

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

+ **OMP 397/2015**

Reserved on: 12th January, 2018
Date of decision : 23rd February, 2018

THE UNION OF INDIAPetitioner
Through: Mr.Manish Mohan, Adv.

Versus

M/S CITY PROMOTER & BUILDWELL PVT. LTD.
.... Respondent
Through: Mr.M.K.Singh, Mr.Rahul Pandey,
Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 26th March, 2015 passed by the Sole Arbitrator in so far as it allows claim nos.1, 2, 4 and 5 of the respondent.
2. The disputes between the parties are in relation to agreement No.CEDZ-36/2009-10 for provision of 72 Single Officers Accommodation Adjacent to Naval Officers Mess (Varuna) at Delhi Cantt. entered into between the parties on 5th November, 2009. Some of the terms of the said agreement that are relevant for the purpose of the present adjudication are reproduced herein below:-

“IN LIEU OF IAFW-2162 (REVISED-1960)
MILITARY ENGINEER SERVICES (NOTICE OF
TENDER)

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4. *The work is to be completed within the period as indicated in the aforesaid Appx ‘A’ (in accordance with the phasing if any, indicated in the tender) from the date of handing over site, which will be about a week after the date of acceptance.*

APPENDIX ‘A’ TO NOTICE OF TENDER
(NIT NO.09/CEDZ/2008-09)

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“Para 4 Period of completion : 18 (eighteen)
Months.”

SCHEDULE ‘A’ NOTES (contd..../-)

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13. *Period of completion. The entire work covered under this contract shall be completed within 18(Eighteen) months from the date of handing over of site.”*

3. The petitioner claims that the date of completion in the contract was meant for completion of all works to be executed under various parts of Schedule A, except Schedule ‘A’ Section XVI which catered for manning and operation of lifts from the date of commissioning till expiry of defects liability period (item no.2 of Schedule ‘A’ Section XVI) and comprehensive maintenance of lifts for a period of 48 months from the date of expiry of defects liable period (item no.1 of Schedule ‘A’ Section XVI). It was further contended that the entire work was to be completed within a period of 78 months. However, in the Work Order, the completion period was considered as 18 months keeping in view only

the work mentioned in Schedule 'A' Note No.13 on page 17 of the Contract Agreement.

4. The petitioner claims that the respondent on 10th October, 2012 also signed an amendment to the contract recording the above understanding of the parties. The said amendment, so far as is relevant to the present adjudication is reproduced hereinbelow:-

“FIRSTLY: The Schedule 'A' note No.13 on Srl. Page No.17 be deleted in toto and in lieu substituted as under:-

13.0 The period of completion for the entire work under this contract shall be 78 (Seventy Eight) Months from the date of commencement shown in the first Work Order placed by the GE in accordance with phasing as indicated hereinafter.

(a) Phase-I <i>The work under this phase shall comprise of all works except Serial Item No.1 and 2 of Schedule 'A' Section XVI</i>	<i>Period of completion shall be 18 months from date of commencements shown in first Work Order.</i>
(b) Phase-II <i>The work under this phase shall comprise of works included in Serial Item No.2 of Schedule 'A' Section XVI</i>	<i>Period of completion shall be 12 months from the date next to date of completion of Phase-I.</i>
(c) Phase-III <i>The work under this phase shall comprise of works included in Serial Item No.1 of Schedule 'A' Section XVI</i>	<i>Period of completion shall be 48 months from the date next to date of expiry of defect liability period.</i>

13.2 Site for Phase-II shall be handed over immediately after the date of completion of Phase-I. Accordingly, site for

Phase-III shall be handed over immediately after the date next to date of expiry of defect liability period.”

5. The petitioner further contends that the work (except the scope catered under Schedule ‘A’ Section XVI) was certified as complete on 30th January, 2012.

6. Certain disputes arose with respect to the payment of the bills of the respondent and the same were referred for adjudication to the Sole Arbitrator leading to the Impugned Award dated 26th March, 2015. A summary of the award is reproduced hereunder:-

