

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

% Date of decision: 6th November, 2019

+ O.M.P. (COMM) 254/2019 & IA. 8935/2019

M/S AVNISH KUMAR & ASSOCIATES Petitioner

Through: Ms.Tina Garg, Mr. M. K. Ghosh and
Mr.Rohit Dutta, Advs.

versus

NORTHERN RAILWAY THROUGH: ITS GENERAL MANAGER
..... Respondent

Through: Mr.Jagjit Singh, Sr. Standing Counsel

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

IA. 8935/2019(for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

O.M.P. (COMM) 254/2019

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act of 1996', for short) is, to the Award dated September 14, 2018 passed by the learned Arbitrator, whereby the learned Arbitrator has dismissed the claims set up by the petitioner herein.

2. The facts as noted from the record are that, the respondent floated a tender dated August 03, 2006 for carrying out certain construction works at Katra Railway Station (then at the proposal stage)

for an approximate amount of ₹2.15 Crores (excluding cost of cement, steel etc. which were to be supplied by the Railways free of cost, as per the required specifications). The petitioner was declared L-1 with its bid and accordingly awarded the contract on December 06, 2006. Thereafter, Northern Railways and the petitioner entered into the Contract Agreement dated March 09, 2007 ('Contract Agreement', for short). The scope of work of the contract comprised of execution of interior and exterior wall finish and floor finishing works in station building including construction of 90 bedded dormitory accommodation at first floor and construction of 20 bedded running room complex including related ancillary works at proposed Katra station UHP-Katra section in connection with USBRL project.

3. It was the case of the petitioner that the stipulated date of completion of work was February 18, 2008. According to the respondent, the completion period was of fourteen months and hence, the stipulated period of completion of work was February 05, 2018. It was the case of the petitioner that, it had mobilized adequate plant and machinery along with other requisite resources so as to avail bonus as per clause 2A of Contract Agreement and to save time related fixed overheads. The date of commencement of work was December 19, 2006. Since the very commencement, the execution of works was delayed inordinately due to a number of delaying events beyond the control of the petitioner and which could not be reasonably foreseeable at the time of submission of bids resulting in slippage in the planned progress of work. According to the petitioner, this aspect was being regularly informed to the respondent. In substance, it is the case of the petitioner that delay was wholly attributable to the respondent. It is the

stand of the petitioner that even after eleven months of allotment of work to the petitioner on December 06, 2006, i.e., around October, 2007, the respondent was not sure of the scope of work. The respondent had given wrong estimation of quantities for which the cost of the contract had gone up by 45%. The petitioner's case was that the respondent failed to give the drawings and specifications and the revised G.A. of the station building was only received on August 07, 2007, i.e., after nine months from the start of the work. That apart, the first floor plan of the station building was received on October 01, 2007, i.e., after eleven months. Due to lack of coordination between the civil and electrical wings of the Railways, not even a single drawing of the electrical layout was received. Vide letter dated January 30, 2008 the petitioner informed the Deputy Chief Engineer, Northern Railway, regarding delay in the sanction of corrigendum, delay in finalization of finishing item, non-payment of NS rates for extra items and regarding incurring of extra expenditure and also requested extension of time upto March 31, 2009 with price variation clause without penalty and revision of rate to cover additional financial burden for the delay on the part of the respondent. It is the case of the petitioner that despite the delay on the part of the respondent the subject work was completed by the petitioner on December 31, 2010. Upon completion of the work, the petitioner requested the respondent to release the justified payments which are being held up, along with price variations vide letter dated July 12, 2011. It is the stand of the petitioner that respondent drew up a grossly undervalued final bill with dated November 26, 2011, which the petitioner was forced and coerced to sign under the threat that if the same is not signed, no payments would be released. The petitioner stated

that the bill did not include several of its claims which were being pursued by it. Thereafter the completion certificate was issued on July 28, 2012. The petitioner stated that the respondent failed to release the payments in the form of price variation upto October 31, 2010 and the delay and prolongation of work for a period of forty eight months is attributable to the respondent. A plea was also raised that liability on account of revised sales tax from 4.2% to 8.4% was also not paid by the respondent. No payment was made on account of losses incurred due to idling resources, man power and machinery; on account of interest against running account bills and no compensation was paid against loss of profits. In the aforesaid background, the learned Arbitrator was appointed by this Court. The claims of the petitioner before the learned Arbitrator were the following:-

