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

Reserved on: 7th November, 2019

Pronounced on: 11th February, 2020

+ **O.M.P 353/2009**

IRCON INTERNATIONAL LIMITED Petitioner

Through: Mr. Chandan Kumar, Advocate.

versus

C.R. SONS BUILDERS AND
DEVELOPMENT PVT.LTD. & ANOTHER Respondents

Through: Mr. Ankit Jain, Advocate.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By way of this petition, under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as “the Act”], the petitioner [hereinafter referred to as “IRCON”] seeks setting aside of an arbitral award dated 10.02.2009. By the impugned award, a sole arbitrator adjudicated various claims and counter-claims raised by the parties under a construction contract dated 17.08.2004. After adjusting the amount awarded on the counter-claims raised by IRCON, the arbitrator awarded a net sum of ₹17,74,332/- in favour of the respondent No.1 herein [hereinafter referred to as “CRS”].

Background

2. By way of the contract dated 17.08.2004, CRS was to construct an office building for IRCON. An arbitration clause was included in a supplementary agreement dated 02.06.2006. CRS invoked arbitration

and raised twelve claims before the arbitrator. Mr. S.P. Mehta, former General Manager of Northern Railways, was appointed as the sole arbitrator, impleaded as respondent No.2 herein. During the course of proceedings, IRCON also filed a counter-claim enumerating nine claims.

3. In the present petition, Mr. Chandan Kumar, learned counsel for IRCON, has confined his arguments to challenging claim nos. 1 and 3, awarded in favour of CRS. By way of claim no.1, CRS made a claim of ₹22,41,192/- [plus interest] on account of “unjustified recovery of excavated earth”. The arbitrator has awarded a sum of ₹2,24,119/- and interest of ₹67,235/- on this account. In claim no.3, on account of escalation, CRS claimed ₹29,22,685.89/- [plus interest at the rate of 18% per annum], of which the arbitrator has awarded a sum of ₹13,00,000/- and interest in the sum of ₹2,60,000/-. Each of these claims, and the validity of the challenge thereto, are discussed in turn hereinbelow.

Claim No.1

Facts:

4. Claim no. 1 raised by CRS arises out of excavation work upon the ground area. CRS was entitled to be paid at the rate of ₹123.69 per cubic meter for this work, provided in item 1.01 of the bill of quantities [“BOQ”] in the following terms:-

“Earth work in excavation over areas (exceeding 300mm depth 1.5m in width as well as 10 sqm. in plan) including disposal of excavated earth, outside District Centre Saket, New Delhi to any other approved dumping area and lift upto 1.5m disposed earth to be levelled and

neatly dressed. The rate provided was Rs.123.69/M³ subjected to agreed tender %age of 5.5% above, coming to Rs. 130.49/M³.”

5. However, item 1.03 of BOQ provided that the value of the excavated earth would be credited to the account of IRCON at the rate of ₹79.55 per cubic meter:-

*“Credit for cost of excavated earth which will become property of contractor.....
Rate Rs.79.55 and with Tender % above comes to Rs.83.92.”*

6. The claim of CRS was that IRCON had unlawfully deducted the value of the excavated earth from the amount due to it under item 1.01 of the BOQ. It was contended that the excavated earth was not the property of IRCON at all, as it held the plot on leasehold basis, and had no authority to sell the excavated earth. It was further contended that the engineers of the Delhi Development Authority [“DDA”], which was the owner of the plot, did not permit CRS to remove the excavated material from the plot in question. CRS referred to letters dated 03.09.2004, 15.09.2004 and 20.09.2004, by which IRCON was asked to obtain the necessary permission from DDA. CRS also contended that the contractual position was, in these circumstances, inapplicable, unless IRCON had issued a certificate that the earth excavated was its property, and had been sold to CRS. In fact, by letter dated 26.02.2005, IRCON asked DDA for permission to sell the excavated material, but did not receive any response. IRCON, however, continued to assert the applicability of item 1.03 of the

BOQ, and ultimately deducted the amount due thereunder from the bill by CRS.

