

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 22.01.2019
Date of decision: 13.02.2019

+ O.M.P. (COMM) 140/2016
BGSCTPL - VIL CONSORTIUM Petitioner
Through: Mr.K.L. Varghese, Sr. Adv. with
Ms.Santha Varghese, Mr.Sanand
Ramakrishnan & Mr.Rajeev
Mishra, Advs.

versus

AIRPORTS AUTHORITY OF INDIA & ANR.

..... Respondents
Through: Mr.Sachin Datta, Sr. Adv. with
Mr.Sonal Kumar Singh, Ms.Prity
Sharma & Ms.Paromita Majumdar,
Advs.

+ O.M.P. (COMM) 149/2016 & IA No. 533/2016
AIRPORTS AUTHORITY OF INDIA

..... Petitioner
Through: Mr.Sachin Datta, Sr. Adv. with
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BGSCTPL-VIL CONSORTIUM Respondent
Through: Mr.K.L. Varghese, Sr. Adv. with
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CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') have been

filed by the parties to the arbitration proceedings challenging the Arbitral Award dated 11.12.2014 passed by the Sole Arbitrator (hereinafter referred to as the 'Impugned Award').

2. In this order, the Airports Authority of India shall be referred to as the petitioner, while the BGSCTPL - VIL Consortium shall be referred to as the respondent.

3. The disputes between the parties were in relation to the award of Work of construction of new integrated Terminal Building and all allied structures including augmentation of water supply, sewerage system, HVAC, BMS system, internal and external electrification and fire fighting etc. at Madurai Airport awarded by the petitioner in favour of the respondent under Agreement dated 20.12.2007

4. The petitioner has challenged the Award under Claim no. 1A raised by the respondent towards wrong rates applied for quantities exceeding deviation limit. The respondent had claimed an amount of Rs. 46,31,088/- in this claim, while the Arbitrator has awarded a sum of Rs. 4,40,600/- in favour of the respondent.

5. The learned senior counsel for the petitioner submits that the respondent vide its letter dated 22.04.2010 had agreed to the rates for such deviated items. Though the respondent sought to raise a plea that the said letter was addressed under duress, the Arbitrator has rejected the said submission. Having rejected the said submission, the Arbitrator could not have proceeded to re-determine the rates and ignore the ones that have already been approved by the respondent.

6. On the other hand, the learned senior counsel for the respondent submits that the Arbitrator has duly considered the letter dated

22.04.2010 addressed by the respondent to the petitioner. The Arbitrator has refused to rely upon the same as, in his opinion, the said letter was not preceded by a notice under Clause 11 of the Agreement between the parties. He further places reliance on Clause 57.2 of the Agreement and submits that the respondent was permitted to raise a dispute in respect of any claim within 90 days of receiving the information from the petitioner that the final bill is ready for payment. Therefore, merely because the respondent has accepted the said rate at one stage, would not debar the respondent from raising such claim.

7. The Arbitrator in the Impugned Award has held as under:-

“6.8. Where the rates were decreased from the BOQ rates, the Respondents did not provide any evidence to show that notices as required by clause 11.1 was issued at the appropriate time. It stands to common sense and fair play (and is indeed confirmed by clause 11.1) that a proper notice should have been given if the Respondents intended to reduce the rates. The Respondents failed to produce such notices.

6.9. Just as clause 11 puts the onus on the contractor to claim increased rates, Clause 11.1 puts the onus on the Respondents to give notices when the intention is to decrease the rates. Both the Claimant and the Respondent failed to fulfil this basic obligation imposed on them by the agreement. Therefore while the Claimant lost their right to claim extra rates for some items, the Respondents lost their right to reduce the rates for some other items. It is immaterial that the Claimant had in fact agreed in writing to receive payments at less-than-quoted rates for some items. In fact, without serving notices at the appropriate time, as mandated by clause 11.1, the Respondent had no authority to propose any rate less than the quoted rate in the first place; and if the Claimant unwittingly agreed to such reduced rate, it cannot be held against them.