- (a) ₹2,000/- on account of illegal imposition of penalty;
- (b) ₹14,74,645/- for prolongation of contract due to fault of respondent;
- (c) ₹33,82,000/- on account of price variation upto actual date of completion.
- (d) ₹11,68,000/- against the sales tax, which were increased from 4.2% to 8.4% and 12.5% till the date of completion.
- (e) ₹45,62,000/- on account of loss suffered due to extra expenditure incurred on site establishment in prolongation of contract.
- (f) ₹26,63,206/- on account of loss suffered due to idling of T&P due to prolongation of contract.

- (g) ₹14,21,790/- site expenses incurred by the petitioner on account of prolongation of the contract.
- (h) ₹10,04,400/- on account of loss suffered due to extra expenditure incurred on head office expenses in prolongation of contract.
- (i) ₹37,66,510/- loss of opportunity due to prolongation of contract.
- (j) ₹1,87,750/- interest @ 18% from date of due till April 13, 2017(date of filing of the Statement of Claim).
- (k) ₹10,00,000/- as cost of arbitration.

4. The respondent had filed their statement of defence. The respondent had taken a plea that the claims are barred by time and are not maintainable under the '*Excepted*' category as provided for under clause 63 of the General Conditions of Contract ('GCC', for short). It was also stated that the petitioner had executed a Supplementary Agreement, in the form provided under Clause 9.8 of the Special Conditions of Contract ('SCC', for short), on November 26, 2011 ('Supplementary Agreement', for short) on completion of the Contract, and thus was debarred from invoking arbitration and setting up claims. It was also stated that the project was completed by the petitioner on December 31, 2010 after being granted seven extensions by varying the date of completion from time to time and as such the plea attributing the delay to the respondent was misleading and incorrect. The respondent denied that the cost of contract had gone up by 45%. According to the respondent, the Contract Agreement was awarded at the cost of ₹2,05,22,021/- and stood finalized at the cost of ₹ 2,81,71,325/- as per

the total amount paid to the petitioner. That apart, a mutually agreed amount of ₹17,18,278/- was paid towards additional items which were introduced in the intervening period and it was payable as per the then prevailing market rate. In the light of the above, the tendered work was completed at the cost of ₹2,64,53,047/- i.e., at an increase of 29% on the initial award amount of ₹2,05,22,021/-. Further, reliance was also placed by the respondent on the stipulation in the contract under the heading 'Schedule For Quoting Rates' of the tender terms and conditions, which states that the Railways reserve the right to alter the quantities indicated in the schedule as per requirement of site conditions, for successful completion of work. It was also the stand of the respondent that the terms and conditions of the agreement would not be amenable to variation based on a party's unilateral belief.

5. According to the respondent it had all along been providing drawings to the petitioner on a timely manner based on the stage of construction achieved by the petitioner on the given date and also that 'specifications' were provided in the SCC encompassing the entire scope of the Contract Agreement. The petitioner having participated in the tender bid and awarded the contract on December 06, 2006 had agreed to be bound by its terms and conditions and there is no provision either in the tender documents, and/or in the GCC and/or SCC and/or any document mutually agreed upon between the parties, which provided for 'Revision Rates'. With regard to the payment towards price variation, the same would be due and payable only if the variation exceeded 5% and that too only for the amount above 5% and further submits that there was hardly any price variation as per RBI indices during the first year of the currency of the Contract Agreement i.e. till December 31, 2007. It

was also stated that the respondent would not in any manner, liable towards the petitioner relating to any tax which may be payable under the applicable laws and further that initially the respondent deducted sales tax @4.2% which was later increased to 8.4% because of the rise in Sales Tax and the same was conveyed to the petitioner. The final payment without price variation calculation was accepted by the petitioner on November 26, 2011. Further, the petitioner took nine months, after the intimation letter dated November 14, 2014 sent by respondent, to sign the final PVC bill and meet the concerned Railway's officer at Udhampur, to complete the formalities for release of payments towards price variation and to sign the PVC and the petitioner signed price variation as calculated by the respondent without any demur or protest on August 25, 2015 and therefore, the petitioner accepted the payment of ₹13,18,567/- without any protest.

