on facts which have surfaced subsequently even if those facts have a bearing on the facts constituting the award. Concealed facts in the very nature of things surface subsequently. Such a construction would defeat the principle of due process and would be opposed to the concept of public policy incorporated in the Explanation.”*

17. Learned senior counsel for the respondent has further submitted that if the petitioner was aggrieved by the order dated 17th April, 2015, it should have immediately protested against the same rather than waiting for the award to be passed and then challenge the same along with the award.

18. This submission of the learned senior counsel for the respondent cannot be accepted as the reading of the document itself suggests that the Arbitrator has completely erred in appreciating the effect of the document which really and truly was only a written submission filed by the respondent before him. Even otherwise, the time period between the order dated 17th April, 2015 and the passing of the Impugned Award on 19th May, 2015 cannot be said to be so large so as to deny the petitioner a right to challenge the recordings made in the order dated 17th April, 2015, even if on the face of the record, the same is found to be incorrect. Though, it may be correct to state that the petitioner should have been more vigilant and should have immediately protested against the order dated 17th April, 2015 to the Arbitrator, however, in my opinion, such delay cannot be said to be fatal to its objection and once it is found that the recordings made by the Arbitrator in the order dated 17th April, 2015 are factually incorrect, principles of natural justice would require the Impugned Award to be set aside on this ground alone.

19. The next challenge of the petitioner is to the award of a sum of Rs.54,14,475/- in favour of the respondent under Claim No.5 on account of revision in the minimum wages of labour based on Clause 10(C) of the agreement. The learned counsel for the petitioners submits that the

respondent was not entitled to any amount under the said agreement inasmuch as the respondent had failed to comply with the pre-conditions for maintaining the claims as stipulated in Clause 10(C) of the agreement. He submitted that in terms of Clause 10(C) of the agreement, the respondent was under an obligation to show documents in proof of having paid the increased wages. He further submits that a claim under Clause 10(C) of the agreement required giving of a notice to the Engineer In-Charge by the respondent within a reasonable time of the respondent becoming aware of any alteration in the wages of labour. He submits that in the present case, the respondent had not given any such notice to the petitioner and, therefore, is not entitled to maintain its claim under Clause 10(C) of the agreement.

20. The learned counsel for the petitioners has placed reliance on the following judgments in support of his plea that in absence of compliance with the condition mentioned in Clause 10(C) of the agreement the Contractor would not be entitled to maintain a claim of increase in wages:-

- “(i) M/s Hindustan Construction Corporation vs. Delhi Development Authority & Ors. – 2009 (4) RAJ 411 (Del)*
- (ii) Republic Construction Co. vs DDA – MANU/DE/1001/2009*
- (iii) R.B Jodhamal & Co. Pvt. Ltd. vs. Delhi Development Authority – 1995 DLT (58) 315*
- (iv) Simplex Concrete Piles (India) Pvt. Ltd. vs Union of India – 2007 (3) ARBLR 394 (Delhi)”*

21. I have considered the submission made by the learned counsel for the petitioner. As a preface, I emphasize that the Arbitrator is the final judge of the facts and inference to be drawn on the evidence led by the

parties. The Arbitrator is also the final word on the interpretation of contractual terms. The Arbitrator, in his Impugned Award has held as under:

“32.....The parties proposed to further deliberate on the issue work out the labour component in each major component of the project and revise the claim accordingly. According to the Respondent, revision of wages was applicable only in respect of unskilled labour and that semi-skilled and skilled labour were not entitled to claim wages at enhanced rates. Shri Anil Mehta, Ex.En.CPWD was, however, unable to establish this fact with reference to the terms and conditions of the agreement or any other statutory provisions. In response to the contention of the Respondent that books of accounts were not supplied by the Claimant, the Claimant has stated that since the Respondent had never demanded that books of accounts should be shown to it, the question of submission of books of accounts would not arise. Further, Clause 10 C of the contract in this regard lays down, “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 the Government, and further shall, at the request of the Engineer-in-Charge may require any documents so kept and such other information as the Engineer-in-Charge may require.”