7. In the impugned award, the claim has been adjudicated as follows:-

“ xxxx xxxx xxxx
4.3.3 Respondent's argument that construction activities were started almost simultaneously and that owner of any of the few empty plots would not allow dumping of earth in his premises which he has to remove before starting construction on his own plot, seems to make sense. Claimant's plea that he disposed the earth by putting in low lying areas does not appear to be convincing as he could sell this earth to other builders or to the excavating sub-contractor, which is a normal practice. Knowing well that he had to give credit to the Respondent for the excavated earth which became his property under BOQ item 1.03, it is unbelievable to accept that the Claimant would throw away the earth unutilized and run the risk of losing money by not operating BOQ item 1.03 without any written or even verbal instruction from the Respondent to this effect.

4.3.4 It is a fact that the Respondent was not able to furnish any letter/authority to the Claimant to the effect that the earth was his property and he could dispose it of in any manner. In the absence of clear permission to take away the earth, the Claimant would have suffered some loss in not getting optimum amount for the disposal of the earth and would also have wasted time and resources in keeping at bay the unscrupulous elements in DDA and local Police.

4.3.5 **AWARD:** Although strictly speaking, nothing becomes payable to the Claimant under the Contract as discussed in para 4.3.3 above, yet considering that the Respondent has also not fulfilled his obligation in getting/giving authority/permission to take away the excavated earth resulting in hindered working and loss to

the Claimant as discussed in para 4.3.4 above, it is felt that a nominal award equal to 10% of the claimed amount is justified. An amount of Rs.2,24,119 is hereby awarded against claim no.1. As the Claimant incurred this loss about 3 years back, the interest payable @ 10% p.a. works out to Rs.67,235/-.

xxxx xxxx xxxx”

Submissions:

8. The principal argument of Mr. Kumar was that the *ad-hoc* award of 10% of the claim amount by the arbitrator was unjustified. He submitted that the arbitrator has returned a clear finding that nothing was payable to CRS under this claim, and the award, being inconsistent with this finding, is unsupported by evidence. He relied upon the judgment of the Supreme Court in *K.P. Poulose vs. State of Kerala and Ors.* AIR 1975 SC 1259 (paragraph 5).

9. Mr. Ankit Jain, learned counsel for CRS, drew my attention to paragraph 4.3.4 of the award, wherein the arbitrator has held that CRS would have suffered some loss as a result of IRCON’s inability to obtain permission to sell off the excavated earth. He therefore characterized the award, on this account, as an award of damages to compensate for the loss suffered. He argued, with reference to the grounds taken in the petition, that IRCON had not challenged the finding that some loss would have been incurred, and had also not disputed the quantification. In these circumstances, Mr. Jain urged that the award of an expert arbitrator ought not to be interfered with. He cited the decisions of this Court in *Delhi Development Authority vs. Madan Construction Co.* (2008) 1 Arb. L.R. 499 and *IRCON*

International Limited vs. Arvind Construction Company Limited & Anr. (1999) 81 DLT 268.

Analysis:

10. On a holistic reading of the above extracted portion of the impugned award, I am of the view that Mr. Jain's submissions deserve acceptance. The finding in paragraph 4.3.4 of the award attributes some responsibility to IRCON, as a result of which CRS would, according to the arbitrator, have suffered a loss. The observation in paragraph 4.3.5 of the award, that nothing becomes payable to CRS under the contract, is qualified by reference to the findings in paragraph 4.3.4. The arbitrator has analyzed the factual position in the context of the correspondence placed before him, including the inability of IRCON to furnish CRS with authority to remove the excavated material. The arbitrator being a retired official of the Railways, his award on these technical aspects is entitled to considerable deference in terms of the judgments cited by Mr. Jain. The judgments of this Court in *Madan Construction* (supra) (paragraph 9) and *IRCON International* (supra) (paragraph 10) cited by Mr. Jain are clear on this point. Mr. Jain is also justified in submitting that the factual finding of the arbitrator (viz. that IRCON had not fulfilled its obligation which would have led to CRS suffering some loss) has not been challenged. Ground 'C' of the petition is the only ground which deals specifically with claim no. 1. The only contention raised is of the inconsistency between the observations of the arbitrator and his ultimate award, which contention I have already dealt with hereinabove.

