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

+ **O.M.P. (COMM) 339/2018**

UNION OF INDIA

..... Petitioner

Through: Mr.Ripu Daman Bhardwaj, CGSC with
Mr.T.P.Singh, Adv. for UOI.

versus

ANS CONSTRUCTION LTD

..... Respondent

Through: Mr.Kapil Kher, Mr.Sushil Aggarwl,
Ms.Subiya Akbar Warsi, Ms.Diksha Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% **07.08.2018**

IA 10470/2018

Exemption allowed subject to all just exceptions.

OMP(Comm.) 339/2018 & IA 10469/2018

This petition has been filed by the petitioner challenging the Arbitral Award dated 28th February, 2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the award of work of “C/o QM. Store, Magazine, SO's Mess & Quarter Guard including internal electrical installation at Bn. Hqrs. SSB., Balrampur(UP)” to the respondent on 9th June, 2011.

The limited challenge of the petitioner is to the award of Claim No.3 and Claim No.4 in favour of the respondent.

As far as Claim No.3 is concerned, counsel for the petitioner submits that as admittedly, there was no clause in the agreement allowing the grant of escalation in favour of the respondent on account of any delay in the execution of work attributable to the

petitioner, the Arbitrator has erred in granting Claim no.3 in favour of the respondent. In this regard, he has placed reliance upon the judgment of the Supreme Court in *State of Orissa vs. Sudhakar Das (dead) by Lrs.* (2000) 3 SCC 27. He further submits that the respondent had also given an undertaking at the time of applying for extension of time to the effect that it would not claim any escalation due to extension of time as it has suffered no loss due to such delay.

I have considered the submissions made by the counsel for the petitioner, however, I find no merit in the same. Though, there is no clause in the agreement entitling the respondent to seek escalation on account of delay in execution of the work, however, at the same time, it is to be noted that in the present case and as has been found by the Arbitrator, there was a 625 days delay attributable solely to the petitioner. In light of such extraordinary delay, the Arbitrator was entitled to award damages in favour of the respondent.

It is not the case of the petitioner that there was any clause in the agreement which prohibits grant of escalation or damages in favour of the respondent due to delay attributable to the petitioner. In *Assam State Electricity Board & Ors. vs. Buildworth Pvt. Ltd.* (2017) 8 SCC 146, the Supreme Court has held that such claims, being in nature of damages are just and proper. It was held that the contractor was justified in seeking price escalation on account of an extension of time for the completion of work and noted as under:

“Once the arbitrator was held to have the jurisdiction to determine whether there was a delay in the execution of the contract due to the respondent, the latter was liable for the consequence of the delay, namely, an increase in

price.”

As far as the plea based on the undertaking given by the respondent not to claim damages, the Arbitrator has considered the same and has held as under:-

“3.3.5 After considering the above facts and circumstances of the case and the submissions made by the Claimants at Para 3.1.5, 3.1.6, 3.1.7 and 3.1.8, I am of the view that the undertaking in Hindi on the EOT application was not given by the Claimants voluntarily and the Respondents cannot take shelter of the said undertaking to deny the compensation payable to the Claimants for the delays not attributed to them. The Claimants can't be made to suffer for the faults of the Respondents. They have to be compensated for the rise in cost of materials and labour during the extended period of contract.”

This being a question of appreciation of evidence led before the Arbitrator, this Court in exercise of its powers under Section 34 of the Arbitration and Conciliation Act, 1996 cannot interfere with the same.

The petitioner further challenges the grant of Claim No.4 in favour of the respondent. The petitioner in exercise of its powers under Clause 2 of the General Conditions of Contract had withheld an amount of Rs.12,46,908/- from various running bills of the respondent for respondent's failure to achieve the milestones in time. This amount was adjusted against the delay of 80 days in execution of the work by the respondent as liquidated damages. Counsel for the petitioner submits that as the amount was withheld and later adjusted in accordance with the terms of the agreement, the Arbitrator has

erred in awarding the claim of refund in favour of the respondent.

I have considered the submissions made by the counsel for the petitioner, however, again I find no merit in the same.

The Arbitrator has held that the petitioner had admitted that there was an initial delay of 155 days attributable solely to the petitioner. Further out of a total delay of 705 days, only 80 days delay was attributable to the respondent. In this view, the Arbitrator has held that the petitioner was not justified to withhold the amount of Rs.12,46,908/- on account of non-achievement of the milestone on part of the respondent.

I do not find the approach taken by the Arbitrator to be unreasonable or perverse warranting any interference of this Court in exercise of its power under Section 34 of the Act. Once, it is admitted that there was an initial delay of 155 days attributable solely to the petitioner and further it is not disputed that out of total delay of 705 days in completion of the work, 625 days delay is again attributable only to the petitioner, petitioner certainly was not justified in imposing any penalty/damages on the respondent. It is further noted that in Claim No.3, the Arbitrator has confined respondent's claim of escalation only to 625 days thereby balancing the equities between the parties.

In view of the above, I find no merit in the present petition and the same is dismissed with no order as to costs.

NAVIN CHAWLA, J

AUGUST 07, 2018

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