<i>Claim No.</i>	<i>Brief particulars of dispute</i>	<i>Amount claimed</i>	<i>Amount Awarded</i>
1.	<i>Claim No.1 Toward balance payment against the contract</i>	<i>Rs.1,55,65,700.00 Revised amount Rs.2,68,24,565.00</i>	<i>Rs.1,70,23,006.00</i>
2.	<i>Claim No.2. Interest on delayed and short payment of RARs</i>	<i>Rs.22,90,000.00 Revised Rs.45,91,000.00</i>	<i>Rs.8,90,800.00</i>
3.	<i>Claim No.3 Damages due to various breaches by the respondent</i>	<i>Rs.3,57,44,500.00</i>	<i>NIL</i>
4.	<i>Claim No.4 Under payment as well as denial of payment for certain legitimate variation</i>	<i>Rs.53,600.00 Revised Rs.81,592.00</i>	<i>Rs.81,592.00</i>
5.	<i>Claim No.5 Past, pendent-lite and future interest @ 18% PA.</i>		<i>(a) Past and pendent-lite interest is Awarded on the amount of arbitral Award</i>

			<i>against claim No1 and 4 @ 12% simple interest w.e.f. 30th Mar 2013, a day after date of entering into reference to the date of Award.</i> <i>(b) Since the net Award is in favour of contractor, a period of three months is allowed to PETITIONER for making payment in terms of this Award. If the payment is not made on this date, then the Awarded amount in favour of contractor under (a) shall carry future interest @ 12% per annum from the day after date of publication of Award to the date of actual payment.</i>
6.	<i>Claim No.6 Cost of Arbitration</i>	<i>Rs.500000/-</i>	<i>NIL</i>

7. The Petitioner also raised three Claims before the Ld. Arbitrator, the details of which are reproduced herein below for ease of reference:

<i>Claim No.</i>	<i>Brief particulars of disputes</i>	<i>Amount claimed</i>	<i>Amount Awarded</i>
1.	<i>Claim No.1 Cost of rectification of defects</i>	<i>Rs.26,981.00</i>	<i>Rs.26,981.00</i>
2.	<i>Claim No.2 Cost of reference</i>	<i>Rs.5,00,000.00</i>	<i>NIL</i>
3.	<i>Claim No.3 Interest 18% Past, Pendente lite and Future</i>		<i>12@ simple interest per annum w.e.f. 31st Mar 2013 a day after date of entering into reference to date of Award.</i>

8. The petitioner has challenged the Impugned Award only to the grant of claim nos.1, 2, 4 and 5 in favour of the respondent.

9. The ground of challenge to the Impugned Award is that the Sole Arbitrator has completely mis-directed himself and acted contrary to the terms of the contract between the parties in not appreciating that the final bill was payable only after full completion of work i.e. completion of comprehensive maintenance of lifts as provided in Schedule 'A' Section XVI . It is submitted that the Sole Arbitrator has, therefore, erred in holding that for the purpose of payment of final bill, work is to be considered as completed on 30th January, 2012 as that was a certification

of the work except work mentioned in Schedule 'A' Section XVI. It is further contended that the Arbitrator has mis-directed himself as he has failed to consider the effect of the amendment to the contract signed by the respondent on 10th October, 2012.

10. I have considered the submissions made by the counsel for the petitioner, however, I am unable to agree with the same.

11. The Arbitrator has considered the above plea of the petitioner and, while interpreting the contract, has held as under:-

“32. Scope of the work under the subject mentioned Contract included Single Officers Accommodation Officers Institute, Sports Complex along with internal and external services besides comprehensive maintenance of lifts for 4 years after expiry of defect liability period and manning and operation for 12 months. Large numbers of changes were ordered on the Contractor as per user's requirement. Respondent either delayed the finalization of changes resulting either in non-payment or under pricing resulting in short payment. Thus the Contract had the following provisions:-

(a)	<i>Date of commencement</i>	<i>24 Nov 2009</i>
(b)	<i>Original date of completion</i>	<i>23 May 2011</i>
(c)	<i>Actual date of completion</i>	<i>30 Jan 2012</i>
(d)	<i>Date of expiry of defect liability period as well as completion of Manning and Operation for work under Item 2 of Schedule 'A' Section XVI</i>	<i>29 Jan 2013</i>
(e)	<i>Date of commencement for work under Item 1 of Schedule 'A' Section XVI for Comprehensive Maintenance</i>	<i>30 Jan 2013</i>
(f)	<i>Date of completion of Comprehensive Maintenance</i>	<i>29 Jan 2017</i>

In such a situation, it was incumbent on the part of Union of India to clarify various aspects connected with completion namely payment of final bill, release of retention money etc. The contract was totally silent on these aspects. Schedule 'A' note 13 on Serial page 17 of contract agreement is appended below:-

“Period of completion: The entire work covered under this contract shall be completed within 18 (Eighteen) months from the date of handing over of site.”

