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

+ O.M.P. (COMM) 467/2018 & IAs 15773, 15775, 15776/2018

Date of Decision : 10th January, 2019

UNION OF INDIA Petitioner

Through: Mr.Jaswinder Singh, Mr.Ruchir
Mishra, Advs.

versus

MAGO CONSTRUCTION PVT. LTD. Respondent

Through: Mr.Rakesh Saini, Adv. along with
Mr.Ravi Tej Singh Maggo, Authorized
signatory of respondent company.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

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 12.05.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Contract Agreement No.CEDZ/40 OF 2009-10: Construction of Building for PLI (OPS) at Delhi Cantt.

2. The Arbitrator has carved out the basic facts in relation to the Contract in paragraph 15 of the Award, which is reproduced hereunder:

“15. BRIEF PARTICULARS OF THE CASE.

- a. CA No and Name of Work : CEDZ/40 of 2009-10
CONSTRUCTION OF
BUILDING FOR PLI (OPS)
AT DELHI CANTT. DELHI.
- b. Date of tender Receipt : 20th Nov 2009
- c. Date of Acceptance : 16th Dec 2009
- d. Amount of Contract: : 5,88,99,749.95
- e. Date of Commencement : 01st Jan 2010
- f. Date of Stipulated Completion: 31st March 2011
- g. First Extension of time : 30th Dec 2011,
Granted on : 30th Apr 2011
- h. Second Extension of time : 30th June 2012 (Provisional)
Granted on: 19th Mar 2012
- i. Third Extension of time : 31st Oct 2012 (Provisional)
Granted on: 03rd Aug 2012
- j. Fourth Extension of time : 28th Feb 2013
Granted on: 10th Dec 2012
- k. Fifth Extension of time : 30th May 2013
Granted on: 21st May 2013
- l. Sixth Extension of time : 30th Sept 2013
Granted on: 31st Oct 2013
- m. Actual date of completion : 30th Sept 2013.”

3. The Arbitrator, by the Impugned Award has awarded the claims of the respondent *inter alia* on account of the delay in completion of the work attributable to the petitioner.

4. Counsel for the petitioner, relying upon Condition 11 of the General Conditions of Contract (GCC), submits that in terms of Condition 11(D) of the GCC, no claim in respect of compensation or otherwise for idle labour and/or idle machinery, etc. and/or business loss or any other loss arising

out of extensions of time granted under Condition 11 (A) and/or (B) of the GCC were maintainable. He submits that the extensions of time granted by the petitioner were under Condition 11 (A)(vii) of the GCC and clearly recorded that no claim in respect of compensation or otherwise as a result of this extension shall be admitted. He submits that the respondent never protested against such extensions and therefore, was not entitled to maintain the claim. He submits that the Arbitrator, therefore, could not have granted a claim which is otherwise prohibited under Condition 11(D) of the GCC. For this, he places reliance on the judgments of the Supreme Court in *Ramnath International Construction (P) Ltd. vs. Union of India* (2007) 2 SCC 453; and *Union of India vs. M/s Varindera Constructions Ltd.* 2018 (6) SCALE 359.

5. On the other hand, counsel for the respondent submits that the Arbitrator, after appreciating the reasons for the grant of such extension of time, has held such extension of time to be relatable to Conditions 7 and 9 of the GCC and not to Condition 11 (A) or (B) and, therefore, the bar contained in Condition 11 (D) of the GCC would not operate in the facts of the present case. He submits that the Arbitrator having appreciated the facts and interpreted the Agreement, it is not open for this Court to interfere with such findings in exercise of its powers under Section 34 of the Act. He places reliance on the judgment of the Supreme Court in *Asian Techs Ltd. vs. Union of India &*

Ors. 2009 (4) Arb. LR 89 (SC); judgment dated 11.05.2015 passed by this Court in *Union of India vs. Ktech Engineers Builders Pvt. Ltd. & Anr.* in OMP No.331/2014; *Union of India vs. Moti Enterprises & Anr.* 2003 (2) Arb. LR 229 (Bombay); and *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49.

6. Counsel for the respondent further submits that the respondent had duly protested against the first grant of extension of time by the letter dated 23.08.2011 contending therein that the extension of time should be under Conditions 7 and 9 of the GCC and not Condition 11(A) (vii) of the same. He submits that though no formal letter of protest was given thereafter, however, this was the dispute raised before the Arbitrator and the Arbitrator was within his jurisdiction to interpret the Agreement and on appreciation of evidence conclude whether the extension of time was relatable to Condition 11 or Conditions 7 and 9 of the GCC. He further submits that the reasons for grant of extension of time clearly indicate that the extension of time could only have been justified under Conditions 7 and 9 of the GCC and not under Condition 11.

