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

Date of Decision: 3rd September, 2021

+ O.M.P. (COMM) 262/2021 & I.As. 11079-83/2021

UNION OF INDIA

..... Petitioner

Through: Mr. Rakesh Kumar, CGSC with
Mr. Sahaj Garg, Advocates.
Mr. P.K.S. Senger, Director
(Contract) and Mr. Satish Kumar,
Deputy Director (Contracts).

versus

VASCON ENGINEERS LTD.

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

I.A.Nos. 11078/2021 & 11084/2021 (seeking condonation of delay of 29 days in filing and 115 days beyond three months of communication of arbitral award in re-filing the objection)

1. The petition has been filed beyond the period of three months prescribed under Section 34 (3) of the Act, however within the permissible extension period provided under the proviso thereof.
2. For the grounds and reasons stated in the application, delay in filing and in re-filing is condoned.
3. The applications stand disposed of.

O.M.P. (COMM) 262/2021

4. The present petition under Section 34 (3) of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as '*the Act*'] has been filed

by the Directorate General of Married Accommodation Project (DG-MAP), working under the Ministry of Defence, Union of India [*hereinafter referred to as ‘DG-MAP’*], seeking setting aside of the Arbitral Award dated 31st December, 2020 [*hereinafter referred to as ‘Impugned Award’*], whereby the learned Sole Arbitrator has allowed certain claims of the Respondent herein – Vascon Engineers Ltd. (being the Claimant before the Arbitrator) [*hereinafter referred to as ‘Vascon’*].

5. The tender was initially awarded by DG-MAP to one M/s. Sainath Enterprises Private Ltd., but, upon its default, it was decided to execute the balance work through another agency. Thus, on 17th September, 2009, Vascon was awarded the work of “*Completion of Balance Works of Construction of Dwelling Units Including Allied External Services at Kirkee (Aundh) Pune Army*” [*hereinafter referred to as the ‘Contract’*]. The work was to be done in three phases. The original date of completion for Phase-I was stipulated as 16th January, 2010, for Phase-II as 16th July, 2011 and for Phase-III as 4th March, 2014. The work was completed on the extended date of completion, i.e., 1st March, 2016.

6. When disputes arose, the learned Sole Arbitrator was appointed in pursuance to a petition made before this Court. He has now passed the Impugned Award, deciding the claims and counter-claims as follows:

I. CLAIMS OF VASCON:

<i>Claim No.</i>	<i>Description</i>	<i>Amount Claimed (in Rs)</i>	<i>Amount Awarded (in Rs)</i>
1.	<i>Balance payments for works, including deviations, additional works (Parts 1 to 9 of Claim 1)</i>	<i>Rs 2,53,43,288/-</i>	<i>Rs 24,16,874/-</i>
2.	<i>Increase in rates of cement, steel, sand and coarse</i>	<i>Rs 1,17,09,737/-</i>	<i>Nil</i>

	<i>aggregates</i>		
3.	<i>Increase in excise duty</i>	<i>Rs 9,96,678/-</i>	<i>Rs 9,96,678/-</i>
4.	<i>Increase in labour costs</i>	<i>Rs 78,85,812/-</i>	<i>Nil</i>
5.	<i>Stoppage of work between September to December 2009 and March to June 2010</i>	<i>Rs 1,81,07,757/-</i>	<i>Rs 1,16,58,459/-</i>
6.	<i>Shortfall in steel under schedule of credit</i>	<i>Rs 66,79,365/-</i>	<i>Nil</i>
7.	<i>Loss due to incorrect progress stage stated in the tender</i>	<i>Rs 46,99,208/-</i>	<i>Nil</i>
8.	<i>Maintenance and operation of water supply installation after handing over to users</i>	<i>Rs 750,000/-</i>	<i>Nil</i>
9.	<i>Delayed / Underpayment of RARs</i>	<i>Rs 35,45,629/-</i>	<i>3,73,578/-</i>
10(a).	<i>Prolonged commitment to contract</i>	<i>Rs 163,71,838/-</i>	<i>Nil</i>
10(b).	<i>Prolonged commitment of Claimant's T&P</i>	<i>Rs 31,17,663/-</i>	<i>Nil</i>
10(c).	<i>Prolongation of the validity periods of the Bank Guarantees</i>	<i>Rs 42,39,644/-</i>	<i>Nil</i>
11.	<i>Costs of arbitration</i>	<i>Rs 40,39,471/-</i>	<i>Rs 25,85,153/-</i>
12.	<i>Interest on due amounts for past, pendent-lite and future</i>	<i>@ 20 % p.a.</i>	<i>Rs 39,90,559/- @8% p.a. for past and pendente lite. For future interest also @ 8% p.a.</i>

II. COUNTER-CLAIMS OF DG-MAP:

Claim No.	Description	Amount Claimed (in Rs)	Amount Awarded (in Rs)
1.	<i>Recovery of interest on mobilization advance</i>	<i>Rs 6,69,683/-</i>	<i>Rs. 2,64,697/-</i>
2.	<i>Compensation for alleged delay of performance on the part of the Claimant</i>	<i>Rs 4,51,51,685/-</i>	<i>Nil</i>
3.	<i>Loss of revenue caused to Respondent (DG-MAP) on account of alleged non-handing over of accommodation to the service personnel</i>	<i>Rs 3,43,53,765/-</i>	<i>Nil</i>
4.	<i>Costs of reference</i>		<i>Nil</i>

	<i>Additional Counter claim with regard to the inferior quality of work alleged to have been done by the Claimant</i>	<i>Rs 1,23,98,664/-</i>	<i>Nil</i>
5.	<i>Interest on due amounts for past, pendent-lite and future</i>	<i>@18% per annum</i>	<i>Nil (for past and pendente lite.) For future interest 8% p.a. (see decision on Issue 18.)</i>

7. The challenge in the present petition is confined to amounts awarded under Claim No. 3 (*increase in excise duty*); Claim No. 5 (*stoppage of work between September to December 2009 and March to June 2010*); Claim No. 11 (*cost of arbitration*) and Claim No. 12 (*award of interest*). No challenge is made to denial of the counter-claims.