11. The judgment of the Supreme Court in *K.P. Poulose* (supra), cited by Mr. Kumar, deals with a somewhat different situation. On a construction of the award that was challenged in that case, the Supreme Court came to the conclusion that the observations contained in the award “*cannot be anything but rationally inconsistent*”, and therefore set aside the award under Section 30(a) of the Arbitration Act, 1940. In the present case, in contrast, the award on claim no. 1 is consistent with the findings of the arbitrator in paragraph 4.3.4 of the award. The analysis in paragraph 4.3.5 of the award, as I read it, is an attempt to reconcile the competing factors discussed by the arbitrator in paragraphs 4.3.3 and 4.3.4 of the award. The language employed is perhaps not that of one versed in law, but the rationalization is nonetheless clear and unimpeachable under Section 34 of the Act. An award must be read as a whole; the purpose of binding arbitration with relatively narrow grounds for setting aside an award would be defeated if the unsuccessful party is permitted to draw upon isolated observations in the award to infer inconsistencies and infirmities.

Conclusion:

12. I am therefore of the view that, on a holistic reading of the award, claim no. 1 thereof is not liable to be set aside under Section 34 of the Act.

Claim No.3

Facts:

13. Claim no. 3 raised by CRS was for payment for escalation. The claim of ₹29,22,685.89/- (and interest thereupon at the rate 18% p.a.)

has been partly allowed- the arbitrator has awarded a sum of ₹13,00,000/- plus ₹ 2,60,000/- as interest.

14. The factual background regarding this claim is that the letter of intent was awarded in July, 2004; the agreement entered into in August, 2004 (followed by a supplementary agreement dated 18.11.2005); and although extensions were granted until September, 2006, the work was completed only in December, 2006. The arbitration clause had been invoked in the meantime on 05.06.2006.

15. The arbitrator's discussion and award on this claim are as follows: -

“xxxx xxxx xxxx

6.3.1 It is a fact that the Agreement did not provide for escalation as the period of construction was only 9 months and escalation is normally provided in Railway Contracts when period of construction is more than a year. The position, however, changed with the abnormal delay of 7 months in the receipt of approval of drawing from DDA. For this initial delay of 7 months also there is no dispute, as the Claimant had volunteered to accept it without any compensation even before the award of the contract and it was made a part of the letter of acceptance.

6.3.2 The problem arose when the work could not be completed within 9 months after the receipt of approval from DDA i.e. up to 18.11.05.

Claimant is attributing this delay to receipt of drawings without structural details for upper basement, staircase, electrical conduits in lower and upper basement, ramps as well as staircase and plumbing works in basement area, frequent changes and a number of revisions in the drawing and delayed decisions by the Respondent. He

had requested for further extension beyond 18.11.05, without penalty and with escalation.

6.3.3 To sort out further extension, a supplementary agreement between the Claimant and the Respondent was drawn on 18.11.05 in which the completion date was extended to 08.03.06. the main feature of the Supplementary Agreement was that no escalation would be payable. The Claimant pleads that this supplementary agreement was signed under undue influence, as a large amount of his was pending with the Respondent. He stated that it was tantamount to coercion and the supplementary agreement should be considered as void. There is force in the Claimant's argument that the Respondent being in a position of strength, could use undue influence in adding an unfair clause that no escalation would be payable during the extended period of completion. It could be considered alright if the delay was due to lapses on the part of the Claimant, but is absolutely unfair if no escalation is to be paid even if the delay is on account of the Respondent himself.

6.3.4 The respondent stated that the allegation of signing the supplementary agreement under duress/ coercion is baseless. He also argued that deciding the allegation of coercion was beyond the jurisdiction of the Arbitrator and should be decided by a Court of Law. The Claimant cited judgment of Hon'ble Supreme Court of India in KN Sathyapalan Vs State of Kerala (2006-4 Arb. LR 275 – SC) in which it was held that the Arbitrator was within his jurisdiction in allowing some of the claims on account of escalation of costs, although as per supplementary agreement, the Claimant was not entitled to enhanced rates during the extended period.