7. I have considered the submissions made by the counsels for the parties. Before dealing with the same, I would first reproduce the relevant findings of the Arbitrator in this regard:

“18.7.29 My opinion on applicability of condition 11 for grant of extensions for all the reasons attributing to delays and subsequent bar, as contended by the respondents, on claiming damages by the claimant on account of condition 11 (C) is as under:

(i) The entire work was to be completed in 15 months but the respondents failed to provide hindrance free site for most of the work for initial 9 months, thereafter foundation design was changed and another 05 months were lost in finalisation of revised foundation by the respondents. Also substantial changes under condition 7 were ordered belatedly and finally about 8 months were lost due to delayed supply of lift by the lift agency and 4 months were lost in providing electrical connection by the respondents. I am in agreement with the contention of the claimant that except for 8 months delay on part of lift agency in supplying the lift, rest of the delay are attributable to the action / inaction of the respondents. Except the delay of 8 months on part of lift agency other delays do not qualify for extension under condition 11(A) or (B). 18 months period during which no work was possible due to non clearance of trees, foundation changes and non availability of electrical connection, the work should have been suspended under condition 9 and extra time and compensation given to the claimant as per provisions contained in this clause. Similarly, extra time needed for execution of changes ordered under condition 7 should have been granted under the provisions of condition 7.

(ii) Granting of extensions under condition 11, irrespective of reason, does not automatically debar claimant from claiming the damages under condition 11 (c), the reasons for delay must qualify for extension under condition 11 for the bar to become operational. Plain analysis of grounds

(GH-1) for 914 days of extension granted by the Accepting Officer under condition 11 reveal that only 169 days of delay on account of delayed supply of lift and its erection was beyond control of both the parties and qualified for extension under condition 11. Extensions of 549 days due to tree hindrances and foundation changes and 123 days due to not availability of electricity qualify under condition 9 as no work was possible during this period. Similarly, extension of 73 days for carrying out work under deviations qualifies under condition 7, under which the changes were ordered. Thus the work prolonged for about 24.8 months due to reasons covered under condition 9 and 7 of IAFW 2249 and the claimant is entitled for suitable compensation as bar of no damages under condition 11 (C) does not apply in this period.”

8. A reading of the above finding would show that the Arbitrator has held that except for delay of eight months on behalf of lift agency in supplying the lift, rest of the delay was attributable to the action/inaction of the petitioner and did not qualify as a ground for extension under Condition 11(A) or (B). The Arbitrator further held that granting of extensions under Condition 11, irrespective of reasons, did not automatically debar the respondent from claiming damages under Condition 11(C) (*sic* D). The Arbitrator further holds that extension of 549 days due to tree hindrance and foundation changes and 123 days due to non-availability of electricity qualify under Condition 9 as no work was possible during this period. Similarly, extension of 73 days for carrying out work under

deviations qualifies under Condition 7 under which the changes were ordered. Therefore, the Arbitrator has considered various reasons for delay and held that the same fall under Conditions 7 and 9 and not under Condition 11 of the GCC.

9. Condition 11 (A) to (D) of the GCC is reproduced hereinunder:

“11. Time, Delay and Extension-

(A) Time is of the essence of the Contract and is specified in the contract documents or in each individual Works Order.

As soon as possible after Contract is let or any substantial Works Order is placed and before Work under it is begun, the G.E. and the Contractor shall agree upon a Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof and/or the Contract or Works Order as a whole. It shall indicate the forecast of the dates for commencement and completion of the various trade processes or sections of the work, and shall be amended as may be required by agreement between the G.E. and the Contractor within the limitation of time imposed in the contract documents or Works Order. If the Works be delayed:-

- [(i) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or*
- (ii) by reason of delay on part of nominated sub-contractors, or nominated supplies which the Contractor has, in the opinion of G.E., taken all practicable steps to avoid, or reduce, or*
- (iii) by reason of delay on the part of Contractors of tradesmen engaged by Government in executing works not forming part of the contract, or*

- (iv) *by reason of any other cause (except force majeure which in the absolute discretion of the Accepting Office is beyond the Contractor's control;]*

then, in any such case the Office hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of Works for which separate periods of completion are mentioned in the contract documents or Works Order, as applicable.