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6.11. However for item 9.12, the Claimant had sent their A/R in letter dated 14.10.2009 (Exh.C-120) in which they worked out a rate of Rs.3900/- per Sq.M, but in the same letter agreed to execute the work at Rs.3360/- per Sq.M and further agreed to a rate of Rs.3320.90 per Sq.M in their letter dated 22.04.2010. As stated earlier, their acceptance dated 22.04.2010 need not be given any cognizance since this was not in response to proper notice by the Respondent. But the rate of Rs.3360/- per Sq.M (Exh.C-120) was offered voluntarily by the Claimant in response to letter dated 01.10.2009 (Exh.C-118) by the Respondent in which they simply asked the Claimant whether they were willing to execute the work at less than quoted rates. In other words, the Claimant voluntarily proposed a reduced rate of Rs.3360/- per Sq.M for item No.9.12 (unlike for other items where the Claimant agreed to certain reduced rates proposed by the Respondent without authority). It is also seen that this rate of Rs.3360/- per Sq.M tallies with the rates offered by M/s Polybond Organics Private Limited in their quotation for this item collected by the Respondent. In this case the Claimant was not obliged by contract to get this work done through M/s Polybond organics as an expert agency. Therefore it can be concluded that if M/s Polybond organics had quoted a rate of Rs.3360/- per Sq.M for the item 9.12 in the agreement, that was the reasonable market rate at which the Claimants also could have executed the work. Therefore I hold that the Claimants should honour their suo moto letter (Exh.C-120) dated 14.10.2009 offering a rate of Rs.3360/- per Sq.M for item 9.12; and that the Claimants are not bound by their letter dated 22.04.2010, in which they had agreed for certain rates proposed by the Respondent with our following the procedure prescribed in clause 11.1.”

8. A reading of the above would clearly show that it is not as if the Arbitrator has passed the Impugned Award remaining oblivious to the letter dated 22.04.2010 addressed by the respondent to the petitioner. The

Arbitrator was aware of the said letter and has considered its effect. The same would be a matter of appreciation of evidence and interpretation of the documents alongwith the Agreement between the parties and therefore, does not warrant any interference of this Court in exercise of its power under Section 34 of the Act.

9. The learned senior counsel for the petitioner has further challenged the Award of Claim no. 1B in favour of the respondent. Claim no. 1B was towards “wrong rates applied for non-scheduled extra item of curved glazing on Air Side Elevation”. The learned senior counsel for the petitioner submits that the Arbitrator, while accepting the price of such items approved by the petitioner, has added a margin of 10% towards contractors profit and overhead expenses for certain items and 20% for the others. He submits that the Arbitrator has not disclosed the reasons for adding the above margins.

10. I have considered the submissions made by the learned senior counsel for the petitioner, however, again find no merit in the same. The Arbitrator has gone through the evidence produced by the petitioner and found that the bulk of the various components of the rate analysis had been done based on quotations submitted by various manufacturers / suppliers to M/s Innovators Facade System, while certain other quotations were of M/s Innovators Facade System themselves addressed to the respondent. M/s Innovators Facade System was the expert agency that had to be employed by the respondent to carry out certain works in accordance with the terms of the Agreement. The Arbitrator, therefore, held that as far as the rates that were quoted by the manufacturer/dealer to M/s Innovators Facade System are concerned, a 20% addition on account

of contractors profit and overhead expenses amount has to be made, while for the rate quoted by the M/s Innovators Facade System directly, such addition has to be at the rate of 10%. The learned senior counsel for the respondent has relied upon Serial No. 14 in Schedule E “Reference to Conditions of Contract”, to submit that even the Contract provides for a 10% rate for the “market rate percentage addition to cover overheads and profits”. He therefore, rightly submits that there can be no fault found in the Impugned Award as the Arbitrator has taken this rate for awarding Claim no. 1B in favour of the respondent.

11. The learned senior counsel for the petitioner further challenges the Award of Claim no. 1C in favour of the respondent. Claim no. 1C of the respondent was for “arbitrary reduction in measurement of tension rod glazing”. The learned senior counsel for the petitioner submits that the measurement of the said work had been carried out jointly by the parties pursuant to the order passed by the Sole Arbitrator. There was no challenge raised to said measurement. Therefore, the claim stood satisfied. However, the Arbitrator has unilaterally thereafter proceeded to re-determine the amount for such work and awarded the said claim in favour of the respondent.