The relevant portion of Clause 10 C thus clearly lays down that the contractor is required to maintain his books of account to be ready for inspection. The respondent had never expressed a desire to inspect the books of account and there was, as such, no violation of Clause 10 C.

33. In the joint report submitted by the parties, the Claimant has reduced its claim from Rs. 1,21,76,514/- to Rs. 54,14,475/- whereas the Respondent in a separate report (Exhibit RX/1) has accepted a claim of Rs. 48,36,387/-, counting the enhanced wages in respect of only the unskilled labour. As stated earlier, the Respondent has not produced any evidence in support of its contention that revised rates in minimum wages were applicable only in case of unskilled labour. Even otherwise, it does not appeal to logic as to why revision in wages would be applicable for one category of labour and not to the other. If the Respondent had included such a clause in the agreement, the Claimant would have kept this factor in view while quoting its rates at the time of filing the tender. There is force in the Claimant's contention that revision of minimum wages would over the entire labour force including unskilled, semi-skilled and skilled and is accepted.

34. In view of the position stated in the previous paragraphs, I am inclined to support the case put forward by the Claimant. Claim No. 5 is, thus, accepted to the extent of Rs. 54,14,475/-."

22. The Arbitrator has therefore, considered the effect of Clause 10(C) of the agreement and has concluded that the petitioner herein had never expressed a desire to inspect the books of account and there was, as such, no violation of Clause 10(C). The Arbitrator further relied upon the certificate issued by the Deputy Labour Welfare Commissioner confirming that there was no complaint pertaining to non-payment/less payment in respect of the work undertaken by the respondent on modernization of Sena Bhawan. The Arbitrator further holds that there was no justification in confining the revision of rates of wages only to

unskilled labour and for not extending the benefit of Clause 10(C) of the agreement to the revision in rates of semi skilled and skilled labour.

23. I may also note that in the record of proceedings dated 05.02.2015 the Arbitrator recorded the following in respect to the Claim No.5:

“4. Claim No. 5 pertains to withholding of a sum of Rs. 1,21,76,514/- (revised) on account of revision of minimum wages of labour. The learned Counsel for the Respondent drew attention to Clause 10 C and stated that the Claimant had failed to give prior intimation to the Respondent in this regard and was, therefore, not entitled to claim this amount. Further, the increase in minimum wages from time to time was also not indicated to the Respondent. The Claimant produced a copy of the notification vide which the minimum wages payable to the labourers were notified. It was also mentioned that non-payment of minimum wages tantamounts to a criminal offence for which the Claimant could have been prosecuted if it had failed to pay the minimum wages as notified by the Labour Department from time to time. The Claimant drew attention to Exhibit C-9 which is the certificate issued to the Respondent by the Dy. Labour Welfare Commissioner confirming that there was no complaint pertaining to nonpayment/less payment in respect of the work undertaken by the Claimant on Modernisation of Sena Bhawan. Shri Mehta, Executive Engineer, CPWD, however, raised a point at this stage that charging labour component at a uniform rate of 32% for all the works undertaken in the project could not be justified as the strength of labour deployed would differ depending on the nature of work. The parties agreed that they would further deliberate on this issue and work out the labour element required in each sub component of the project and revise the claim accordingly. This exercise should also be completed within two weeks and the result thereof reported to the tribunal.

(emphasis supplied)”

24. The petitioner thereafter submitted the document marked Ex.RX/1, wherein it made the following submissions in respect of the Claim No.5:

“1. Contractor M/s Garg Associates has submitted the statement & Nos. for payment under Clause 10C amounting to Rs. 80,74,557/- vide its Letter No. NIL dt. 03/03/2015.

2. The items has been scrutinized by the office and it is found that there was difference in coefficient of labour. In some of the item even the quantity were on the higher side. The items have been checked and the corrected amount of the 10C work out to Rs. 48,36,387/-.