Further Appendix 'A' to Notice of Tender on Serial page 11 of Contract also stipulates period of completion as 18 months.

The date of expiry of defect liability period as well as completion of Manning and Operation i.e. item 2 of Schedule 'A' Section XVI left was 2 months from certified date of completion of work. Thereafter 48 months period, Comprehensive Maintenance of lifts against Schedule 'A' Section XVI item no: 1 was to be carried out by Contractor. Reasonable interpretation of contract would have been to treat the completion as completion of the work other than that of Section XVI (Lifts) because the later is not really an execution of work but only a work of Operation & Maintenance. This lacuna was realized by Union of India and proposed to amend the contract by dividing it into Phases. Phase -I for completion of all work except Schedule 'A' Section XVI and Phase II for Schedule 'A' Section XVI by taking a most unreasonable stand that payment of final bill and retention money shall be only after completion of Phase-II. Thus for all practically purposes, the completion period of contract was 18 months. This is evident from conduct of the parties as reflected in first Work Order placed by GE vide letter no.8370/CEDZ-35/11/E8 dated 17 Nov 2008 wherein the period of completion has been mentioned as 18 months only. It does exclude Schedule 'A'

Part XVI as is being now claimed by Union of India. In case the intention of the contract was otherwise, the Work Order should have been placed accordingly. Thus the conduct of the parties' shows that completion period of the contract was considered as 18 months. There is no bar that there cannot be two final bills in the contract i.e. one for Work executed and the second for operation and maintenance of lifts. Thus the first (final bill and retention money should have been paid after completion of work except work covered under Schedule 'A' Part XVI. This view is also supported by following citations relied upon by Learned Consultant of the Claimant.

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39. I have heard, examined and considered the submissions and arguments of both parties and perused the provisions of contract relied upon. I have already held in Par 19 hereinbefore that work covered under Schedule A Section XVI is not really execution of work but it is for operation and maintenance only. Thus the period of completion is Schedule 'A' note 13 on Serial page 17 of Contract takes precedence over all other provisions of the contract as held by me hereinbefore and also supported by various citations relied upon by Claimant quoted above. The work was certified as complete on 30 Jan 2012 except Schedule 'A' Section XVI. Serial item 2 of Schedule A Section XVI for manning and operation of lifts was completed on 30 Jan 2013 i.e. the date of expiry of defect liability period as well. Rule of Contra proferentum for interpretation of contract provides that where there is ambiguity in the terms of contract, it must be resolved against the executor or drafter of the contract. It is so because the drafter of the contract should not take advantage of his mistakes. Thus for the purpose of payment of final bill, work is considered as complete on 30 Jan 2012 except item 1 & 2 of Schedule 'A' Section XVI for which separate bill can be paid on completion of comprehensive maintenance. Logical meaning of provisions of the contract is that after completion there will be manning and operation of lifts for 12 months (Item 2

of Schedule 'A' Section XVI) i.e. during defects liability period. After expiry of defects liability period, there will be comprehensive, maintenance for a period of 48 months. As per agreed conditions of the contract, thus the final bill was required to be paid by 30 Oct 2012 but has not been paid as yet. Union of India/ Respondent has even failed to finalize the deviations ordered in the contract on one pretext or the other. Thus the Claimant/Contractor is required to be compensated for extension of BGBs by way of interest on delayed payment of the final bill. I consider 12% Simple Interest per annum as reasonable compensation of delayed payment.”

12. The Sole Arbitrator has, therefore, interpreted the contract to arrive at a conclusion that the period for completion of work having been prescribed as 18 months did not include the work mentioned in Item no.2 of Schedule 'A' Section XVI or the comprehensive maintenance of lifts mentioned in Item no.1 of Schedule 'A' Section XVI of the contract. The arbitrator further holds that completion of work would not include the items mentioned in Section XVI (lifts) because the later is not really an execution of work but only a work of operation and maintenance.

13. A reading of the above clause of the agreement clearly shows that the interpretation given by the Sole Arbitrator cannot in any manner be said to be perverse or unreasonable. In any case, construction of the terms of a contract is primarily for an arbitrator to decide unless the Arbitrator construes the contract in such a manner that it could be said to be something that no fair minded or reasonable person could do.