6. It was the case of the respondent that the resources engaged by the petitioner were insufficient and not extra and the respondent repeatedly requested the petitioner to deploy adequate resources so as to complete the work without any further delay. In substance, it is the case of the respondent that it is the petitioner, who was responsible for the delay and actually committed fundamental breach of the Contract Agreement.

7. The first and the foremost issue, which was decided by the learned Arbitrator was the issue of the Supplementary Agreement, which according to the respondent discharged the agreement and amounted to full and final settlement of the claims under the Contract Agreement. The plea on behalf of the petitioner was that this

Supplementary Agreement accompanied with a grossly under-valued final bill dated November 26, 2011 was drawn up by the respondent, and which the petitioner was forced and coerced to sign under the threat, that if the same is not signed, no payments would be released and for which protest was lodged by the petitioner vide letter dated February 16, 2013, letter dated July 12, 2013 and also letter dated October 15, 2015.

8. On the other hand, it was the case of the respondent that the Supplementary Agreement was signed out of its free will and consent and without any protest. As regards the letters, it was submitted that the same were written by the petitioner much after the final bill and Supplementary Agreement was signed and that none of these are protest letters, but just claims and request for release of payments. The learned Arbitrator on this issue was of the following conclusion:-

"52. In the light of above legal position, the factual scenario of the present case has to be considered. It is not disputed that the parties entered into an Agreement dated 09.03.2007 which was for a period of 14 months from the date of award i.e. 05.02.2008. The said Agreement included the terms contained in the SCC of which Clause 9.8 reads thus:

"after the work is completed and taken over by the Railway as per terms and conditions of the contract agreement or otherwise concluded by the parties with mutual consent and full and final payment is made by the Railway to the contractor for work done under the contract the parties shall execute the supplementary agreement annexed here to as Annexure-C"

53. *The Respondent contends and rightly so that on the completion of contract both the parties signed the SA dated 26.11.2011 in the form provided under Clause 9.8 of the SCC. Subsequently, the Claimant referred to the said SA for the first time only after span of almost 15 months vide letter dated 16.02.2013 (Annexure C-8/1) claiming the expenses incurred due to prolongation of the performance of contract. The Claimant did not raise the issue of 'coercion or duress', instead vide this letter the Claimant conveyed its gratitude to the Department for 'releasing their long due payment (in the shape of "Final Bill")". The same request was reiterated by the Claimant in the letter dated 12.07.2013 (Annexure C-9). When the contractor had accepted the final payment made to it by the Railways (Respondent) as full and final settlement of all its disputed claims under the Principal Agreement without any protest or objection, raising of claims for losses and expenses allegedly due to prolongation of contract much after full and final settlement, appears to be unjustified and mala fide. The fact that these expenses and losses were not mentioned at the time of the settlement of the final bill or immediately thereafter, but after about 15 months, makes these belated claims all the more suspicious, baseless and merely bald assertions. The Claimant's letter dated 05.10.2015 stating "said PVC bill covered only part of PVC claim and other claims were not addressed by Railways. We Signed said bill to receive the payment" amounts to an admission on its part that the SA was signed voluntarily and the Claimant at the relevant point in time fully understood the consequences of its acts. The financial condition of the Claimant was not so precarious that it was left with no alternative, but to accept the terms as suggested. By its own admission, the Claimant is not new in the area of construction work and had worked with the Railways /*

Respondent in the past too and knew the technical and procedural glitches faced by every contractor who contracts with the State owned service sector industries. The Claimant in its letter dated 15.12.2007 has categorically stated that "in spite of adversely framed contract conditions, we have always been more than willing to comply to any instructions given by the department."