3. As per CPWD practice increase in labour for unskilled labour is to be paid to the agency, where as the Agency has claimed variable rates for skilled, unskilled and semi skilled class, which is not in order.

4. It is to be ensured that as per clause 10-C the amount is payable only, if the Agency actually pays the enhance rates to the labour.

Put up for further n.a.pl.

Submitted to the Ld. Arbitrator for further favourable necessary action please.

*Sd/-
(Anil Mehta)
Respondent ”*

25. A reading of the above documents would show that the petitioner itself had worked out an amount of Rs.48,36,387/- as payable to the

respondent under Clause 10(C) of the agreement. The only condition put to the same was a proof of the actual payment of such enhanced rate to the labour by the respondent.

26. Before proceeding further with this claim, I would first reproduce Clause 10(C) of the agreement:-

“Clause 10C

Payment on Account of Increase in Prices/Wages due to Statutory Order(s)

If after submission of the tender, the price of any material incorporated in the works (not being a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 thereof) and/or wages of labour increases as a direct result of the coming into force of any fresh or statutory rule or order (but not due to any changes in sales tax/VAT) and such increase in the price and/or wages prevailing at the time of the last stipulated date for receipt of the tenders including extensions if any for the work, and the contractor thereupon necessarily and properly pays in respect of that material (incorporated in the works) such increased price and/or in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied and provided further that any such increase shall not be payable if such increase has become operative after the stipulated date of completion of the work in question.

If after submission of the tender, the price of any material incorporated in the works (not being) a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 thereof) and/or wages of labour is decreased as a direct result of the coming into force of any fresh law or statutory rules or order (but not due to any changes in sales tax/VAT) and such decrease in the prices and/or wages prevailing at the time of receipt of the tender for the work. Government shall in respect of materials incorporated in the works (not being materials supplied from the Engineer-in-Charge's stores in accordance with Clause-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 contractor, such amount as shall be equivalent to the difference between the prices of the materials and/or wages as prevailed at the time of the last stipulated date for receipt of tenders including extensions if any for the work 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 authorised representative of the Government, and further shall, at the request of the Engineer-in-Charge may require any documents so kept and such other information as the Engineer-in-Charge may require.

The contractor shall, within a reasonable time of his becoming aware of any alteration in the price of any such materials and/or wages of labour, give notice thereof to the Engineer-in-Charge stating that the same is given pursuant to this condition together with all information relating thereto which he may be in position to supply.”

27. Clause 19(B)(i),(ii) and (v) are also relevant as they cast an obligation on the contractor/respondent to pay wages in accordance with the Minimum Wages Act, 1948. The same are reproduced herein below:-

“CLAUSE 19 B

Payment of wages:

(i) *The contractor shall pay to labour employed by him either directly or through sub-contractors, wages not less than fair wages as defined in the C.P.W.D. Contractor’s Labour Regulations or as per the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 and the contract Labour (Regulation and Abolition) Central Rules, 1971, wherever applicable.*

(ii) *The contractor shall, notwithstanding the provisions of any contract to the contrary, cause to be paid fair wage to labour indirectly engaged on the work, including any labour engage by his sub -contractors in connection with the said work, as if the labour had been immediately employed by him.*

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(v) *The contractor shall comply with the provisions of the Payment of Wages Act, 1936, Minimum Wages Act, 1948, Employees Liability Act, 1938, Workmen's Compensation Act, 1923, Industrial Disputes Act, 1947, Maternity Benefits Act, 1961, and the Contractor's Labour (Regulation and Abolition) Act 1970 or the modifications thereof or any other laws relating thereto and the rules made thereunder from time to time."*

28. Clause 5 of the CPWD Contractor's Labor Regulation further provides as under:-

"5. PAYMENT OF WAGES

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ix) A notice showing the wages period and the place and time of disbursement of wages shall be displayed at the place of work and a copy sent by the contractor to the Engineer-in-Charge under acknowledgment.

x) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the Junior Engineer or any other authorized representative of the Engineer-in-Charge who will be required to be present at the place and time of disbursement of wages by the contractor to workmen."