14. In ***Rashtriya Ispat Nigam Ltd. vs. Dewan Chand Ram Saran, (2012) 5 SCC 306***, the Supreme Court has held as under:-

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarized in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 653] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296] to which one of us (Gokhle, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

*45. This para 43 reads as follows:
(Sumitono case SCC p. 313)*

“43. The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one’s own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

15. In *Associate Builders vs. DDA*, (2015) 3 SCC 49 the Supreme Court again emphasized that though contravention of Section 28(3) of the Act by the Arbitrator would fall under the principle of ‘patent illegality’, the same is to be understood with a caveat that if an arbitrator construes a term of the contract in a reasonable manner, the award cannot be set aside on this ground.

16. I may only quote from the said judgment as under:-

“42. In the 1996 Act, this principle is substituted by the ‘patent illegality’ principle which, in turn, contains three sub heads-”

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42.3 (c) Equally, the third sub-head 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.—(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.”

17. As far as the question of signing of the Amendment is concerned, it is only to be noted that the Amendment was signed by the respondent

on 10th October, 2012. Immediately, upon signing of the Amendment, the respondent addressed a letter dated 10th October, 2012 itself stating that it does not agree with the said amendment. The letter is quoted hereinbelow:-

“We have signed the Amendment on 10 Oct 2012 but on going through the contents of the Amendment, the condition for final bill payment is not clear/mentioned for Phase-I and Phase-II. Which should be invariably defined in the said amendment. In view of the same, we are not agreed with the amendment and withdraw our signature and request you to cancel the same.”

18. Therefore, the respondent cannot be said to be bound by the terms of the amendment.

19. Counsel for the petitioner further submits that the Sole Arbitrator has erred in awarding escalation on account of increase in the prices of material, labour and fuel as a part of Claim no.1 in favour of the respondent. It is submitted that though Condition no.63 IAFW-2249 contemplates reimbursement on account of variation in prices of materials and/or wages of labour as a result of coming into force of any fresh law or statutory Rule or Order, the same is subject to the condition of the contractor giving a notice in this regard as also showing proof of the payment thereof.

20. The Arbitrator has worked out the escalation as per Condition 63 and awarded the same in favour of the respondent. I may only quote paragraphs 41 to 43 of the award in this regard:-

“41. Reimbursement of variation in prices is required to be made in terms of Condition 63 of IAFW-2249, General

Condition of Contract, forming part of contract. The Claimant has filed notifications of Labour Department issued by Government of National Capital; Territory of Delhi as Annexure 'B' of their Statement of Claims. Increase in wages of labour has not been denied by Union of India. Their only objection is that Claimant has not given notice of increase in wages at the appropriate time and also has not produced requisite documents for verification of Union of India as a proof of having made the payment of increased wages to the labour. During hearing, Contractor was directed to work out escalation for material and labour based on empirical formula forming part of various other contracts in MES though this formula does not form part of this contract. This direction was issued as the said empirical formula is considered more rational as compared to Condition 63 of IAFW-2249 and has been in use for last about 23 years in MES department only duly approved by Government of India. As per Condition 63 Contractor is supposed to absorb 10% variation in the rates quoted and variation beyond 10% is only payable. Contractor during hearing had agreed to 10% of deduction in the escalation worked out based on empirical formula. The details thereof have been forwarded by Contractor vide their letter no. NIL dated 01 Dec 2014. Union of India has not forwarded any comments thereon so far. In absence of any comments from Respondent/ Union of India I am constrained to consider the details submitted by Contractor as correct. As per the details forwarded by Contractor, the escalation as per empirical formula works out as under:-

(i)	<i>On a/c of materials</i>	<i>Rs.86,35,918.48</i>
(ii)	<i>On a/c of labour</i>	<i>Rs.76,94,005.28</i>
(iii)	<i>On a/c of fuel</i>	<i>Rs.3,09,804.81</i>
	<i>Total</i>	<i>Rs.1,66,39,728.57</i>
(iv)	<i>Less 10% agreed during</i>	<i>Rs.16,63,972.86</i>

	<i>hearing</i>	
	<i>Net Total</i>	<i>Rs.1,49,75,755.71</i>
	<i>Say</i>	<i>Rs.1,49,75,756.00</i>

42. Escalation amount as per Condition 63 for labour from date of commencement up to original date of completion and beyond up to date of completion work out as under:-