12. On the other hand, the learned senior counsel for the respondent submits that it was not denied by the petitioner that there was deviation in the work on this item and such deviation had remained unmeasured. The Arbitrator has got the said work measured by directing the parties to carry out joint measurement. There was no dispute to such measurement. The second step was to determine the rate of such deviated item of work. The Arbitrator considered the said dispute and found that the rate worked

out by the petitioner as well as by the respondent was incorrect. The Arbitrator thereafter proceeded to determine fair rate for such work by holding as under:-

“8.6. A more practical way of working out the rate payable is to estimate the cost of providing the rear leg of the frame work, below the RCC beam top level. This is the exact portion of the work which has remained unmeasured. (The glazing and both the legs of the frame above the RCC beam top level have been measured and paid). The Respondents in their E-mail dated 16.10.2014 (copy handed over during the hearing on 08.11.2014) have worked out the extra cost of rods below the RCC beam top level. Further on a query from the Arbitrator, the Respondents have confirmed that the cost worked out by them is only for the rear leg of the frame work below the RCC beam top level which remained unmeasured.

8.7. I believe that this is a more acceptable way of working out the amount payable because this way the Respondents would be paying only for the cost of work done in the rear leg (below the RCC beam top level) which has gone unmeasured. The rates adopted by the Respondents in their E-mail dated 16.10.2014 are taken from the price list furnished by M/s Innovators, the approved fabricators. However, the cost of fabricating and erecting have not been taken by the Respondents which shall have to be added. This has been assessed by me as Rs. 2,50,000/- and the extra amount payable shall be as below:

8.8. The extra amount payable shall therefore be-

<i>Extra cost of rods</i>	<i>...Rs.12,81,844</i>
<i>Add for VAT 12.5%</i>	<i>...Rs.1,60,231</i>
<i>Add for fabricating and fixing</i>	<i>...Rs.2,50,000</i>
<i>Total</i>	<i>...Rs.16,92,075</i>
<i>Add 1% water charges</i>	<i>...Rs.16,921</i>
<i>Total</i>	<i>...Rs.17,08,996</i>
<i>Add 10% C.P. and O.H</i>	<i>...Rs.1,70,900</i>
<i>Total</i>	<i>...Rs.18,79,896</i>
<i>Say:</i>	<i>...Rs.18,79,900/-</i>

13. The learned senior counsel for the respondent submits that the Arbitrator being an expert, it would not be open to this Court to re-appreciate the findings on the above claim.

14. I am in agreement with the submission made by the learned senior counsel for the respondent. The said claim has two components; first of measurement and the other of rate. The measurement was done jointly by the parties and the rate has been determined by the Arbitrator. No fault has been pointed out by the learned senior counsel for the petitioner to the determination of such rate. I therefore, find no merit in challenge to the award on Claim no. 1C.

15. The learned senior counsel for the petitioner has further challenged the award of Claim no. 1E in favour of the respondent. The said claim was for non-payment of 4% Work Contract Tax in respect of BOQ items beyond deviation limit and extra items. Relying upon Clause 29 of the Notice Inviting Tender, the learned senior counsel for the petitioner submits that the Contract clearly stipulated that the incidence of tax would be borne by the respondent. He submits that the Arbitrator has ignored the said Agreement between the parties by holding that such Clause would be against public policy. Relying upon the judgment of the Supreme Court in ***Rashtriya ISPAT Nigam Limited v. Dewan Chand Ram Saran***, (2012) 5 SCC 306, he submits that though the incidence of tax may be on one of the parties to the Contract, there is no embargo on the parties entering into an Agreement passing any such burden of tax to the other.

16. On the other hand, the learned senior counsel for the respondent submits that Clause 29 of the Agreement would be confined only to the items of work and BOQ rates that were provided in the Agreement itself. For the deviated and extra items Clause 29 would have no application.

17. Clause 29 of the Notice Inviting Tender / Agreement is quoted hereinbelow:-

“29. Sales Tax/purchase tax/VAT/turnover tax/service tax/octroi/royalty/cess/Service Tax/Excise or any other duty levied by Custom Authorities in respect of import or any materials or any other tax on material, labour, services or contract in respect of this work contract including payment to local/Govt./Statutory authorities shall be payable by the contractor and Airports Authority of India will not entertain any claim whatsoever in this respect.”