Upon the happening of any such event causing delay, the Contractor shall immediately, but not later than 30 days of the happening of the event, give notice thereof in writing to the G.E. but shall nevertheless use constantly his best endeavour to prevent or make good the delay and shall do all that may reasonably be required to the satisfaction of G.E. to proceed with the works. Extension of time shall be granted as under:-

- (a) by G.E. for all Term Contracts;*
- (b) by Accepting Officer of the contract for all other Contracts.*

In case the Contractor fails to notify the G.E. of happening of an event(s) causing delay within the period of 30 days stipulated in sub-para 3 above, he shall forfeit his right to claim extension of time for the delay caused due to such event(s).

Extension of time, as granted above, shall be communicated to the Contractor by Accepting Officer in writing and shall be final and binding. PROVIDED THAT in the case of contracts (other than Term Contracts) accepted by the G.E., in the event of the Contractor not agreeing to the extension granted by the G.E., the matter shall be referred to the C.W.E. whose decision shall be final and binding.

- (B) If the Works be delayed:*

- (a) *by reason of non-availability of Government stores shown in Schedule 'B'; or*
- (b) *by reason of non-availability or breakdown of Govt. Tools and plant listed in Schedule 'C'.*

then, in any such event, notwithstanding the provisions hereinbefore contained, the Accepting Officer may in his discretion grant such extension of time as may appear reasonable to him and the same shall be communicated to the Contractor shall be bound to complete the works within such extended time.

[(c) Extension of time if due shall be granted within 45 days of receipt of request from the contractor along with supporting documents, but before expiry of original/extended period of completion.

- (D) *No claim in respect of compensation or otherwise, for idle labour and/or idle machinery etc. and/or business loss or any such loss, howsoever arising, as a result of extension granted under Conditions (A) and (B) above shall be admissible. The decision on reason and quantum of extension shall be final and binding. ”*

10. There is some controversy between the parties whether GCC amended till 16th amendment is applicable to the Contract or even the subsequent amendments are applicable. However, for the present petition the counsels admit that this would have no bearing as Conditions 11(A) and (B) have remained similar and Condition 11(C) in GCC upto 16th amendment, which has also remained similar, was thereafter numbered as 11(D), with insertion of a new Clause in Condition 11(C), which otherwise has no relevance to the facts of the present case.

11. A reading of Condition 11(D) would show that where the extension of time is granted under Conditions (A) and (B), no claim in respect of compensation or otherwise for idle labour, idle machinery, business loss or any other loss shall be admissible. Therefore, the pre-requisite for application of Condition 11(D) was the grant of extension of time under Condition (A) and/or (B).

12. Counsel for the petitioner has submitted that under Condition 11(A) (iv) 'any other reason' is also included, therefore, even reasons which are attributable to the petitioner would be covered under Condition 11(A) of the GCC.

13. Condition 7 of the GCC is reproduced hereunder:

“7. *Deviations (Applicable specifically to Measurement and Lump Sum Contracts and generally to Term Contracts – The Contractor shall not make any alteration in, addition to or omission from the Works as described in the tender documents except in pursuance of the written instructions of the G.E.*

No work that radically changes the original nature and scope of the Contract shall be ordered as a Deviation and in the event of disagreement between the Contractor and the Accepting Officer, the decision, of the next higher authority (or of the Chief Engineer in case of contracts accepted by him) shall be final and binding on the Contractor.

The Accepting Officer or person specially authorised by him on his behalf, may vary either by way of addition to and/or deduction from the Works so described provided that the Contract Sum be not thereby varied on the whole by more than the percentage set out

in the tender documents (referred to hereinbelow as the 'Deviation Limit'), subject to the following restrictions :

- (a) The Deviation Limit referred to above is the net effect (algebraical sum) of all additions and deductions ordered.*
- (b) In no case shall the Additions/Deductions (arithmetical sum) exceed twice the Deviation Limit.*
- (c) The Deviation ordered on items of any individual trade included in the Contract shall not exceed plus/minus 25% of the value of that trade in the Contract as a whole or half the Deviation Limit, whichever is less except in the case of Prime Cost and Provisional Items where the parties to the contract may agree to at different percentage for any particular trade item.*
- (d) The value of additions of items of any individual trade not already included in the Contract shall not exceed 10% of the Deviation Limit.*