29. A reading of the above Clauses would show that the respondent was under an obligation to pay the minimum wages in accordance with the notifications issued by the Appropriate Government from time to time. The claim of the respondent was based on such Government

notifications. It is also noted that the component of labour was left blank in Schedule F of the agreement.

30. The learned senior counsel for the respondent had drawn my attention to the certificate dated 12/14 June, 2013 issued by the office of Deputy Labour Welfare Commissioner(C), Government of India certifying that there is no complaint pertaining to non-payment/less payment or otherwise in respect of the work undertaken by the respondent. He submits that not only were the payments made in presence of the authorized representatives of the petitioner but also, it is not the case of the petitioner that there were any complaints of short payment or non-payment of wages against the respondent. He further draws my attention to the letter dated 20.12.2011 from the respondent to the petitioner wherein the respondent had claimed that it maintained proper evidence of payment of minimum wages and has never refused to show such record to the representatives of the petitioner whenever asked for.

31. The above documents show that the respondent was under an obligation to pay the minimum wages as notified by the Appropriate Government from time to time; such notifications were not in dispute; the payment was to be made before the representative of the petitioner; the petitioner did not contend that it had received any complaint of non-payment/short payment of wages against the respondent; the concerned labour authority had certified that there are no complaints received by it against the respondent with regard to short payment/non-payment of minimum wages; and the respondent offered to the petitioner inspection

of its books of accounts. The finding of the Arbitrator that the respondent had indeed fulfilled the conditions as mentioned in Clause 10(C) of the agreement therefore, cannot be said to be unreasonable or perverse. In any case, this being a matter of appreciation of evidence by the Arbitrator, it would not be open for this Court to re-appreciate the same.

32. In view of the above, the judgments relied upon by the learned counsel for the petitioner would have no application to the facts of the present case.

33. In *Associate Builders vs. DDA* (2015) 3 SCC 49, the Supreme Court, has issued a word of caution for the Courts exercising powers under Section 34 of the Act in the following words:-

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

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42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

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42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute. (1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. 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. Oil and Natural Gas Commission, (2003) 8 SCC 593; 2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

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 fact of the award.”

34. Award on Claim No.5 being based on the interpretation of Clause 10(C) by the Arbitrator and the weight and inference drawn by him from the evidence led by the parties, this Court cannot set aside such Award

merely because it would have preferred another interpretation or arrived at another conclusion on the evidence.

35. The next challenge of the petitioner is to the award of interest in favour of the respondent under Claim no. 6. The Arbitrator has awarded this interest at the rate of 18% per annum purportedly on the basis of a settlement between the parties. As discussed by me above, in relation to the challenge to Claim no. 3, merely because the representative of the petitioner had signed a calculation sheet calculating the amount of interest that may become payable by the petitioner to the respondent if the interest is calculated at the rate of 18% per annum, it cannot be said that the petitioner had also agreed that the respondent is entitled to indeed claim interest at the rate of 18% per annum.

36. The learned senior counsel for the respondent submits that the respondent had filed documents before the Arbitrator certifying that it was paying interest at the rate of 17% per annum to the Punjab and Sindh Bank and therefore, the award of interest at the rate of 18% per annum was justified. I cannot accept the said argument. Under Section 31(7) of the Act, the Arbitrator has a discretion to award interest at such rate as he deems reasonable. In the present case, the Arbitrator has exercised such discretion on a totally wrong premise that the parties have arrived at a settlement on the rate of interest to be paid by the petitioner to the respondent. Once this basic foundation is found to be incorrect, the award of interest cannot be sustained.