18. The above Clause can only be applied to the items of work and rates provided in the Agreement. For the deviated items and for extra items, Clause 11 of the Agreement provides for determination of the rate by the Engineer In-Charge. The Arbitrator, in the Impugned Award has, infact, rejected the claim of the respondent for such tax for the deviated quantities where the BOQ rates had been paid by the petitioner. The Arbitrator has allowed the said claim only for those items where the rates paid were different from the BOQ rates and for extra items which the respondent had been called upon to perform. The Arbitrator also found that the BOQ rates already included the 4% WC Tax.

19. In view of the above, the Award of Claim no. 1E in favour of the respondent cannot be faulted.

20. At the same time, the general observation of the Arbitrator that Clause 29 would be against the public policy of India, cannot be

sustained. As held in ***Rashtriya ISPAT Nigam Limited*** (supra) there is a difference between the taxing statute and liabilities created thereby and the contractual terms. Unless the taxing statute itself prohibits the transfer of the tax liability to the other contracting party, the rights between the parties have to be governed by their contract. There is nothing in law to prevent the contracting parties to stipulate that the burden of tax arising out of obligations of one party shall be borne by one of the contracting parties. However, merely because the Arbitrator has observed that Clause 29 of the Agreement would be contrary to public policy, the Award cannot be set aside on this ground alone.

21. The next challenge of the learned senior counsel for the petitioner is on the Award of Claim no. 2, which was the claim for damages due to breach of the Contract in form of prolongation of work for a period of seventeen months. The learned senior counsel for the petitioner submits that the Arbitrator has awarded the said claim without any proof of the same having been filed by the respondent. He submits that for grant of such claim, the respondent was obliged to place on record its accounts and show how the prolongation of the Contract has resulted in the claim of overhead expenses. He places reliance on the discussion on “delayed contracts in Hudson’s Building and Engineering Contracts (Eleventh Edition, Vol.1)” to submit that the learned author has criticized the grant of such claim on adoption of formula in absence of proof of actual damages by the contractor. He further places reliance on the judgment of this Court in ***BEHL Associates v. Union of India and Others***, 2016 SCC OnLine Del 98; ***M/s Kamal Construction Company v. Delhi Development Authority & Anr.***, 2009 SCC OnLine Del 4128 and of the

Bombay High Court in *Essar Procurement Services Ltd. v. Paramount Constructions*, 2016 SCC OnLine Bom 9697, to contend that the award of damages in favour of the Contractor without any proof of the same has been set aside by the Courts.

22. On the other hand, learned senior counsel for the respondent submits that the respondent has justified the claim of damages through the adoption of Hudson's Formula as well as by giving details of the actual expenditure incurred by the respondent due to such prolongation of the work. He submits that the Arbitrator, infact, has not even adopted the Hudson's Formula but has passed the Award by treating 3% of the contractual work performed after the scheduled date of completion as a reasonable amount that the respondent would have spent due to prolongation of the work. He submits that the Arbitrator having adopted a formula for award of the said claim, such Award cannot be faulted by this Court.

23. I have considered the submissions made by the learned senior counsels for the parties. While it is true that the Arbitrator cannot award a claim of damages in absence of any proof thereof being led by the claimant, however, at the same time, in the peculiar facts of the present case where the petitioner itself had agreed to the extension of time for 452 days without levy of compensation and the Arbitrator had also found that the work done upto the stipulated date of completion was only of Rs. 2060.64 lakhs, and thereafter work of a substantial value of Rs. 6182.58 lakhs had been done by the respondent, the eventual award of such damages cannot be faulted. The relevant findings of the Arbitrator are as under:-

“11.10. I find these arguments faulty on the following grounds:-

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(iii) the Respondents contention that there was no breach on their part is belied by the accepted-list of hindrances shown by the Respondents in EOT Part II. Out of 15 hindrances listed in page N/5 of the notings, only items 2, 4, 7 and 15 are not attributable to the Respondents. All the other hindrances relate to non- issue of drawings, technical decision, change in decision, non-finalisation of details, revision of drawings etc. which certainly constitute breach of the implied reciprocal promise by the Respondents for supplying decisions, drawings, designs etc. on time. The total period of delay due to such breach works out to 399 days or roughly 13 months.