54. In view of the above noted facts and circumstances, the Claimant is not able to establish that the SA was signed by it under duress, coercion and undue influence or that it, was forced to sign on the dotted line having no other option. It is not the case where the Claimant had no choice, or rather no meaningful choice, but to give its assent or to sign on the dotted line in a prescribed or standard form. Thus, under the Supplementary Agreement, the Claimant had given full discharge of the claims due from the Respondent and there remaining no dispute on this score, nothing was left for the Arbitration. However, it would also be seen subsequently that the Claimant even otherwise had no case to agitate and set up the claims."

9. Even before this Court, the learned counsel for the petitioner has reiterated the stand taken before the learned Arbitrator on this issue and had relied upon the judgment of the Supreme Court in ***R.L. Kalathia and Company vs. State of Gujarat (2011) 2 SCC 400*** to contend that the petitioner is within its right to agitate the claims even if the petitioner has executed the Supplementary Agreement. I am afraid, in the given facts, as noted above by the learned Arbitrator, surely the claim of the petitioner was raised after almost fifteen months from the date of execution of the Supplementary Agreement. It is concluded by the

learned Arbitrator that the petitioner did not raise any issue of coercion or duress in any of the letters addressed by it to the respondent. It is also noted by the learned Arbitrator, in fact that the petitioner had conveyed gratitude to the Department for releasing their long due payment. The findings of the learned Arbitrator, as noted above are not perverse and are based on the facts as analysed by the learned Arbitrator, with which this Court clearly agrees.

10. Insofar as the judgment relied upon by the learned counsel for the petitioner in ***R.L. Kalathia and Company vs. State of Gujarat (supra)*** is concerned, the said judgment is not applicable in the facts of this case. In that case, the issue was whether the contractor can raise claims after submission of '*No Claim Certificate*' or acceptance of final bill by mentioning '*without prejudice*'. It was in that background, the Supreme Court held that under such circumstances, the claim made by the contractor could not have been rejected on the ground of issuance of *No Due Certificate*. The Supreme Court also held that after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "*without prejudice*".

11. This plea of the petitioner has to be seen in the context that it was the case of the petitioner that the Supplementary Agreement was signed by the petitioner under coercion and duress. Admittedly, the plea of coercion and duress could not be proved by the petitioner before the learned Arbitrator. If that be so, the very basis for raising the claim after

fifteen months on the ground of coercion and duress, surely shall be unsustainable. In this case, the petitioner has not signed any 'No Claim Certificate' or full and final discharge voucher / receipt but had signed a Supplementary Agreement, that too after the payment of ₹13,18,567/-. Under such circumstances and in the given facts, the conclusion drawn by the learned Arbitrator cannot be interfered with.

12. That apart, I find that the learned Arbitrator has examined the claims, even on merits. In this regard, it is necessary to refer to paras 55 to 62 of the Award:-

55. *It is reiterated that after the completion of work, the Claimant admittedly received the outstanding amount as per the Final Bill and thereafter also signed the S.A. as satisfaction of the outstanding claims. The present claims are set up by the Claimant allegedly on the prolongation of contract by the Respondent. The main grievance of the Claimant is that the Respondent had delayed in supplying the drawings as also there was delay in approvals and decisions beside addition of extra works, which all resulted in the contract getting prolonged, and the Claimant resultantly suffered on various counts. The Claimant has sought the price variation (PVC) due to various extensions granted by the Respondent stating all those to be at the instance of the Respondent, being because of the above delays and indecisions on the part of the Respondent.*

56. *It is admitted that as many as seven (7) extensions of time for completion of project were granted by the Respondent and that except the first extension, which was under clause 17 A of GCC, all the remaining six (6)*

extensions were under clause 17B thereof. Extension under clause 17 A is granted due to reasons attributed to the Respondent, whereas extensions under 17B as stipulated are at the instance of the Claimant. There is no dispute that the Claimant applied for all the extensions. The Claimant however contends that the extensions, (except 1st) are arbitrarily granted by the Respondent without PVC, the extensions being at the instance of the Respondent and not because of fault of the Claimant.