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All additions and deductions will be priced as per Condition 62 hereof and added to or deducted from the Contract Sum. Whenever the Accepting Officer intends to exercise such right his intention shall be communicated to the Contractor by the G.E. whose order in writing shall specify the deviations which are to be made, the lump sum assessment or the proposed basis of payment, the change if any, in the date or completion of the relevant phase and/or the entire Contract. Any objection by the Contractor to any matter concerning the Deviation Order, shall be notified by him in writing to the G.E. within fifteen days from the date of receipt of such order, but under no circumstances shall the progress of the Works be stopped (unless so ordered by the G.E.) owing the differences or controversy that may arise from such objection. In default of such notification the Contractor will be deemed to have accepted the order and the conditions stated therein without in any way affecting the

right of the parties to rectify any mistake on the basis of payment only to the extent it differs from Condition 62. In the event of the Contractor failing to agree with the G.E. regarding the proposed alteration of time, the objection shall be referred to the Accepting Officer or, in the case of Contracts (other than Term Contracts) accepted by the G.E. to the C.W.E., whose decision shall be final and binding.”

14. A reading of the above would show that a specific provision is being made in the Contract for dealing with a situation where deviations are ordered and the said provision also provides for change in the date of completion of the relevant phase and/or the entire Contract. As a matter of fact, the Arbitrator has found that the delay of 73 days would fall under Condition 7 of the GCC.

15. Condition 9 of the GCC is reproduced hereunder:

“9. Suspension of Works-

- (a) *The Contractor shall, on receipt of the order in writing of the Garrison Engineer, suspend the progress of the Works or any part thereof for such time and in such manner as the Garrison Engineer may consider necessary for any of the following reasons :*
- (i) *on account of any default on the part of the Contractor; or*
 - (ii) *for proper execution of the Works or part thereof for reasons other than the default of the Contractor; or*
 - (iii) *for safety of the Works or part thereof.*

The Contractor shall, during such suspension, properly protect and secure the Works

to the extent necessary and carry out the instructions given in that behalf by the Garrison Engineer.

(b) If the suspension is ordered for reasons (ii) and (iii) in Sub-para (a) above :

(i) the Contractor shall be entitled to an extension of time equal to the period of every such suspension plus 25% for completion of the item or group of items of work for which a separate period of completion is specified in the Contract and of which the suspended work forms a part, and

(ii) if the total period of all suspensions in respect of an item or group of items of work for which a separate period of completion is specified in the Contract exceeds 60 days the Contractor shall in addition, be entitled to the compensation, as the Garrison Engineer may on the basis of facts consider reasonable, in respect of salaries and/or wages paid by the Contractor to his employees and labour at Site actually remaining idle during the period of suspension.

(c) If the Works or part thereof is suspended on the orders of the Garrison Engineer for more than four months at a time, except when suspension is ordered for reason (i) in Sub-para (a) above, the Contractor may after 60 days from receipt of such order serve a written notice on the Garrison Engineer requiring permission within fifteen days from receipt by the Garrison Engineer of the said notice, to proceed with the Works or part thereof in regard to which progress has been suspended and if such permission is not granted within that time, the Contractor if he intends to treat the suspension, where it affects only a part of the Works as an omission where of

such part by Government under Condition 7 or where it affects the whole of the Works, as an abandonment of the Works by Government, shall within ten days of expiry of such period of 15 days give notice in writing of his intention to the Garrison Engineer. In the event of the Contractor treating the suspension as an abandonment of the Contract by Government. He shall have no claim to payment of any compensation on account of any profit or advantage which he may have derived from the execution of the work in full but which he could not derive in consequence of the abandonment. He shall, however, be entitled to compensation, as the Garrison Engineer may on the basis of facts consider reasonable, in respect of salaries and/or wages paid by him to his employees and labour and tools and plants at Site actually remaining idle in consequence and also for loss on materials collected which could not be utilized on these or other Works including 5% as overheads on materials, salaries and wages.

The contractor shall give the details of idle labour, workmen, employees, tools and plants and such other details as asked by the GE, within 7 days of issue of order of suspension and the GE, shall verify the necessity and correctness thereof. Proper record of these details shall be maintained duly signed by the GE and the contractor.”

16. A reading of the above would show where the work is to be suspended for proper execution of the works or for the safety of the works, again the contractor shall be entitled to an extension of time. Therefore, these two provisions are separately provided, for grant of extension of time for reasons contained therein. The Arbitrator having considered the terms of the Agreement, which in no manner can be said to be perverse or unreasonable, the Award does not require any

interference from this Court in exercise of its powers under Section 34 of the Act.

17. In *Associate Builders* (supra) it has been held as under:

“42.3. (c) Equally, the third subhead 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.

(1)-(2)

(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.

