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

Date of Decision: 28th October, 2021

+ O.M.P. (COMM) 44/2021

UNION OF INDIA

..... Petitioner

Through: Mr. Chetan Sharma, ASG with Mr. Ripudaman Bhardwaj, CGSC and Ms. Bhumika Mishra, EE CPWD.

versus

C AND C CONSTRUCTION LTD.

..... Respondent

Through: Mr. Vikas Goel, Mr. Ritesh Sharma, Mr. Vivek Gupta, Mr. Siddharth Pandey and Mr. Deepal Hoda, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996, [hereinafter "***the Act***"] impugns the Award¹ dated 27th December, 2019² whereby the Arbitrator has partly allowed the claims of the Respondent. The summary of the Award is extracted hereinbelow: -

¹ No. KV/MAA/391.

² corrected *vide* Order dated 15th January, 2020.

SUMMARY OF AWARD

<i>Claim No.</i>	<i>Claim in Brief</i>	<i>Amount of claim in USD as per SOC</i>	<i>Amount of Award in USD</i>
1	Wrongful levy of compensation	21,45,639.79	21,45,639.79
2	Work done but not paid & reduction in rates a) Items executed but not paid b) Reduction in rates of extra items c) Reduction in rates of deviated items	1,30,071.00 1,74,945.37 2,49,357.68	Nil 4,191.87 2,12,606.73
3	Interest on account of delayed payments	32,222.47	Not pressed
4	Additional Overheads for the extended period	33,34,681.75	4,19,799.08
5	Escalation for work done during extended period	13,07,752.99	2,84,120.98
6a	Refund of recovery due to non-deployment of technical staff	1,75,400.00	Nil
6b	Interest on withheld amount of milestones	55,027.40	18,195.73
6c	Release of amount withheld for damage to chiller units	3,00,000.00	3,00,000.00
6d	Recovery on account of testing charges	36,000.00	Nil
7a	Repair of damaged installations	24,325.00	Nil
7b	Reinstallation of 3 transformers	9,000.00	Nil
7c	For carrying out operation of installation	1,16,666.00	Nil
8	Non-utilisation of material due to change of decision	1,84,469.74	Not pressed
9	Reimbursement of Business Receipt Tax	53957.44	39881.59
10	Interest	15% pa	4.96% pa
	Total (excluding interest)	83,29,516.63	34,24,435.77

BRIEF FACTS

2. The factual matrix in brief is as under: -

The Contract

3. The Respondent viz. M/s. C & C Construction Ltd. [hereinafter “C&C”] being the L-1 bidder, was awarded the work of – “Construction of Afghan Parliament building at Kabul, Afghanistan (SH: Bulk Electro Mechanical Services)” [“BEMS”] vide letter of Award³ dated 15th January, 2013 for contract price of USD 21,456,396.90 [hereinafter “the Agreement”], by the Petitioner viz. Union of India, through CPWD, New Delhi [hereinafter “UOI”].

4. The schedule date of commencement of the said project was 06th February, 2013 and date of completion was 05th February, 2014.

Constitution of the Arbitral Tribunal

5. Disputes arose between the parties and C&C referred nine claims for settlement before the three-member Dispute Redressal Committee [“DRC”] constituted by the Director General, CPWD in terms of Clause 25 of the General Conditions of Contract [hereinafter “GCC”]. DRC gave its decision on 26th July, 2017, but the recommendations made therein were not accepted by UOI.

6. UOI invoked arbitration under Clause 25 and Sh. K.K. Varma, (Retd.) Additional Director General, CPWD, was appointed as the Sole Arbitrator

vide letter dated 21st September, 2017 for adjudication of claims and to make a declaratory award on the decision of DRC.

7. C&C was not satisfied with the restricted reference of seven claims for adjudication and invoked arbitration *vide* its letter dated 29th September, 2017 and requested for reference of nine claims for adjudication. According to C&C's request, Director General, CPWD *vide* letter dated 03rd October, 2017 in continuation of his earlier letter dated 21st September, 2017, referred nine claims of C&C to the Sole Arbitrator for adjudication. The claims of UOI were withdrawn, as recorded in the Award, and claims of C&C were adjudicated in arbitration.

8. The Sole Arbitrator, after hearing the parties and considering the material on record, passed the impugned Award on 27th December, 2019.⁴ UOI impugns the Award *qua* three claims – viz. Claims No. 1, 4 and 5, which are taken up separately.