57. The above controversy raised by the Claimant is nothing but an afterthought plea being taken by the Claimant to substantiate its claims. Clause 37 of SCC which deals with price variation during extended period of contract provides that the price adjustment as worked out under clause 36, i.e. either increased or decreased will be applicable upto the stipulated date of completion and also for all the extensions of time granted except extensions granted under clause 17B of GCC. This makes the things amply clear that the extensions granted under clause 17B do not entitle the Claimant for any Price Variation. Clause 17B of GCC, which provides for extension of time for delay due to the contractor, also provides that on such extension the Respondent will be entitled without prejudice to any other right and remedy available, to recover from the contractor (Claimant) the damages as provided therein. This clause also provides the formula for calculation of the damages and the mode of its appropriation, and also stipulates that the Respondent could rescind the contract under clause 62, irrespective of there being or not actual damage on account of default of the Claimant in completing the work within extended period. Reading both clauses 17B of GCC and 37 of SCC together it is amply clear that no

PVC was available to the Claimant on the extensions granted under clause 17B, and rather the Respondent could also impose damages while granting an extension under this clause.

58. The first extension which was granted with PVC under clause 17 A of GCC entitled the Claimant to claim PVC for the extended period, and which is also not denied by the Respondent, and during the course of arguments the Ld. Counsel for the Respondent fairly conceded in this regard.

59. It is not in dispute that all the seven extensions were granted by the Respondent on the request letters of the Claimant. It is noted that excepting the 4th extension, which was for a short period from 01.10.2009 to 30.11.2009 (2 months) under clause 17B of GCC with a token penalty of ₹1,000/- per month, all other extensions were without any penalty or damages. The use of the word penalty for 4th extension is nothing but liquidated damages under 17B, and which is also so described by the Claimant under claim no.1. I do not see any wrong or illegality in the Respondent imposing damages of ₹2,000/- while granting 4th extension under clause 17B.

60. The Claimant has not led any evidence to substantiate that the delay in supply of some drawings (of boundary wall, porch, first floor), in any way affected the construction after the grant of first extension (with PVC). On the other hand, the Claimant admitted that there was "slippage in planned progress of work" due to fault in assessment. The Respondent submits, and which is not

disputed, that most of the drawings were provided to the Claimant along with the tender. And that further drawings were provided on 26.01.2007 and 10.04.2007 (Ex. R-2) (COLLY). 01.08.2007 and 28.09.2007 as per stage of construction achieved by the Claimant, which has not been denied by the Claimant. While admitting that the drawings regarding entrance porch, boundary wall and revised drawings of first floor plan of station were provided in August/September 2007, the Ld. Counsel submits that these were minor modifications which did not affect the continuity of the work by the Claimant as there were various other fronts available for carrying activities. However, the work of entrance porch was later withdrawn. The Ld. Counsel also refers to clause 2 of tender terms, clauses 7.1 of tender document, clause 6.1 of sec, clauses 11.1 to 11.3 of SCC and Clause 10.13 of Special Conditions Related to Site Data and Specifications: These clauses read as under:

"Clause 2 tender form: Drawing for the work- The drawing for the work can be seen in the office of the and / or at any time during the office hours. The drawing are only for the guidance of tenderer (s). detailed working drawing, (if required) based generally on the drawing mentioned above, will be given by the Engineer or his representative from time to time."

"7.0 STUDY OF DRAWINGS AND LOCAL CONDITIONS

7.1 The drawings for the works can be seen in the office of the Dy. Chief Engineer/S&C-111, Northern Railway, Udhampur. It should be noted by tenderers that these drawings are meant for general guidance only as the Railway may suitably modify them during the execution of the work according to the circumstances without making

the Railways liable for any claims on account of such changes."