11.11. Thus the objections raised by the Respondents are not supported by facts or by-law and I hold that the Claimants are entitled for compensation for the period of breach (13 months) and not for the full period of delay of 17 months.

11.12. As per information furnished by the Respondents in their E-Mail dated 20.11.2014 ---

The total value of work on completion ...Rs.7654.39 lakhs

Value of final escalation bill ...Rs.597.83 lakhs

Total final bill value ...Rs. 8243.22 lakhs

Value of work done upto stipulated date of completion ...Rs. 1852.00 lakhs

Escalation upto stipulated date of completion ...Rs. 208.64 lakhs

Total value upto stipulated date of completion ...Rs. 2060.64 lakhs

From this it appears that after the stipulated date of completion, the value of balance work remaining was Rs.6182.58 lakhs.

11.13. The Claimants in all their rate analysis for extra/deviated items etc. is claiming only 10% as CP and OH. Therefore it is unreasonable to claim 5% as OH component. As per the practice prevailing in the trade it is reasonable to assume that the OH component will only be about 3% out of the total of 10%. If the statement of expenditure on overheads as supplied by the Claimants shows more than 3% towards overhead expenses, I can only conclude that the Claimants have spent more on their overheads than what is prevailing in the trade. I therefore decide that the Claimants are entitled for reimbursement of overhead expenses of 3% on the balance value of work for a period of 13 months of breach of contract by the Respondents. Since the value of work to be done was Rs.6182.58 lakhs, which was actually completed in 17 months, the overhead expenses shall have to be calculated as follows:-

*Overhead expenses ... $6182.58 \times 0.03 \times 13117 =$
Rs.141.84 lakhs ”*

24. A reading of the above Award would also show that the Arbitrator has used his expertise to hold that 3% of the contractual value of remaining work would be a reasonable standard of overhead component as per the practice prevailing in the trade. The Arbitrator being an expert in the field, such assessment cannot be challenged by this Court. The Arbitrator has infact, also taken note of the fact that the statement of expenditure produced by the respondent shows an amount more than 3% claimed towards overhead expenses. The Arbitrator, however, restricted the amount awarded only to 3% of the balance value of the work. The

Arbitrator having taken a reasonable view, the Award cannot be challenged on this ground.

25. In **BEHL Associates** (Supra), the Court found that the Arbitrator had merely relied upon the typed claim statement filed by the Contractor. In the present case, the Arbitrator has infact, refused to rely upon the same and has found another reasonable basis for awarding such damages in favour of the respondent. Therefore, the said judgment would have no application to the facts of the present case.

26. In **M/s Kamal Construction Company** (Supra), the claim of the Contractor was regarding infructuous expenditure and the Court noted that in case of claim for idle labour, idle machinery, deployment of engineers/supervisors during idle period etc., the Contractor must prove the same. The Court found that in absence of compliance of the terms of the Agreement regarding maintenance of labour attendance and forwarding the same to the DDA, the employer therein, and in absence of evidence regarding any loss suffered, the Arbitrator could not have granted such claim. It was further found that there was no formula provided in the Agreement for calculation of damages. Apart from the fact that the claim in the present case is different from the one in **M/s Kamal Construction Company**, the Agreement, as noted above, mentions 10% of the Contract value as the market rate percentage for contractors profit and overhead expenses. The Arbitrator had bifurcated this 10% and held that 3% thereof is towards overhead expenses. For this he has used the general prevailing practice in the trade. As held above, such assessment of the Arbitrator cannot be interfered by this Court.

27. In *Essar Procurement Services Ltd.* (Supra), the Contractor made a claim on the premise that the Contractor had considered 10% towards overhead for work while finalizing the bid and had incurred the overhead expenses at that rate. The Court found that it was for the Contractor to prove such a claim by leading evidence and the Arbitrator could not rely simply on the Hudson's formula. In the present case, as noted above, the Contract itself provides for 10% of the Contract value to be the contractors profit and overhead expenses.