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the

arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593:2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award.”

44. In MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011)10 SCC 573: 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence

extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram, AIR 1954 SC 689, Thawardas Pherumal v. Union of India, AIR 1955 SC 468, Union of India v. Kishorilal Gupta & Bros., AIR 1959 SC 1362, Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 SC 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 SC 214 and Renusagar Power Co. Ltd. v. General Electric Co. (1984) 4 SCC 679: AIR 1985 SC 1156)”

45. *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)*

“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 summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] 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: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , 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 *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] 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.”

18. In ***Ramnath International Construction (P) Ltd.*** (supra), there was no dispute that the extension had been granted under Condition 11 of the Agreement. The Court was not confronted with the situation where a dispute had arisen between the parties as to whether the extension of time would fall under Condition 11 or any other condition of the Contract.

19. In ***Varindera Constructions Ltd.***(supra), the Supreme Court has held as under:

“12. It is a settled law that the process of interpretation is based on the objective view of a reasonable person,

given the context in which the contracting parties made their agreement. On a perusal of the said two paragraphs of the impugned judgment, we fail to understand that on what parameters the High Court has interpreted Clause 19 in light of Clause 25 of the Contract. Both the clauses stand on different footing. Clause 19 deals, inter alia, with the matter of wages whereas Clause 25 deals with the matter of Octroi Sales Tax and other Duties. Such interpretation adopted by the High Court is against the cardinal principle of law which says that the terms of the contract shall be construed by the courts after having regard to the intention of the parties. Courts ought not to take any hypothetical view as it may cause prejudice to either of the parties.

13. It is pertinent to note here that Clause 19 does not start with any word "Subject to". Moreover, there is no other provision in the contract which specially allow the reimbursement of wages in case of escalation. In the absence of these things, we are of the considered view that it is not permissible in law that Clause 19 ought to be interpreted in light of Clause 25. Also in the impugned judgment, the High Court without having regard to the title and first part of Clause 25, interpreted Clause 19, along with the second part of Clause 25, which is against the canons of law."

20. A reading of the above would clearly show that the Supreme Court has infact held that clauses of an Agreement are to be interpreted based on the objective view of a reasonable person given the context in which the contracting parties made their Agreement. On the facts of the case, the Court found that the scope of Clause 19 of the Agreement could not be curtailed by Clause 25 in question therein. The said judgment would have no application to the facts of the present case inasmuch as

three clauses in question that is, Conditions 7, 9 and 11 operate in different fields and the Arbitrator has not restricted the scope of either of these clauses by relying on the other. The Arbitrator only holds that the facts of the present case would fall under Conditions 7 and 9 rather than Condition 11 of the Agreement.

21. In *Asian Techs Ltd.* (supra), the Supreme Court, considering the effect of Condition 11, which was in similar terms as in the present case, observed that such a clause only prohibits the department from entertaining the claim but it did not prohibit the Arbitrator from entertaining it.

22. In *Ktech Engineers Builders Pvt. Ltd. & Anr* (supra), the Court considered the judgment of the Supreme Court in *Ramnath* (supra) as also *Asian Techs* (supra). It also considered the judgment of the Bombay High Court in *Union of India vs. Moti Enterprises*, 2005 (2) MhLJ 791 and held that decision on whether Condition 11(C) or Conditions 7 and 9 apply would be a decision on interpretation of clauses of Contract and where the Arbitrator finds that Conditions 7 and 9 are attracted, such Award cannot be interfered with.

23. In view of the above, I find no merit in the objection raised by the counsel for the petitioner.

24. Counsel for the petitioner has further contended that the Arbitrator having granted an amount of Rs.6,53,383/- in favour

of the respondent under Claim no.1, which was for incorrect pricing for DO No.12(P) for change in foundation, could not have further granted Claim no.7 for damages on account of alleged breaches of the petitioner. He submits that two claims were overlapping in nature.

25. I am unable to agree with the said submission of the counsel for the petitioner. Claim no.1 was for the actual work done by the respondent at the site while Claim no.7 was for the damages due to delays that occurred in carrying out of the work for the reasons attributable to the petitioner. The two cannot be said to be overlapping in any manner.

26. It is further contended by the counsel for the petitioner that Condition 63 of the GCC prohibits grant of escalation in favour of the respondent. In spite of the said clause, the Arbitrator has awarded a sum of Rs.60,78,599/- in favour of the respondent. In this regard, he places reliance on the judgment of the Supreme Court in ***New India Civil Erectors (P) Ltd. vs. Oil and Natural Gas Corporation*** AIR 1997 SC 980.