"6.0 PLANS AND DRAWINGS FOR EXECUTION OF WORKS

6.1 The drawings for the works can be seen in the office of Dy. CE/S&C-111, Udhampur on any working day from 10.30 hrs to 15.00 hrs. these drawings are meant for general guidance only and as provided in special tender conditions and instructions to tender/s, Railway may suitably modify them, without making the railway liable for any claims on account of such changes or delay in the modification of the same.'

"11.0 DRAWINGS FOR WORKS

11.: The Railway administration reserve the right to modify the plans and drawings as referred to in the special data and specifications as also the estimate and specifications without assigning any reasons as and when considered necessary by the Railway. The percentage rates for the schedule item and items rates for the non-schedule items quoted by the contractor as may be accepted by the Railways will, however, hold good irrespective of any changes, modification, alterations, additions, omissions in the locations of structures and detailed drawings, specifications and/or the manner of executing the work.

11.2: It should be specifically noted that some of the detailed drawings may not have been finalized by the Railway and will, therefore, be supplied to the contractor as and when they are finalized on demand. No compensation whatsoever on this account shall be payable by the Railway administration.

11.3: No claim whatsoever will be entertained by the Railway on account of any delay or hold up of the works arising out of delay in approval of drawings, changes, modifications, alterations, additions, omission and the sight layout plans or detailed drawings and design and/or late supply of such material as are required to be arranged by the Railway or due to any other factor on Railway accounts."

Clause 10.13: The design of foundations, depth of foundations below the ground level may be varied and will be decided by the Engineer during the progress of the work according to actual soil conditions at site of work. The drawings already prepared and which may be prepared hereafter are not to be taken as final nor are these binding on railway in any respect. The contractor shall have no claim on the railway if any change is made in the approved drawings. Also his inability to make timely arrangements for the necessary plant and machinery due to any such changes which the Engineer may make, will not be taken as an excuse for slow performance or non-performance of the work."

61. The Claimant was reminded of all this vide letter dated 17.05.2008 by the Respondent which was issued in response to the Claimant letters dated 30.01.2008, 17.04.2008 and 08.05.2008. However, the Claimant also kept repeating about the same, even after the completion of the work and the Supplementary Agreement, vide letters dated 12.07.2011, 24.08.2011, 05.10.2015. The Respondent gave the detailed reply to all those letters of the Claimant in this regard on 27.08.2011.

62. In any case, the fact that all the six extensions were granted at the instance of the Claimant, under clause

17B, without any objection and protest by the Claimant at relevant time or even thereafter, the pleas of delay in some drawings, or any other similar ground, are all afterthought or in any case deemed to be waived or not considered to be relevant and serious as regards the construction activity.”

13. The learned Arbitrator has not agreed with the case of the petitioner that the completion of the work was delayed because of the reasons attributable to the respondent like (i) delay in supplying the drawings; (ii) delay in approvals; (iii) addition of extra works. Rather, the learned Arbitrator has come to a conclusion that various extensions have been given by the respondent at the instance of the petitioner, that too under Section 17(B) of the GCC.

14. As regards the plea of the petitioner that there was increase in quantities and extra works, which resulted in the delay, the learned Arbitrator has relied upon clause (2) of the Contract Agreement, Note (2) of Schedule for Quoting Rates of tender terms and conditions and also clause 4.2(d) and clause 4.8 of the Tender conditions and Instructions to tenderers, which reads as under, to reject the same.

Clause (2) of Agreement" "The quantities shown against various items in the schedule of items, rates and quantities are approximate and for guidance only. The same are subject to variation depending upon site requirement and Railway reserves the right to increase / decrease the quantities as per site conditions"

Clause 4.2 (d): "The value of quantities given in the attached schedule of items, rates and quantities is approximate and are given only as a guide. These are subject to variations / additions and/or omission. The

quantum of work to be actually carried out shall not form the basis of any dispute regarding the rates to be paid and shall not give rise to claim for compensation account of any increase or decrease either in quantity or contract value. "

"Note.2: The quantities indicated in the above schedule are approximate. The Railways reserve the right to alter the same as per the requirement of sight conditions for successful completion of work.