28. While dealing with Claim no. 2, I must also note the submission of the learned senior counsel for the respondent challenging the restriction of the period of delay by the Arbitrator to only 399 days or roughly 13 months. The learned senior counsel for the respondent submits that the Arbitrator had proceeded on the basis that the assessment of delay by the competent authority under the Contract is final and cannot be challenged. He submits that there is no Clause in the Arbitration Agreement which makes such assessment as "final" or provides the same to be an "excepted matter". Relying upon the judgment of the Supreme Court in *Durga Charan Rautray v. State of Orissa and Another*, (2012) 12 SCC 513, he submits that the Arbitration Agreement between the parties is wide enough for the respondent to challenge the assessment of the competent authority on the period of delay. The Arbitrator having treated the same as final, the Award restricting the claim of the respondent is liable to be set aside. He further places reliance on the judgment of this Court in *National Highways Authority of India v. Afcons-Apil Joint Venture*, 2018 SCC OnLine Del 7194 in this regard.

29. I have considered the submission made by the learned senior counsel for the respondent. While on the principle of law, the argument of the learned senior counsel for the respondent is correct, in the facts of the present case, the same cannot come to aid of the respondent. In the Impugned Award, the Arbitrator has not simply relied upon the assessment of the period of delay by the competent authority, but has independently considered the same as is evident from the following quotation from the Award:

“11.4. During oral hearings, the Claimants indicated that the major delay occurred in items 1-3, 5-7, 11-15, 26-27, 30-31 and 78 of the EOT Part I (Exh.C-148). I find that all these delays have been accounted for in the Respondents EOT Part II. The main difference between the two approaches (of the Claimants and the Respondents) is that the Respondents have worked out the “justified hindrance” as a percentage of “net hindrance” for each case. I am convinced that this approach is correct, as it would account for the fact that work in other part of the building (not affected by the delay) was going on. I am aware that in such cases only an approximation can be made to estimate what percentage of the “net delay” could be allowed as “justified delay”. Only the Engineers at site can make an assessment of the same. The Claimants took this percentage as 100% in every case which is improbable. The Respondents on the other hand, have made an estimation of the “justified hindrance” in each case. The Claimants did not ever point out in their pleadings that the assessment in this respect made by the Respondents was wrong. I am therefore inclined to rely on the Respondents EOT Part II.

11.5. As per the terms of the agreement, the Competent Authority in this case was the Member(P), AAI, who ultimately granted EOT without compensation for 452 days and with compensation for 65 days. Clause 13.2 of the agreement gives “absolute discretion” to this authority to determine whether

“any other cause” for delay falls “beyond the contractor’s control”.

11.6. On a perusal of the EOT Part II, [page N/5 of the notings of the Senior Manager(Engg)(C) which was the basis on which the Competent Authority arrived at the final EOT decision], it appears to me that there are two items viz. item 4 (delay due to encountering rock) and item 15 (delay due to rain) - which could have made the Competent Authority consider whether they were indeed "beyond the control of the contractor". One may argue that the contractor should have been able to immediately procure/hire the required machinery to excavate rock and temporarily enhance their resources so that the delay on this account is kept to a bare minimum. Similarly even though rain is a natural occurrence and apparently beyond the control of the contractor, the contractor knew what were the rainy months in Madurai and should have accounted in his programme schedule for breaks during the rainy season. Even if one cannot predict the exact dates of occurrence of rains, one can at least provide for reduced number of working days during the rainy months. This method of scheduling will ensure that the resources are so disturbed that the occurrence of rain does not impact the schedule. One could argue therefore, that the occurrence of rains should not be considered as a justified cause for delay.

11.7. These are only two examples. The Competent Authority, in the event, used his "absolute discretion" and decided that only 452 days (out of 550 days) could be granted without levy of compensation. There is no evidence that he acted whimsically without considering the facts before him. As I said earlier, there are at least two items of delay (or probably more in the Competent Authority's discretion) which are open to a contra interpretation.

11.8. In view of the above, I do not find anything amiss in the decision of the Competent Authority to grant EOT for 452 days

without levy of compensation and the balance 65 days with levy of compensation.”