CLAIM-WISE OBJECTIONS AND ANALYSIS

I. CLAIM NO. 1 – WRONGFUL LEVY OF COMPENSATION

9. Mr. Ripudaman Bhardwaj, CGSC makes the following submissions: -
- (i) The Arbitrator has failed to appreciate the fact that Clause 2 of GCC is a binding condition accepted by both the parties and any action(s) in conformity with the Clause 2 is fully justified.
 - (ii) The Arbitrator has erroneously relied upon the judgment of Apex

³ 01/Dir(PM)/CPWD/Kabul/2013-14.

⁴ UOI filed application(s) for making correction(s) and which was decided by the Tribunal *vide* its Order dated 15th January, 2020.

Court in the matter of ***J.G. Engineers v. Union of India***⁵ without appreciating the facts and circumstances of the instant case and has wrongly held that the aforesaid claim is not an “*excepted matter*”. In this regard, reliance is placed on a recent judgment of Supreme Court in the matter of ***Mitra Guha Builders (India) v. Oil and Natural Gas Corporation***⁶ wherein the Court held that levy of liquidated damages/ compensation under Clause 2 of GCC is final and cannot be subjected to arbitration. In light of the aforesaid, observations of the Arbitrator regarding arbitrability of the said claim are patently erroneous and not sustainable in law.

- (iii) While adjudicating Claim No. 4 (*viz.* Additional Overheads for extended period), the Arbitrator has compensated C&C for the delay caused by UOI. The Arbitrator, however, failed to appreciate the fact that C&C was also in breach due to delay caused in completion of work. Therefore, the action of UOI to levy compensation in terms of Clause 2 is lawful as per Section 74 of the Indian Contract Act, 1872 [*hereinafter “Contract Act”*].
- (iv) Apart from the embarrassment for the country due to delay(s) in completion of Afghan Parliament building, UOI also suffered terminal losses by way of additional expenditure(s) towards salaries of technical staff. Loss of Rs. 17.18 Crores was borne by UOI due to variation in exchange rate during the extended period. Therefore, decision of the Arbitrator of revoking levy of compensation in favour of C&C is perverse, opposed to public policy, and contrary to facts

⁵ (2011) 5 SCC 758.

⁶ (2020) 3 SCC 222.

and notion of justice.

10. *Per Contra*, Mr. Vikas Goel, counsel for C&C makes the following assertions: -
- (i) The award *qua* Claim No. 1 is based on findings of fact i.e., review whereof is beyond the jurisdiction of this Court under Section 34 of the Act.
 - (ii) UOI had itself referred Claim No. 1 to arbitration *vide* letter dated 21st September, 2017.
 - (iii) Reliance placed by UOI on ***Mitra Guha*** (*supra*) is erroneous and is distinguishable on facts and law. In ***Mitra Guha*** (*supra*), the contractual clause was substantially different than the one in the instant case. Therein, none of the parties raised the issue(s) of validity/ or voidability of contractual provision. The said case was also not cited before the Arbitrator and besides, the judgment in ***J.G. Engineers*** (*supra*) has been correctly followed.
 - (iv) In support of his contentions, reliance was placed upon the decision of this Court in ***DSI IDC v. H.R. Builders***⁷.

ANALYSIS

11. Claim No. 1 pertains to wrongful levy of compensation for the delay in completion of BEMS work and whether C&C is entitled to extension of time without levy of compensation in terms of Clause 2 of GCC. The Arbitrator held that the action of UOI to levy compensation in terms of Clause 2 was wrongful and legally untenable and awarded an amount of

⁷ 2021 SCC OnLine Del 3997. Reliance is placed on para 28-31, 35-36, 38-41.

USD 21,45,639.79/- as refund. Mr. Bhardwaj has argued that the aforesaid claim forms part of “*excepted matter*” premised on Clause 2 of GCC.

12. To deal with this objection, it would be necessary to refer to the clause for ‘Settlement of Disputes & Arbitration’ [viz. Clause 25], which reads as under: -

“CLAUSE 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give this written instructions or decision within a period of one month from the receipt of the contractor's letter.

*If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the **contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the***

rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.⁸

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General of works, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any

⁸ Clause 25 (i) of the CPWD Works Manual, 2010 was modified vide Office Memorandum No. DG/CON/255 issued by Authority of Director General, CPWD.

demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

13. The Clause 25 (extracted above) provides for a mechanism wherein different specified authorities are empowered to look into and determine the questions/ disputes relating to the work in question. The afore-noted provision also provides the contractor a contractual remedy of filing an appeal before the DRC along with list of dispute(s) with amounts claimed in respect of each such dispute(s). If any of the parties is dissatisfied with the

decision given by DRC, remedy lies in reference of the dispute(s) to arbitration. Such reference can be made except for decision(s) which are final, binding, and conclusive in terms of Sub-Para (1).