6.3.5 The Respondent attributed the delay in completion of the work to lack of induction of enough resources of men and material. He stated that the Claimant had employed much less men than claimed and had not arranged 5000 sqm of shuttering that was committed by

him in the contract. He also stated that there was no delay on account of drawings and their revision after 30.05.05.

6.3.6 The Claimant has submitted hindrance chart showing the delays at different stages. He has also argued that he had been giving reasons for delays in the applications seeking extensions in time and hardly any delay was on his own count. All the extensions were granted without refuting any reason and no liquidated damages was levied at any stage. As such, as per legal position even if nothing is payable on account of escalation during the original contract period as the escalation clause does not exist, yet in case the work gets delayed for reasons not attributed to him, he is entitled to payment of escalation for the period of delay.

6.3.7 This is a case which is neither black nor white, as the Claimant and the Respondent are both responsible for the delay in the completion of work. It is difficult to apportion exact amount of delay on the part of each of them and I assess half the delay on the part of each of them. This being the position, it will be just and fair if half the amount payable on account of escalation is paid to the Claimant. Further, no escalation is payable for the 7 months period of delay in getting approval from DDA (which was agreed to by the Claimant even before the issuance of letter of acceptance) and also for the period from 1.10.06 to the actual date of completion as the Claimant did not even apply for any extension beyond 30.09.06. I consider that the loss caused to the Respondent due to half the delay in completion caused by the Claimant in the shape of loss of rent/interest on capital and engagement of resources for a longer time, would get nullified by the loss due to half the delay in completion caused by the Respondent in the shape of loss of opportunity, wastage of resources and blockage of capital etc. But the loss caused to the Claimant due to non payment of escalation in the market rates as linked

to RBI index should not be denied for the period of delay not attributable to him.

6.3.8 AWARD: Against the amount of Rs.29,22,685 claimed by the Claimant, the Respondent has verified (without prejudice to his stand for non eligibility of any amount) an amount of Rs. 26,00,000 after disallowing the escalation considered by the claimant for some NS items where payment was already made on market rate and for calculation mistakes etc. An amount equal to half of Rs.26,00,000 i.e. Rs.13,00,000 is therefore awarded against claim no.3. It will also attract an interest @ 10% p.a. for a period of 2 years. Interest works out to Rs.2,60,000.

xxxx xxxx xxxx”

16. IRCON’s challenge to this award is based upon clause 5 of the supplementary agreement dated 18.11.2005, which is set out below: -

“5. For execution of the works, the contractor shall be paid only as per BOQ & agreed rates in the original agreement without any escalation/price variation.”

Submissions:

17. Mr. Kumar submitted that, in the face of clause 5 of the supplementary agreement, the arbitrator’s conclusion is contrary to the contractual provisions. He also argued that the finding of undue influence in entering into the said supplementary agreement, reflected in paragraph 6.3.3 of the award, is unsupported by evidence and therefore liable to be set aside. In fact, Mr.Kumar also drew my attention to the statement of claim filed by CRS before the arbitrator to argue that the claim was not based upon the allegation of coercion or undue influence, but on the basis that the delay on account of IRCON

entitles CRS to escalation in the absence of a contrary contractual provision.

18. In addition to clause 5 of the supplementary agreement, Mr.Kumar also drew my attention to paragraph 49.5 of the General Conditions of Contract [“GCC”], which reads as follows: -

“49.5 Delays due to Employer/Engineer

In the event of any failure or delay by the Employer/Engineer in fulfilling his obligations under the contract, then such failure or delay, shall in no way affect or vitiate the contract or alter the character thereof; or entitle the Contractor to damages or compensation thereof but in any such case, the Engineer shall grant such extension or extensions of time to complete the work, as in his opinion is / are reasonable.”