<i>(a)</i>	<i>Up to original date of completion as per Condition 63</i>	<i>Rs.18,75,805.00</i>
<i>(b)</i>	<i>Original date of completion to actual date of completion as per formulae</i>	<i>Rs.33,31,229.20</i>
		<i>Rs.52,07,034.20</i>
	<i>Say</i>	<i>Rs.52,07,034.00</i>
<i>(c)</i>	<i>Less 10% of (b) as agreed during hearing.</i>	<i>Rs.3,33,122.92</i>
<i>(d)</i>	<i>Net total for labour</i>	<i>Rs.48,73,911.28</i>
<i>(e)</i>	<i>Escalation for material and fuel as per empirical formulae during extended period to date of completion</i>	<i>Rs.45,66,358.77</i>
<i>(f)</i>	<i>Less 10% of (e) above as agreed during hearing.</i>	<i>Rs.4,56,635.88</i>
<i>(g)</i>	<i>Net total for materials and fuel</i>	<i>Rs.41,09,722.89</i>

Thus total escalation works out as Rs.48,73,911.28 + Rs.41,09, 22.89 = Rs.89,83,634.17.

43. It may be seen from Para 41 & 42, that the escalation as per Para 42 is on lower side and as such I award the

escalation as per Para 42 as Rs.89, 83, 634.00 in favour of Contractor in absence of any comments from UOI.”

21. Except stating that condition 63 does not contemplate payment of escalators on account of general i.e. non-statutory increase, the petitioner has not shown what part of the awarded amount would be the non-statutory increase in labour or material, not covered by Condition no. 63 or how the amount awarded by the Arbitrator is excessive or unreasonable. In fact, the Arbitrator has taken the lower figure while awarding escalation in favour of the respondent. As far as non-giving of notice or submitting proof of payment of such statutory increase, it may only be noted that the petitioner has not denied such statutory increase nor has it contended that there was any complaint received by it of non-payment of such increase by the respondent. It was also not contended that the petitioner had ever asked for proof of such payment from the respondent and the respondent had refused to give the same in spite of such demand.

22. In *Associate Builders (supra)*, the Supreme Court has re-emphasized as under:-

“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. 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, this Court held:

21. *A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating 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 fact 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."*

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."

23. The Arbitrator having considered Condition 63 of IAWF-2249 and the impact thereof as far as the claim of the respondent on the ground of escalation was concerned, this Court would not act as a Court of appeal to re-appreciate the same.

24. In view of the same, I find no merit in the above mentioned objection raised by the petitioner.

25. Counsel for the petitioner submits that the Arbitrator has erred in granting interest in favour of the respondent on the delayed and short payment of the running account bills. He submits that as payment of these bills is in nature of an advance, no interest is payable thereon. The Arbitrator has considered the submission of the petitioner and has held that though it may be correct that the payment of running account bills is in the nature of advance payment subject to final adjustment in the final bills, at the same time, timely payment thereof is essential as finance plays a very important role in the execution of any contract. If the payment of the running account bills is delayed, the contract itself may get disrupted as it would adversely affect performance of the contractor. I find the reasoning of the Arbitrator to be reasonable and correct.

26. The petitioner places reliance on the judgment of the Supreme Court in *State of Manipur vs. S.Hagr Eihan Muivah (2002) 10 SCC 516*, to challenge the finding of the Arbitrator. The same, however, cannot be accepted. In the said case the Supreme Court was considering Clause 7 of the agreement in question, which clearly stated that no payment is required to be made for the work estimated to cost more than 5000 till after the whole of the work is completed and certificate of completion is given. In the present case, Condition 64 of the General Conditions of Contract is not identically worded. The same is reproduced herein below:-

“64. Advances on Account-The contractor may at intervals of not less than 30 days submit claims on I.A.F.W.- 2263 for payment of advances on account of work done and of materials delivered in connection with Measurement and Lump Sum Contracts. Advance

payment against each individual Work Order issued under a Term Contract shall be made also at intervals of not less than one month provided the estimated value of the work performed is not less than Rs.3,000 for new works and Rs.10,000 for repair services and the value of payment on account is not less than Rs.1,500 and Rs.5,000 respectively.

The Contractor shall be entitled to be paid in respect of such claims at the following percentages of the value of work executed on the Site to the satisfaction of the Engineer-in-Charge:-

*(a) **For Works not exceeding Rs. 5 lakhs.**-90 per cent of the value of work executed.*

*(b) **For Works exceeding Rs. 5 lakhs but not exceeding Rs. 10 lakhs**-90 per cent of the value of work executed for the first 5 lakhs and 92½ per cent of the value of work executed for the balance.*

*(c) **For Works exceeding Rs.10 Lakhs**-90 per cent of the value of work executed for the first 5 lakhs, 92½ per cent of the value of work executed for the next 5 lakhs and 95 per cent. of the value of work executed for the balance.*

1[The amount so retained from the contractor shall be called retention money and shall be released to the contractor along with the final bill. However, in case the amount of this retention money is more than Rs. 1.5 lakhs, then after retaining an amount of Rs. 1.5 lakhs or 1% of the contract amount as executed whichever is more, the balance amount of retention money will be refunded to the contractor on satisfactory completion of works as certified by the G.E.]