14. In the instant case, the matter was escalated till DRC which gave its decision on 26th July, 2017. Aggrieved by such decision, UOI *vide* communication dated 21st September, 2017 challenged the same by making reference to Sole Arbitrator. The said communication enclosed a list of claims which included the claim for wrongful levy of compensation of USD 21,45,639.79/- with interest thereon.

15. Since UOI assailed the decision of DRC and did not accept it to be final and binding, and rather sought remedy of adjudication of disputes *via* arbitration, it cannot categorise the same as an “*excepted matter*”. Further, reliance placed by Mr. Bhardwaj on decision of the Supreme Court in ***Mitra Guha*** (*supra*) to contend that the matter herein forms part of “*excepted matter*” is devoid of merit. The said judgment is not applicable to the facts of the instant case and is evidently distinguishable as it was rendered in the context of a clause (extracted in the judgment in Para 16), which is quite apart from Clause 25 of GCC in the present Petition. Clause 25 in ***Mitra Guha*** (*supra*), specifically provided that - “*the decision of the Superintending Engineer regarding the quantum of reduction as well his justification in respect of reduced rates for sub-standard work, which may be decided to be accepted, will be final and would not be open to arbitration.*”. Thus, the clause visibly restricted arbitration on the decision of SE regarding ‘quantum’ of reduction of rates ‘in case of sub-standard work’.

In the instant case, the arbitration clause [*viz.* Clause 25] as extracted above, is distinct.

16. That said, the facts of the present case are closer to those which arose in **J.G. Engineers** (*supra*). The Respondent therein similarly contended that the arbitrator has considered and allowed some claims which were “*excepted matters*” and therefore, non-arbitrable. The Supreme Court, after analysing contractual terms which are nearly identically worded, *inter-alia*, held that the decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract. Only the consequential decision of SE with regard to quantification/ levy of liquidated damages, is made final only “*if there is no dispute as to who committed the breach. That is if the contractor admits that he is in breach or if the arbitrator finds that the contractor is in breach*”. The view expressed by the Supreme Court in the said decision resonates with the facts of the present case. The question whether the other party has committed breach or not cannot be decided by the party alleging breach thereof. One of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. Such question(s) can only be determined by an adjudicatory forum *viz.* a Court or an Arbitral Tribunal.⁹

17. It must be borne in mind that the subject matter of the aforesaid claim

⁹ See: **J.G. Engineers** (*supra*)

i.e., computation of the liquidated damages levied by UOI is concentrated on identifying the party that caused the delay. Thus, UOI cannot be permitted to argue that on this aspect. The decision rendered by the Arbitral Tribunal cannot be open to challenge and is final and binding. Therefore, the Court does not find any merit in this contention urged by UOI.

18. The second limb of Mr. Bhardwaj argument challenging the impugned Award on the aforesaid Claim shall be dealt in the succeeding paragraphs while discussing the challenge to Claim No. 4 as the same is premised on the finding rendered by the Arbitrator regarding the said claim.

II. CLAIM NO. 4 – ADDITIONAL OVERHEADS DURING EXTENDED PERIOD

19. Mr. Bhardwaj, CGSC makes the following submissions: -

- (i) The Arbitrator has failed to appreciate the fact that C&C is also responsible for delay over 8 months, in execution of work and hence, the competent authority rightly imposed liquidated damages.
- (ii) The Arbitrator while awarding Claim No. 4 in favour of C&C failed to appreciate that it had already compensated C&C for the delay caused by UOI (in Claim No. 1), however, on delay caused by C&C neither any compensation/ damages nor proportional reduction of the compensation amount, have been awarded in favour of UOI. Hence, equity has not been balanced at all. Findings are against the principles of natural justice as the Arbitrator holds C&C is entitled to compensation due to delay caused on their account; UOI is entitled to be compensated for delay of 240 days caused by C&C.