The argument advanced, relying upon this provision, was that any delay or failure on part of IRCON entitled CRS only to extension of time and not to payment of escalation.

19. Mr. Kumar cited several authorities in support of his contention, including *State of Orissa vs. Sudhakar Das (Dead) by LRs* (2000) 3 SCC 27, *Alopi Parshad and Sons Limited vs. Union of India* AIR 1960 SC 588, *Airport Authority of India vs. Hotel Leelaventure Ltd.* (2016) 231 DLT 457 and *S.K. Jain vs. State of Haryana and Another* (2009) 4 SCC 357, which will be discussed later in this judgment.

20. Mr. Jain supported the impugned award contending that even in the face of a general prohibition to the grant of escalation in favour of a contractor, an award of escalation is permissible in certain circumstances. He referred to the judgment of the Supreme Court in

K.N. Sathyapalan (Dead) by LRs vs. State of Kerela and Another (2007) 13 SCC 43, and *Assam State Electricity Board and Others vs. Buildworth Private Limited* (2017) 8 SCC 146, and of this Court in *M/s Deconar Services Pvt. Ltd. vs. National Thermal Power Corporation* 2009 SCC OnLine Del 4108 [O.M.P. 254/2000, decided on 16.12.2009].

21. Mr. Jain contended that an extension of time under a contract, such as the present one, with no provision of liquidated damages, penalty etc., itself indicates that the delay was on the part of the employer rather than the contractor. Mr. Jain relied upon *Sh. Bharat Lal vs. Municipal Corporation of Delhi & Ors.* 2010 SCC OnLine Del 1310 [O.M.P. 327/2003, decided on 25.03.2010] and *Delhi State Industrial Development Corporation vs. Mohan Construction Company* 2015 SCC OnLine Del 11832 [O.M.P. 410/2007, decided on 02.09.2015], in this connection. He cited the judgment in *Deconar Services* (supra) to submit that the apportionment of responsibility between the parties, in respect of the delay in the implementation of the contract, is also a matter within the province of the arbitrator.

22. With regard to the contention of undue influence, Mr. Jain relied upon *National Insurance Company Limited vs. Boghara Polyfab Private Limited* (2009) 1 SCC 267 and *Chairman And MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors* (2004) 2 SCC 663, to argue that the finding was not beyond the jurisdiction of the arbitrator. He submitted that the finding being one of fact, it could not be reopened under Section 34 of the Act. In support of this contention, Mr. Jain referred to the decision of this Court in *National*

Respondents will impose liquidated damages, which amounted to a penalty on Claimants of over Rs.30 lakhs, and under this threat, which amounted to coercion and undue influence, against our free consent got signed a Supplementary Agreement. A copy of this Supplementary Agreement is filed at (Annexure C-28).

3.12 A critical reading of this Supplementary Agreement will prove our contention as mentioned in para 3.11 above. The Supplementary Agreement talks of mutual commercial interest. What commercial interest? The claimant was threatened with Liquidated Damages of over Rs.30 lakhs and certainly this is not the commercial interest of claimant. Of course, there was commercial interest of the Respondents i.e. to save themselves of escalation claim.

xxxx xxxx xxxx

3.16 This attracts clause 14 of Indian Contract Act (copy filed at Annexure C-29) where free consent is defined. Any agreement contravening the Indian Contract Act is void and can not be enforced. The Supplementary Agreement attracts sub clauses of coercion and undue influence of clause 14 of the Indian Contract Act.

3.17 Thus, Supplementary Agreement, is thus illegal, void, and cannot be enforced, meaning thereby the Claimants are fully entitled to escalation claim notwithstanding the illegal Supplementary Agreement dated 18.11.2005.

xxxx xxxx xxxx”

Mr. Kumar’s argument, that the claim of CRS on this account was not based on undue influence, is therefore rejected.