37. The learned counsel for the petitioner has further argued that in terms of Clause 7 of the agreement, the respondent would in fact, not be

entitled to claim any interest on account of delay in making payment of the running account bills. This submission of the learned counsel for the petitioner cannot be accepted. Clause 7 of the agreement obliges the petitioner to pay such amount of the running bill and creates an entitlement for the same in favour of the respondent. This Court in ***The Union of India vs. M/s City Promoter & Buildwell Pvt. Ltd.*** 2018 SCC OnLine Del 7643, has rejected a similar argument based on Clause 64 of the General Conditions of the Contract and therefore, I see no reason to accept the argument of the learned counsel for the petitioners on this ground.

38. The above discussion on Claim no. 6 would, therefore, leave the question of final relief to be given to the parties. In ***Puri Construction Pvt. Ltd. & Ors. vs. Larsen and Tubro Ltd. & Ors.*** MANU/DE1316/2015, this Court has held that while exercising its powers under Section 34 of the Act, the Court cannot modify, remit or vary the award. This Court relied upon the judgment of the Supreme Court in ***Mc Dermott International Inc. vs. Burn Standard Company Ltd.***, (2006) 11 SCC 181. However, it is noticed that in ***Mc Dermott***, the Supreme Court also reduced the rate of interest awarded by the Arbitrator from 10% to 7½ % p.a. therein, exercising its powers under Article 142 of the Constitution of India. In many other cases, this Court has also modified the rate of interest awarded by the Arbitrator. In the present case, the Arbitrator under Claim no.9 has awarded pendente lite and future interest in favour of the respondent at the rate of 9% p.a. Therefore, discretion on the reasonable rate of interest has been exercised

by the Arbitrator. Accordingly, it is held that the respondent shall be entitled to interest at the rate of 9% p.a. under Claim no.6.

39. The petitioner has further challenged the award of an amount of Rs.18,48,000/- in favour of the respondent under Claim No. 8 as expenditure incurred on the salaries of the supervisory and supporting staff as well as on idle T & P over a period of 28 months on account of prolongation of contract.

40. Before dealing with this submission, it is noted that in terms of the contract, the Scheduled Date of Completion of work was 06.02.2010 and the Actual Date of Completion of work was 15.06.2012. The Arbitrator, after considering the submissions made by the parties as also the documents produced before him, arrived at the following conclusion:-

“49. I am not convinced with the argument advanced by the Respondent that extensions were given without levying any penalties in view of the undertaking given by the Claimant that it had not suffered any loss and that it would not claim anything extra on this account. It is very often seen that for securing payments against outstanding dues, the Contractors are not left with any choice but to furnish such undertakings with a view to obtaining pending payments. It is interesting to note that neither party has filed copies of their replies to the communications received from the other party, which would have given some idea as to the genuineness of the issues raised in their respective complaints addressed to each other. It appears that in the facts and circumstances of the case, both parties were equally responsible for the delays in the execution of the project, and it would be just and fair that the burden of extra expenditure on the salaries of supervisory staff and idle T & P is shared equally by both parties during the prolongation period.

50. *Claim No. 8 is, thus partially accepted to the extent of Rs.18,48,000/- only i.e. 50% of the amount claimed.”*

(emphasis supplied)

41. The learned counsel for the petitioners submits that the Arbitrator has ignored the undertaking given by the respondent while seeking extension of time, whereby the respondent had clearly represented that it had not suffered any losses due to the delay and will not claim anything extra on this account. The learned counsel for the petitioners further states that the award of 50% of the Claim is even otherwise without any justification and completely ad-hoc.

42. On the other hand, the counsel for the respondent submits that the Arbitrator has considered the evidence led before him, including the undertaking of the respondent sought to be relied upon by the petitioner. He further submits that the Arbitrator in this case, did not place reliance on the undertaking giving cogent reason that the extension of time was being given without levying any penalty, thereby, admitting that the delay was not attributable to the respondent; damages, being a consequential relief of delay amounting to breach of contract, the Arbitrator was within his rights to have awarded such damages.