20. Mr. Goel, controverts as follows: -

- (i) While adjudicating Claim No. 1, the Arbitrator held that the work of Parliament building itself was completed on 15th February, 2016 [and the subject work on 21st February, 2016]. The Arbitrator held that the work of installation covered under the scope of the Agreement could be completed only after completion of the Parliament building. The Arbitrator rightly held that the C&C was entitled to extension of time till the actual date of completion of work – viz. 21st February, 2016, without levy of compensation. Therefore, UOI could not be compensated for any alleged delay.
- (ii) Further, while adjudicating Claim No. 4, the Arbitrator apportioned delay between the parties in the ratio of 60:40 only for the purpose of determining financial implication of the delay. It was not a determination by the Arbitral Tribunal regarding the entitlement of full extension of time till the date of actual completion viz. 21st February, 2016.
- (iii) Claim No. 4 is based on a finding of fact that cannot be interfered with under Section 34 of the Act.¹⁰

ANALYSIS

21. The challenge to Claim No. 4 and the second ground of challenge to Claim No. 1 is based on the apportionment of the delay in the ratio of 60:40 between UOI and C&C, respectively. The Arbitrator herein awarded compensation in favour of C&C for additional overheads of the sum of USD 4,19,799.08/-.

¹⁰ *Associated Builders v. Delhi Development Authority*, (2015) 3 SCC 49.

22. Mr. Bhardwaj has argued that the findings on Claim No. 4 for apportionment *qua* additional overheads during extended period, should also be adopted for awarding Claim No. 1. Firstly, findings rendered by the Arbitral Tribunal on the question of delay is purely a finding of fact, which cannot be interfered by this Court while exercising limited jurisdiction under Section 34 of the Act.¹¹ The apart, it is to be noted that the apportionment of delay by the Arbitrator under Claim No. 4 is only for the purpose of determining the financial implication of delay. The Arbitrator, while giving finding under Claim No. 1 held that the work of the Parliament building itself was completed on 15th February, 2016 and the subject work which was to be executed in the Parliament building was completed on 21st February, 2016. The work of installation covered under the scope of Agreement could be completed only after the completion of Parliament building. In these circumstances, the Arbitrator held that C&C was entitled to extension of time till actual date of completion *viz.* 21st February, 2016 without levy of compensation. The Arbitral Tribunal found that the Claimant therein (C&C) was not accountable for the delay in completion of work and was thus entitled to extension of time without levy of compensation. There is no challenge to the afore-noted findings for Award of Claim No.1.

23. While deciding Claim No. 4, the question before the Arbitral Tribunal was entirely different. This claim pertained to additional overheads during extended period – financial implication of delay. Under the said Claim, the Arbitrator was deciding the question of financial implication of delay caused in execution of work. For computing the same, the Arbitrator examined the

¹¹ See: *Associated Builders (supra)*.

contractual work and observed that the same involved activities which are both sequential and parallel. He observes – “*While the sequential activities cannot be performed independently, the parallel activities are independent of each other.*” In these circumstances, the Arbitrator was of the view that it was impossible to assess and apportion the contributory effect of various delays and defaults by either party. In these circumstances, the Arbitrator approached the matter by making a reasonable estimation for apportioning 60% of the delay to UOI [60% of 600 days viz. 360 days/ 12 months] and 40% to C&C [40% of 600 days viz. 240 days] and accordingly, held that the C&C was entitled to compensated by additional overheads for a period of twelve months.

24. Once the contractor was held entitled to extension and not responsible for delay, the mechanism adopted by the Arbitrator for finding out the financial implication of overheads, is reasonable. Despite holding C&C entitled to extension of time till 21st February 2016 without imposition of compensation, the Arbitrator did not allow Claim No. 4 for the entire period of delay and restricted the claim by apportioning the delay on reasonable basis and as against claim of USD 33,34,681.70/-, only Rs. 4,19,799.08/- has been awarded, giving UOI the benefit of contributory delay. Therefore, the Court does not find any merit in the contentions urged by UOI impugning the Award *qua* Claim No. 4. Concomitantly, the second ground of challenge *qua* Claim No. 1 also does not sustain.