25. The judgment of the Supreme Court in *Boghara Polyfab* (supra) (paragraph 21) makes it clear that adjudication of a claim of this nature is within the jurisdiction of the arbitrator. The peculiar

dynamics that may arise from transactions between a public sector undertaking and a contractor have been noticed in *Chairman And MD, NTPC* (supra) cited by Mr. Jain. The relevant observations of the Supreme Court are as follows-

“xxxx xxxxx xxxxx

27. Even when rights and obligations of the parties are worked out, the contract does not come to an end *inter alia* for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a “No-Demand Certificate” is signed. Each case, therefore, is required to be considered on its own facts.

28. Further, *necessitas non habet legem* is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.

xxxx xxxxx xxxxx”

(Emphasis supplied)

26. The above extracted portions of the statement of claim lay the foundation for a similar argument- CRS claims that the supplementary agreement was entered into in the face of a threat that liquidated damages would be imposed by IRCON. The arbitrator’s finding in paragraph 6.3.3 of the award cannot, in these circumstances, be held to

be wholly devoid of substance or set aside on any of the grounds under Section 34 of the Act. The judgment of this Court in *Synergy Steels* (supra) (paragraphs 9 to 11) also supports this conclusion. [The judgment cited by Mr. Jain is of a Coordinate Bench of this Court, which has also been affirmed in appeal – *National Insurance Co. Ltd. vs. Synergy Steels Ltd.* [(FAO(OS) 196/2019, decided on 30.09.2019)].

27. One of the judgments cited by Mr. Kumar, *S.K. Jain* (supra) (paragraph 8), appears to strike a different note to *Chairman And MD, NTPC* (supra). Paragraph 8 of *S.K. Jain* (supra) is reproduced below: -

“8. It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] . The said decision does not in any way assist the appellant, because at para 89 it has been clearly stated that the concept of unequal bargaining power has no application in case of commercial contracts.”

In my view, the above extracted paragraph in *S.K. Jain* (supra) was only by way of distinguishing *Central Inland Water Transport Corpn. Ltd. vs. Brojo Nath Ganguly* (1986) 3 SCC 156, which had been cited before the Court. It does not lay down anything contrary to the observations in *Chairman And MD, NTPC* (supra).

28. In any event, Mr. Jain is also justified in his submission that IRCON has not challenged this finding at all in the present petition.

Only two of the nine grounds urged deal particularly in respect to claim no. 3. The grounds read as follows: -

“xxxx xxxx xxxx

D. Because the Hon’ble Arbitrator further mis-conducted himself when, while dealing with Claim No.3 and Counter Claim Nos. 2 and 3, he found that both the Applicant and Respondent No.1 were responsible for delay in the ratio of 50:50, yet he allowed claim only of the Respondent No.1. After he had established a fact, its application should have been equal upon the parties. He could not have applied two yardsticks after such finding of facts. This also violates established legal principle that law applies equally to all.

E. Without prejudice, award of claim no.3 has been in violation of the contract and the supplementary agreement dated 18.11.2005, which prohibited escalation / price variation.

xxxx xxxx xxxx”

29. It is clear therefrom that there is no specific challenge to the arbitrator’s finding that coercion and undue influence vitiated the supplementary agreement.

30. On the aforesaid finding, the provision of the supplementary agreement restricting CRS’s entitlement to escalation is itself of no assistance to IRCON.

31. Even on the assumption that the supplementary agreement binds the parties, I am of the view that the award of escalation in the present case cannot be held to be beyond the jurisdiction of the arbitrator. The judgments in *Alopi Parshad* (supra) and *Sudhakar Das* (supra) do lay down in general terms that escalation cannot be granted in the absence of a provision entitling the contractor to the same. However, the facts

of the present case are much closer to the judgment in *K.N. Sathyapalan* (supra) cited by Mr. Jain. Significantly, the judgment in *Alopi Parshad* (supra) was specifically considered and discussed by the Court. In *K.N. Sathyapalan* (supra) also, extensions of time were granted to in favour of the claimant/contractor. Although the original agreement did not contain such a clause, a supplemental agreement included a clause restricting the contractor's entitlement to the agreed rates without enhancement. In that case too, the contractor took the position that it had no option but to sign the supplemental agreement. The arbitrator's award on account of escalation was set aside by the High Court as being outside the terms of the contract. The Supreme Court reversed this judgment and restored the award on the following reasoning: -