30. Reliance can also be placed on paragraph 11.10(iii) of the Award, which has already been quoted hereinabove.

31. The Arbitrator having made an assessment of the period of delay attributable to the petitioner, this Court cannot consider any plea against the same and reappreciate the same as an Appellate Court to arrive at another calculation, if at all.

32. The learned senior counsel for the respondent has further challenged the rejection of Claim no. 3 of the respondent, which was for loss of profit due to prolongation of Contract. He submits that the Arbitrator having found that the delay had been caused by the petitioner, ought to have awarded such claim, especially when the Arbitrator had reduced the Claim no. 2 by taking overhead component to be only 3% of the contractual value.

33. I have considered the submission made by the learned senior counsel for the respondent, however, find no merit in the same. The Arbitrator has rejected the said claim by holding as under:-

“12.1. The Claimants have failed to show what were the other projects which they were unable to bid for because of the prolongation of the current project. The current project did not involve any heavy machinery and equipment. Only some manpower was locked up in this prolonged period. I fail to appreciate that a contractor of this repute was unable to mobilise manpower required for procuring and handling other projects and therefore they let such other projects pass by.

12.2. The claim is wholly hypothetical and has not been substantiated.”

34. The respondent had already been held entitled to the claim of overhead expenses for the prolongation period. It was for the respondent to thereafter prove that it could not participate in and procure other projects due to its retention in the work in question for the prolonged period. In absence of such proof, the Arbitrator was justified in rejecting the claim of the respondent especially where, as noted above, amount for overhead expenses had already been granted in favour of the respondent by the Arbitrator. I may usefully rely on the judgment of the Supreme Court in ***Bharat Coking Coal Ltd. v. L.K. Ahuja***, (2004) 5 SCC 109.

35. The learned senior counsel for the respondent further challenges rejection of Claim no. 4, which was a claim for escalation for the period of 23.05.2010 to 27.07.2010, that is, the period for which the petitioner had levied liquidated damages.

36. The Arbitrator has rejected the said claim on the ground that the respondent was not entitled to the grant of extension of time without compensation during this period and taking note of contractual provisions for escalation.

37. As noted above, this being a matter of reassessment of findings given by the Arbitrator and for which the Arbitrator has give a cogent reason, this Court in exercise of its power under Section 34 of the Act cannot interfere with the same.

38. Similar is the fate to the rejection of the Claim no. 5, which was for refund of liquidated damages levied by the petitioner on the respondent. The Arbitrator has rejected the said claim by holding as under:-

“14.1. While discussing the Claim No.2, I had shown that the Competent Authority was within his rights and used his full discretion to treat the period 23.05.2010 to 27.07.2010 as unjustified delay.

14.2. The Claimants quoted from G.T. Gajaria Book "Law relating to Building and Engineering Contract" pages 262 and 702 to show that if the employer fails in his obligation they cannot expect performance on time from the contractor and cannot therefore levy LD. But this cannot be taken to mean that if the Respondents had breached certain promises they altogether lose their right to levy LD, even for those periods where the contractor fails to perform (23.05.2010 to 27.07.2010) and during which period there is no breach by the Respondents.

14.3. The Respondents being a commercial organisation, there is no doubt that they will suffer financially, if there is a delay in commissioning the facility. More over this is a liquidated damage covered under Section 74 of the Contract Act which does not require the Respondents to produce any proof of loss or damage. However as indicated earlier it is certain that some loss would have occurred to this commercial entity because of unjustified delay.

14.4. In view of the above, I hold that the Respondents were within their rights to levy LD and the claim of the Claimants is rejected.”

39. I find no reason to interfere with the findings of the Arbitrator.

40. Both the parties have also challenged the award of interest at the rate of 10% per annum in the Impugned Award. While the petitioner claims that it should not have been more than 9% per annum, the respondent claims that it should be 18% per annum.

41. In my view, the rate of interest being a matter of discretion of the Arbitrator, and the interest rate not being completely unreasonable, cannot be interfered with by this Court. I therefore reject the objections of both the parties on this claim.

42. In view of the above, I find no merit in the above petitions. They are dismissed, with no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 13, 2019/rv