4.8: Variation in quantity:

4. 8.1: "The tenderer /contractor will be bound to execute the additional quantities to the extent of (+50%) of the agreement value on the following items and conditions:

(a) If agreemental value goes beyond (+) 25%, in that case, for the first 15% increase in the value of the agreement, the rates shall be reduced by 2% in the incremental value.

(b) The rate shall be further reduced by 2% for the incremental value of the agreement, for the next 10% increase in the value of the agreement beyond 15% as in (a).

(c) In case agreemental value goes beyond (+) 50%, the rates for incremental value shall be decided as per prevailing codal provisions. "

15. On the point of limitation raised by the respondent, the learned Arbitrator did not agree with the said plea and concluded in favour of the petitioner.

16. On the plea of 'Excepted matters' of the respondent, the learned Arbitrator, even though, held that different claims of the petitioner are

not arbitrable and admissible as such or otherwise. But he still went on to examine the claims of the petitioner on merit and held even such claims are not maintainable because of the fact that he had already come to a conclusion that the delay in completion of the work was attributable to the petitioner and every time the extension for completing the contract was sought for, the same was granted by invoking clause 17(B) of GCC and 37 of SCC, which does not entitle the petitioner to any price variation.

17. A feeble attempt was made by the learned counsel for the petitioner to contend that the delay in execution of the contract was attributable to the respondent but I find that except the petitioner filing a summary of letters showing delay / admission on the part of the respondent Department, she has not filed those letters on record. In this regard, I may only state that the learned Arbitrator, has in paras 60 and 62 held as under:-

60. The Claimant has not led any evidence to substantiate that the delay in supply of some drawings (of boundary wall, porch, first floor), in any way affected the construction after the grant of first extension (with PVC). On the other hand, the Claimant admitted that there was "slippage in planned progress of work" due to fault in assessment. The Respondent submits, and which is not disputed, that most of the drawings were provided to the Claimant along with the tender. And that further drawings were provided on 26.01.2007 and 10.04.2007 (Ex. R-2) (COLLY). 01.08.2007 and 28.09.2007 as per stage of construction achieved by the Claimant, which has not been denied by the Claimant. While admitting that the drawings regarding entrance porch, boundary wall and revised drawings of first floor plan of station

were provided in August/September 2007, the Ld. Counsel submits that these were minor modifications which did not affect the continuity of the work by the Claimant as there were various other fronts available for carrying activities. However, the work of entrance porch was later withdrawn. The Ld. Counsel also refers to clause 2 of tender terms, clauses 7.1 of tender document, clause 6.1 of sec, clauses 11.1 to 11.3 of SCC and Clause 10.13 of Special Conditions Related to Site Data and Specifications: These clauses read as under:

"Clause 2 tender form: Drawing for the work- The drawing for the work can be seen in the office of the and / or at any time during the office hours. The drawing are only for the guidance of tenderer (s). detailed working drawing, (if required) based generally on the drawing mentioned above, will be given by the Engineer or his representative from time to time."

"7.0 STUDY OF DRAWINGS AND LOCAL CONDITIONS

7.1 The drawings for the works can be seen in the office of the Dy. Chief Engineer/S&C-111, Northern Railway, Udhampur. It should be noted by tendererls that these drawings are meant for general guidance only as the Railway may suitably modify them during the execution of the work according to the circumstances without making the Railways liable for any claims on account of such changes."

"6.0 PLANS AND DRAWINGS FOR EXECUTION OF WORKS

6.1 The drawings for the works can be seen in the office of Dy. CE/S&C-111, Udhampur on any working day from

10.30 hrs to 15.00 hrs. these drawings are meant for general guidance only and as provided in special tender conditions and instructions to tender/s, Railway may suitably modify them, without making the railway liable for any claims on account of such changes or delay in the modification of the same.'