“xxxx xxxx xxxx

18. Admittedly, the original agreement did not contain a clause for escalation of rates. On the other hand, the supplemental agreement contained a specific provision that the contractor would carry out all further works within the extended period at the rates and in the manner agreed to in the agreement and would not claim any enhanced rate for such item of work on account of the extension of time either due to the increase in the rate of labour or materials or on any other ground whatsoever. The High Court took the view that although the arbitrator had come to a finding that the appellant had to execute the supplemental agreement under the force of circumstances, there was no material before the arbitrator in support of such contention. On such finding also, the High Court held that the arbitrator had acted beyond his jurisdiction in allowing Claim (g).

xxxx xxxx xxxx

31. *The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the original agreement and a specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of escalation of costs and whether the arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.*

32. *Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad case [(1960) 2 SCR 793 : AIR 1960 SC 588] and also Patel Engg. case [(2004) 10 SCC 566]. As was pointed out by Mr Dave, the said principle was recognised by this Court in P.M. Paul [1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George case [(2001) 2 SCC 758].*

33. *We have intentionally set out the background in which the arbitrator made his award in order to examine the genuineness and/or validity of the appellant's claim under those heads which had been allowed by the arbitrator. It is quite apparent that the appellant was prevented by unforeseen circumstances from completing the work within the stipulated period of eleven months*

and that such delay could have been prevented had the State Government stepped in to maintain the law and order problem which had been created at the worksite. It is also clear that the rubble and metal, which should have been available at the departmental quarry at Mannady, had to be obtained from quarries which were situated at double the distance, and even more, resulting in doubling of the transportation charges. Even the space for dumping of excess earth was not provided by the respondents which compelled the appellant to dump the excess earth at a place which was faraway from the worksite entailing extra costs for the same.

34. In the aforesaid circumstances, the arbitrator appears to have acted within his jurisdiction in allowing some of the claims on account of escalation of costs which was referable to the execution of the work during the extended period. In our judgment, the view taken by the High Court was on a rigid interpretation of the terms of contract and the supplemental agreement executed between the parties, which was not warranted by the turn of events.

35. We accordingly allow the appeal and set aside the order passed by the High Court and restore the award made by the arbitrator.

xxx xxx xxx”

The judgment in *Assam State Electricity Board* (supra) (paragraphs 13 to 17) follows the same line as *K.N. Sathyapalan* (supra).

Conclusion:

32. The present case is similar. The arbitrator has returned a finding that IRCON and CRS were both responsible for the delay. Having come to this conclusion, there is no infirmity in the exercise of jurisdiction by the arbitrator apportioning the delay between the two parties. The judgment of this court in *Deconar Services* (supra)

(paragraph 8) emphasizes that this exercise, in the nature of a factual determination, is well within the jurisdiction of the arbitrator.

33. The arbitrator's finding, attributing the delay to both the parties can also not be faulted in the present case on the ground of perversity or manifest arbitrariness. The judgments in *Sh. Bharat Lal* (supra) (paragraph 2) and *Delhi State Industrial Development Corporation* (supra) (paragraphs 6 and 8), lay down that the arbitrator is entitled to draw a conclusion in favour of the contractor from the fact that extensions of time were granted without imposition of liquidated damages.

34. In view of the aforesaid discussion, I do not find any ground to set aside the impugned award on claim no. 3.

Interest

35. The final argument urged by Mr. Kumar was with respect to the rate of interest awarded by the arbitrator. However, the grounds in the petition lay no foundation for such an argument. Following the decision of the Division Bench of this Court in *NITTY Construction* (supra), I am of the view that the rate of interest awarded cannot be modified in the present petition.

Conclusion

36. For the reasons aforesaid, IRCON has failed to make out any ground for setting aside of the impugned award. The petition is therefore dismissed, but with no order as to costs.

PRATEEK JALAN, J.

FEBRUARY 11, 2020/ 'pv/gg' /