Provided further, the Contractor may be paid advance on account to the full value of work executed on the Site on his furnishing Guarantee Bond(s) or Fixed Deposit Receipt(s) from a Scheduled Bank for the amount of the retention money which should otherwise be recoverable from him under the contract.

The Guarantee Bond shall be executed for a period and on a form as directed by the Accepting Officer. The Contractor shall further arrange to extend the period of Guarantee Bond or shall furnish a fresh Guarantee Bond of similar value so as to cover the period till the payment of the final bill.

In the case of Fixed Deposit Receipts, the same shall be for a period exceeding 6 months beyond the period of contract and shall be endorsed in accordance with the Govt. Securities Manual for the time being in force. If the Fixed Deposit Receipts are in the name of the Contractor, they shall be transferred/endorsed to the Accepting Officer concerned in such a way that they can be encashed by the said Accepting Officer without reference to the Contractor. In the event of delay in the preparation of the final bill, the Contractor shall make arrangements with the bank for suitable extension of the fixed deposit period.

In the case of Measurement and Lump Sum Contracts the Contractor shall also be entitled to be paid during the progress of the Works 85 per cent. of the value of any material which are in the opinion of the Engineer-in-Charge in accordance with the Contract and which have reasonably been brought on the Site in connection therewith and are adequately stored and/or protected against damage by weather or other causes, but which have not at the time of the advance been incorporated in the Works.

Provided always that payment shall not be made under these periodical certificates in respect of perishable materials (the discretion of the G.E. as to what is perishable being final and binding).

Any sum due from the Contractor on account of Transport, Stores or any such matter provided by Government shall be deducted from the first or next subsequent advance.

The G .E. shall from time to time certify the sums to which the Contractor is entitled after retaining the reserve.

Any certificate relating to Work done or materials delivered may be modified or corrected by any subsequent interim certificate or by the final certificate and no certificate of the G .E. supporting an advance payment shall of itself be conclusive evidence that any Work or materials to which it relates are in accordance with the Contract.”

27. Though Condition 64 of GCC uses the word ‘advance on account’, it is in the nature of payment for the work already done and protects the employer by providing for retention money against such bill. The employer, therefore, stands fully protected. It also gives the percentage of the value of work to which the contractor shall be “entitled to be paid”. I, therefore, find no merit in the objection raised by the petitioner to the grant of Claim No.2 in favour of the respondent by the Sole Arbitrator.

28. As far as Claim no.4 is concerned, the only ground raised in the petition is as under:-

“T) That the Sole Arbitrator has similarly awarded a sum of Rs.81,592.00 against contractor's Claim No. 4 towards extra lead for disposal of surplus earth without there being any substantiating documents, just on the basis of a hypothetical claim preferred by contractor and hence same is liable to be set aside.”

29. The Arbitrator while granting the said claim has relied upon letters dated 2nd March, 2010 and 12th February, 2011 and concluded as under:-

“75. If any be seen from above correspondence that Contractor is due the amount claimed for disposal of surplus earth from site to gate of the complex and then from gate to 5 km away from the gate to the place decided by MES in consultation with users. Disposal of earth to 5km has been considered by Contractor in Claim no. 1.

76. In view of above claim is sustained and in award a sum of ₹ 81,592.00 (Rupees Eighty One Thousand Five Hundred Ninety Two only) in favour of contractor against this claim.”

30. It is not shown by the petitioner how the above finding of the Arbitrator is wrong. I, therefore, find no merit in the objection raised by the petitioner against the grant of such claim.

31. The last challenge of the petitioner is to the grant of interest on the amounts awarded in favour of the respondent. It is contended that as the amounts had been crystallized only during the arbitration proceedings, interest should not have been granted in favour of the respondent.

32. I am unable to agree with the submission made by the counsel for the petitioner. The Arbitrator having found that the amounts were due and payable to the respondent, has rightly granted interest thereon. Rate of interest also cannot be said to be unreasonable or fanciful.

33. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with costs quantified at Rs.25,000/-.

NAVIN CHAWLA, J

FEBRUARY 23, 2018
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