"11.0 DRAWINGS FOR WORKS

11.: The Railway administration reserve the right to modify the plans and drawings as referred to in the special data and specifications as also the estimate and specifications without assigning any reasons as and when considered necessary by the Railway. The percentage rates for the schedule item and items rates for the non-schedule items quoted by the contractor as may be accepted by the Railways will, however, hold good irrespective of any changes, modification, alterations, additions, omissions in the locations of structures and detailed drawings, specifications and/or the manner of executing the work.

11.2: It should be specifically noted that some of the detailed drawings may not have been finalized by the Railway and will, therefore, be supplied to the contractor as and when they are finalized on demand. No compensation whatsoever on this account shall be payable by the Railway administration.

11.3: No claim whatsoever will be entertained by the Railway on account of any delay or hold up of the works arising out of delay in approval of drawings, changes, modifications, alterations, additions, omission and the sight layout plans or detailed drawings and design and/or late supply of such material as are required to be

arranged by the Railway or due to any other factor on Railway accounts."

Clause 10.13: The design of foundations, depth of foundations below the ground level may be varied and will be decided by the Engineer during the progress of the work according to actual soil conditions at site of work. The drawings already prepared and which may be prepared hereafter are not to be taken as final nor are these binding on railway in any respect. The contractor shall have no claim on the railway if any change is made in the approved drawings. Also his inability to make timely arrangements for the necessary plant and machinery due to any such changes which the Engineer may make, will not be taken as an excuse for slow performance or non-performance of the work."

XXXXX

XXXXX

XXXXX

62. In any case, the fact that all the six extensions were granted at the instance of the Claimant, under clause 17B, without any objection and protest by the Claimant at relevant time or even thereafter, the pleas of delay in some drawings, or any other similar ground, are all afterthought or in any case deemed to be waived or not considered to be relevant and serious as regards the construction activity."

18. During the course of the submissions, the learned counsel for the petitioner has raised an issue of increase in the sales tax component from 4.2% to 8.4% and the claim made by the petitioner in that regard. I may state that the said claim was dealt with by the learned Arbitrator under Claim No.4, which I reproduce as under:-

*"77. **Regarding Claim No.4:** Initially this claim was for a sum of ₹11,55,390/- towards refund of sales tax and*

₹13,216/- towards refund of building cess. Thereafter, the Claimant reduced the total sum of both these claims of ₹11,68,606/- to ₹10,80,315/-. This claim is not admissible being the outcome of the claim of price variation and prolongation of contract. Besides it is also not admissible under clause 23 of sec, which stipulates the liability of the Claimant for payment of sales tax and the building cess at the prevailing rates, the same being included in the tender rate of the Claimant.”

19. From the above, it is clear that one of the reasoning given by the learned Arbitrator is that, in view of clause 23 of the SCC, liability of the petitioner for payment of the sales tax and the building cess at the prevailing rates, is not payable as the same being included in the tender rate of the petitioner. The aforesaid conclusion of the learned Arbitrator is, on an interpretation of Clause 23 of the SCC, which position has not been disputed by the learned counsel for the petitioner and the same being on an interpretation of Clause 23 by the learned Arbitrator surely, such an interpretation cannot be interfered with, more specifically by a Court exercising jurisdiction under Section 34 of the Act of 1996.

20. A reference was made to the judgment of the ***National Highways Authority of India v. Hindustan Construction Ltd. FAO(OS) 47/2012 decided on November 22, 2012.*** From the perusal of the judgment, it appears that the Arbitrator in the said case had allowed the claims of the respondent on account of increase in royalty, sales tax and in the forest transit fee stated to have been imposed by subsequent legislation. On a specific query to the learned counsel for the petitioner as to what was the stipulation in the contract between the

parties in the said case, she could not throw any light and as such, the plea in this regard of the learned counsel for the petitioner is rejected.

21. The position of law with regard to the scope of judicial review against the award passed by the learned Arbitrator being well settled in terms of the judgment of the Supreme Court in the case of *Associate Builders v. Delhi Development Authority (2015) 3 SCC 4*, this Court is of the view that the impugned award does not require any interference. The petition is dismissed.

22. There shall be no order as to costs.

V. KAMESWAR RAO, J

NOVEMBER 06, 2019/ak