III. CLAIM NO. 5 – CLAIM FOR ESCALATION DURING EXTENDED PERIOD

25. Mr. Bhardwaj, CGSC, *qua* the aforesaid claim makes the following

assertions: -

- (i) The Arbitrator has failed to appreciate UOI's contention that Clause 10CC is not applicable. Clause 10CC has been wrongly applied applicable beyond stipulated period of completion of work.
- (ii) Reliance is placed on *National Building Construction Corporation v. Decor India Pvt. Ltd.*¹², wherein this Court held that "*It is a settled law that where there is no escalation clause in the arbitration agreement, the arbitrator cannot assume jurisdiction to award an increased rate*". Thus, there is an apparent error in Arbitrator's finding in this regard.
- (iii) The Arbitrator has failed to appreciate the fact that the very purpose of awarding escalation is to compensate for increase in costs of materials due to prolongation of contract period. In the Agreement, payment of work was done in USD, i.e., treated as constant currency and escalation in prices, if any, are adjusted in the stronger USD with the passage of time. Rate of USD \$1 at the time of award of work [viz. 15th January, 2013] was Rs 54.5793/- and rate of USD \$1 on the actual date of completion [viz. 21st February, 2013] was Rs. 68.7355/-. In this case, instead of enduring any loss due to delay in execution of work, C&C enjoyed exchange rate variation benefits due to 'USD versus Rupees' amounting to Rs. 17.17 Crores for the extended period of completion.
- (iv) There is no judicial application of mind while awarding amount against this claim. The Arbitrator has relied on the amount worked carried out by DRC, and merely reducing it to a period for 12 months.

That apart, the Arbitrator has neither mentioned nor determined whether the amount worked out by DRC against this claim for period of 24.87 months is correct or not. The Award against this claim is hence perverse.

- (v) The Award is also in conflict with basic notions of justice and is liable to be set aside as being opposed to public policy.

26. Mr. Goel, makes the following contentions: -

- (i) The Arbitral Tribunal rightly interpreted Clause 10CC which fell within its domain. C&C was awarded Claim No. 5 as a claim for damages and thus, findings of the Arbitrator on the same is not open to challenge under Section 34 of the Act.
- (ii) Further, the compensation awarded by the Arbitrator in respect of Claim No. 5 was less than amount calculated by UOI, on its own, before the DRC.

ANALYSIS

27. The Arbitral Tribunal awarded USD 2,84,120.98 against the claim of USD 13,07,752.99/- under Claim No. 5 towards escalation during extended period.

28. Once it was found that there was delay in execution of the Agreement due to the conduct of UOI. As a repercussion, they became liable for consequences of delay, on account of increase in prices even in the absence

¹² (2004) SCC OnLine Del 243.

of any escalation clause.¹³

29. For extended period, the Arbitrator has relied upon Clause 10CC of GCC which provides the formula for calculation of price escalation. The challenge to Claim No. 5 is principally premised only on the Arbitrator's interpretation of applicability of Clause 10CC. Even if Clause 10CC had a limited application and was only to apply for price variation only during the terms of the Agreement, mechanism therein could be adopted to calculate price escalation. In the aforesaid circumstances, the Arbitrator appears to have acted within his jurisdiction in allowing some of the claims on account of escalation. Further, the Arbitrator has excluded the component of overhead and profit and reduced the claim amount for a period of 12 months for which delay was apportioned against UOI. Therefore, the findings rendered to that effect are sustainable and cannot be disturbed in the present proceedings.

30. That said, the Court would like to observe that interpretation of the contractual terms falls within the exclusive domain of the Arbitrator. The Arbitrator has construed that Clause 10CC is attracted. The reasoning for this finding is that Clause 10CC contained a stipulation to the effect – “...No such compensation shall be payable for the work for which the stipulated period of completion is equal to or less than the time as specified in Schedule F”. Finding a reference to Schedule ‘F’, the Arbitrator examined the same which reads as under: -

¹³ *Food Corporation of India vs. A.M. Ahmed and Co. and Ors.*, AIR 2007 SC 82, *K.N. Sathyapalan (dead) by LRs v. State of Kerala and Anr.*, (2007) 13 SCC 43., etc.

“Clause 10CC

*Clause 10CC is to be applicable in contract
with stipulated period of completion exceeding
the period stipulated in next column.”*

NA

31. Noting the expression “NA” [viz. Not Applicable], the Arbitrator concluded that since parties had not specified the time period, Clause 10CC is applicable. It is settled law that the construction of contract falls within the purview of the Arbitral Tribunal¹⁴ and even erroneous construction of contract is not amenable to challenge under Section 34 of the Act unless the Court finds it to be completely perverse.¹⁵ Nonetheless, as analysed above, the Arbitrator has only borrowed the principles applicable under Clause 10CC of GCC to quantify the price escalation for the extended period and therefore, for the reasons discussed above, the Court is not inclined to interfere on this ground.

32. In view of the above, the Court does not find any merit in the present petition and the same is dismissed along with pending applications.

SANJEEV NARULA, J

OCTOBER 28, 2021/nk

(corrected and released on: 07th December, 2021)

¹⁴ *Associated Builders (supra)* and *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181.

¹⁵ *South East Asia Marine Engineering and Constructions Limited v. Oil India Limited*, (2020) 5 SCC 164.