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

+ **FAO(OS) (COMM) 239/2018**

UNION OF INDIA

..... Appellant

Through: Mr. Ripu Daman Bhardwaj, CGSC  
with Mr. T.P. Singh, Advocate.

versus

M/S ANS CONSTRUCTION LTD

..... Respondent

Through: Mr. Kapil Kher, Mr. Sushil Aggarwal  
and Ms. Subiya Akbar Warsi,  
Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE A. K. CHAWLA**

**ORDER**

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**16.10.2018**

**CAV 962/2018**

Since the counsel for the caveator has put in appearance, the caveat stands discharged.

**CM APPL.43538/2018 (for exemption)**

Allowed, subject to all just exceptions.

**FAO(OS) (COMM) 239/2018 & CM APPL. 43537/2018**

The appellant challenges an order of the learned Single Judge who affirmed the award of the sole Arbitrator. The award was in respect of the work that the respondent/contractor had agreed to execute i.e. work relating to the QM Store, Magazine, SO's Mess &

Quarter Guard including internal electrical installation at Battalion Hqrs. SSB Balrampur (UP). The contract was awarded on 09.06.2011. Claiming unjustified withholding of amounts due as well as price escalation on account of the extension of the period of the contract, the Arbitration Clause was invoked by the contractor. The appellant contended that under Clause 2 of the General Conditions of Contract (GCC) it had right to withhold amounts, which it finally appropriated on account of delay by determining those sums to liquidated damages. The amounts so withheld was `12,46,906/-. It was also directed that the contract did not contain any escalation clause and that the contractor could not therefore claim any amounts. The Arbitrator negative both these contentions and held that the appellant was responsible for an initial delay of 155 days and later for 705 days in the execution of the contract and consequently the escalation claimed was justified. As regards the withholding of the sum of `12.46 lac it was held that even if it were assumed that the contractor were at fault for 80 days, looking at the overall delay attributable to the appellant, the amount could not be withheld. The appellant's Section 34 petition before this Court was rejected by the learned Single Judge, who held as follows:-

*“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."*

Learned counsel reiterated that the contract did not contain any escalation clause and consequently the amounts awarded were outside the agreement and therefore liable to be set aside as contrary to the contract. It was secondly urged that there was no dispute that under the contract amount could be withheld and liquidated damages too could be claimed as well. In these circumstances, the withholding of `12.46 lac was justified.

The Court has considered the materials on record, which include the award and the arbitral record. The Arbitrator noted that even though the contract did not contain any escalation clause and was premised upon timely performance of obligations by the parties, nevertheless, having regard to the long and unintended extension, the

contractor was entitled to be compensated. It relied upon the ruling in *Assam State Electricity Board & Ors. vs. Buildworth Pvt. Ltd.*, (2017) 8 SCC 146 in this regard.

In these circumstances, the Court is of the opinion that there is no infirmity in the award since the extended period constituted the claim for work actually done in the extended period. As regards the withholding of the amounts in Clause 2 (of the GCC) the Court is of the opinion that here too the award and the learned Single Judge adopted a reasonable approach. The overall delay attributable to the appellant was 705 days. This was besides the initial delay of 155 days. In these circumstances, the imposition of liquidated damages was wholly unjustified. For the above reasons, the Court holds that there is no merit in the appeal. It is accordingly dismissed along with the pending application.

**S. RAVINDRA BHAT, J**

**A. K. CHAWLA, J**

**OCTOBER 16, 2018**

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