27. I am unable to agree with the said submission of the counsel for the petitioner. The Arbitrator while granting the said claim, has held as under:

“d. Increase in the rates of material and wages of labour-

It is a fact that due to initial delay in clearing hindrances and revising foundation design the claimant could start

the work towards end of the original completion period only. Most of the work was done after the original completion period, when the prices had increased. Thus the contractor incurred extra cost on account of increased cost of material, fuel and labour without any compensation for the same as the contract did not include provision for escalation except for partial compensation for labour rate increase under condition 63. Provisions of condition 63 are applicable for normal conditions within the originally contracted period and it does not cater for all the elements of escalations which affected actual cost during the actual execution. I am of considered opinion that the claimant deserves to be compensated for increased cost of the work done during the extended period. There is an escalation formula in use by the department for long duration works, if we calculate the escalation by using this formula, the total escalation excluding lift works out to Rs.68,27,907/-. This includes escalation amount of Rs.8,24032/- for the work done during the originally contracted period. Additionally escalation on lift work is Rs.74,724/- by using formula for lift escalation in use by the respondents. There is agreement on these figures by both the parties (GH-11 submitted by the respondents and calculations agreed by the claimant during the hearing). I am of the opinion that the contract insulates the respondents from risk of escalation during the originally contracted period except as payable under condition 63. Since the claimant did not claim any escalation under condition 63 he is not entitled for any escalation on the work done during the originally contracted period. Accordingly damages on account of escalation payable to the claimant works out to Rs.60,78,599/- (Rs. 68,27,907 - Rs.8,24032 + Rs.74,724) and the claimant is entitled to get the same.”

28. I do not find the approach of the Arbitrator to be in any manner perverse or unreasonable. Unlike in the case of *New*

India Civil Erectors (P) Ltd. (supra), there is no clause which bars grant of relief of escalation in favour of the respondent. Condition 63, on the other hand, infact, allowed such a claim in favour of the respondent and is reproduced hereunder:

“63. Reimbursement/refund on variation in price.—*If during the progress of the Works the price of any materials required to be incorporated in the Works (not being a material supplied from the G.E.’s stores in accordance with Condition 10 hereof) and/or wages of labour increases as a direct result of the coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such increase exceeds ten per cent. of the price and/or wages prevailing at the time of acceptance of the tender for the Work and the Contractor thereupon necessarily and properly pays, in respect of that material (incorporated in the Works) such increased price and/or in respect of labour required for and engaged on the execution of the work such increased wages, then the amount of contract shall accordingly be varied protanto, provided always that any increase so payable is not in the opinion of the C.W.E. (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the Contractor.*

Provided, however, no reimbursement shall be made if the increase is not more than 10% of the said prices/wages and if so, the reimbursements shall be made only on the excess over 10% and provided further that any such increase shall not be payable if such increase has become operative after the contract or extended date of completion of the work in question.

If during the progress of the Works, the price of any material incorporated in the Works (not being a material supplied from the G.E.’s stores in accordance with Condition 10 hereof) and/or wages of labour is

decreased as a result of coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such decrease exceeds ten per cent. of the prices and/or wages prevailing at the time of acceptance of the tender for the Work, Government shall in respect of materials incorporated in the Works (not being materials supplied from the G.E.'s stores in accordance with Condition 10 hereof) and/or labour engaged on the execution of the Work after the date of coming into force of such law, statutory rule or order be entitled to deduct from the dues of the Contractor such amount as shall be equivalent to difference between the prices of materials and/or wages as they prevailed at the time of acceptance of tender for the Work minus ten percent thereof and the prices of materials and/or wages of labour on the coming into force of such law, statutory rule or order.

The Contractor shall, for the purpose of this condition keep such books of accounts and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorized representative of Government, and further shall, at the request of the Garrison Engineer furnish, verified in such a manner as the Garrison Engineer may require, any documents so kept and such other information as the G.E. may require.

The Contractor shall within a reasonable time of his becoming aware of any alteration to the prices of any such material, and/or wages of labour, give written notice thereof to the G.E. stating that the same is given in pursuant to this condition together with all information relating thereto which he may be in a position to supply.”

29. The above clause cannot be read as a prohibition for grant of claim for escalation in case of breach of contract by the petitioner. Such claim would be maintainable under Section 73 of the Indian Contract Act, 1872.

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

NAVIN CHAWLA, J

JANUARY 10, 2019
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