43. I have considered the submissions made by the counsels for the parties. In the present case, the petitioner had granted extension of time in favour of the respondent from time to time without levying any liquidated damages. The counsel for the respondent has submitted that upon completion of the work, the final bill was submitted on 01.11.2012.

The petitioner, as per usual practice, refused to process the same till the respondent gives an undertaking in its prescribed performa. It is only upon giving of the undertaking that finally the bill was passed by the petitioner on 02.03.2013. The respondent immediately invoked Arbitration on 13.05.2013 without even waiting for the payment of the final bill.

44. As noted above, the Arbitrator has indeed taken note of this undertaking but has discarded the same on the ground that the petitioner had granted extension of time without levying any penalties; both parties were equally responsible for the delay; and also because very often the Contractor is left with no choice but to give such undertakings in order to secure the pending payments. In *National Insurance Co. Ltd vs M/s. Boghara Polyfab Pvt.Ltd*, AIR 2009 SCC 170, the Supreme Court, while considering the effect of giving undated receipts of full and final settlement, had also taken note of such practice of taking receipts as a condition precedent for releasing the payments otherwise due and payable under the contract, and held that such discharge voucher cannot be considered voluntary or as having resulted in discharge of the contract by accord and satisfaction.

45. As far as the contention of the learned counsel for the petitioners that the amount awarded has been given on ad-hoc basis rather than on appreciation of the actual loss suffered by the respondent, the Supreme Court in *Dwarka Das vs. State of Madhya Pradesh & Anr.*, (1999) 3 SCC 500, had held that once the grant of damages in case of breach of contract is found justified, the Court will not interfere with the

quantification of the damages even if it was passed upon guess work, provided the same appears to be reasonable.

46. In ***P.C. Sharma v. Delhi Development Authority***, 2006(1) Arb.LR 403 (Delhi), this Court had held that if the delay is attributable to the employer and the machinery is lying idle at the site, it was certainly open for the Arbitrator to award damages, the same being separate from any award which may be made under Clause 10(C) of the agreement.

47. In any case, it is settled law that in exercise of powers under Section 34 of the Act, this Court would not sit as a Court of appeal over the decision of the Arbitrator and arrive at its own conclusions based on the evidence led before the Arbitrator. It is only where the award passed shocks the conscience of the Court that this Court may set aside the award on this ground. In ***Associate Builders*** (supra) the Supreme Court had set aside the order passed by the High Court in that case, *inter-alia* holding as under:-

“56....The formula then applied by the Division Bench was that it would itself do “rough and ready justice”. We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator’s view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”

48. In the present case, once the petitioner has also been held guilty of having caused delay in the timely completion of the work, as is apparent from some of the documents to which my attention had been drawn by the learned senior counsel for the respondent, namely, the letters granting the extension of time, the award of amount under Claim No.8 in favour of the respondent cannot be said to be so unreasonable or unjustified, as requiring an interference by this Court.

49. The final challenge of the petitioner to the Impugned Award is to the grant of *pendente lite* and future interest in favour of the respondent @ 9% per annum by the Arbitrator.

50. The learned counsel for the petitioners submits that the interest awarded in favour of the respondent is unreasonable. I am unable to accept the said submission of the learned counsel for the petitioners. The award of interest @ 9% per annum cannot be said to be unreasonable in the facts and circumstances of the present case. The Arbitrator, in any case, has considered the issue of interest in detail and it would not be open for this Court to sit in judgment over the exercise of discretion by the Arbitrator in this regard.

51. In view of the above, the Impugned Award dated 19th May, 2015, insofar as it grants Claim Nos.3 and 6 in favour of the respondent, is set aside. The respondent shall, however, under Claim No.6 be entitled to claim interest at the rate of 9% per annum for the pre-reference period on the delayed payments.

52. The petition is partly allowed in the above terms. The parties shall bear their respective costs of the present proceedings.

NAVIN CHAWLA, J

APRIL 23, 2018/RN/rv