8. Let us now deal with the contentions of each of these claims.

A. Claim No. 5

9. Mr. Rakesh Kumar, CGSC for DG-MAP / UOI, impugns the Award in respect of Claim No. 5, by making the following submissions:

- (i) DG-MAP was not afforded full opportunity to present its defence on revised claims of Vascon.
- (ii) The impugned award is erroneous, and contrary to law, trade usages and terms of the contract.
- (iii) The award with respect to Claim No. 5, is without any cogent basis and is in gross contradiction of the facts of the case as well as Section 73 of the Indian Contract Act, 1872, which governs the award of damages. Vascon has also not placed any evidence on record to prove

that it took all reasonable steps to mitigate alleged loss as required under Section 73. On this ground, Impugned Award is vitiated by patent illegality appearing on the face of the Impugned Award.

- (iv) There was factually no stoppage of work during the periods for which stoppage of work is claimed. In respect of Claim No. 5, except for a bare assertion and a Chartered Accountant's certificate, no evidence was produced by Vascon to show that no work was done during this period and that the entire staff and labour were sitting idle. Detail 10-A, 10-B and 10-C, by no stretch of imagination, prove claim No. 5.
- (v) As per letter of the Project Manager, directions were issued to stop the work at site, but the work was not entirely stopped. Vascon executed the work and in fact also raised Running Account Bills ('RAR') No. 3 dated 5th April, 2010 for Rs. 3.20 crores and RAR No. 4 dated 28th May, 2010 for Rs. 1.46 crores, RAR No. 5 dated June, 2010 for Rs. 0.60 crores. RARs No. 3 and 4 demonstrate that Vascon was actually executing the work at site and also received payments against this claim. No contrary evidence was produced by Vascon.
- (vi) The learned Arbitrator has committed grave error while accepting Vascon's contention that the RARs were only for material supplied; ignoring Exhibit R-112 produced by DG-MAP. On the other hand, the DG-MAP proved the claim to be wrong by providing details of deployment of labour vis-à-vis progress made at site of work through Exhibit R-112.
- (vii) The learned Arbitrator also committed a grave error by relying upon only a portion of the Exhibit R-112 and ignoring the other, which is contrary to the public policy of India. Exhibit R-112, actually shows

that the work was done by Vascon and workmen were deployed at site. This admission in Exhibit R-112 cannot be read in a piecemeal manner, and reliance only on a certain portion thereof was not warranted. If Exhibit R-112 was to be believed for accepting that workmen were deployed at the site, it also showed that work was done during the period between 12th March, 2010 to 2nd June, 2010.

- (viii) Detail 10-A filed by Vascon is for the salary alleged to be paid by Respondent to the staff from 18th September 2009 to 12th December 2009. However, there is no evidence of actual deployment of such staff at site from 18.09.2009.
- (ix) Vascon's claim for wages paid to labour from 12th March, 2010 to 2nd June, 2010 was without any evidence. Even the Chartered Accountant's certificate on this point was not placed on record. No muster rolls, proof of payments, wage slips, wage books, PF statements, ESI contribution etc. were placed on record. Thus, the details submitted by Vascon in Detail 10-C, viz. salary of supervisors, engineers and dedicated staff, ought not to have been relied upon. Likewise, the details given in Detail 10-B filed by Vascon, which has been relied upon by the learned Arbitrator for award of compensation towards salary of supervisors, engineers and dedicated staff, was also not supported with any evidence. The award of compensation is without any evidence on record and is therefore patently illegal.
- (x) Though a certificate from a Chartered Accountant was placed on record to verify that wages were paid to the workers for the period from 11th March, 2010 to 2nd June, 2010, it could not be said that Vascon suffered any loss for damages which can be compensated

under Clause 11 of GCC. The certificate dated 28th August, 2018 of the Chartered Accountant, relied upon by the learned Arbitrator for award of amount of Rs. 3,38,688/- as compensation for the period between 18th September, 2009 to 11th December, 2009 was not for the entire period but only for the month of November, 2019. Without any certificate or proof of payment of wages for the period of between 18th September, 2009 to 11th December, 2009, the award of Rs. 3,38,688/- is patently illegal and arbitrary.

- (xi) The learned Arbitrator has committed grave error in awarding compensation of Rs. 89,36,000/- for average number of 337 workmen per day, for 83 days from 12th March, 2010 to 2nd June, 2010 without there being any actual proof of payment. This computation is contrary to Clause 11 of the GCC.
- (xii) The learned Arbitrator has relied upon Clause 11 of the GCC, but ignored that the said provision provides for compensation to Vascon in respect of salaries/wages paid by the Contractor. No evidence was produced by Vascon to show that indeed salaries/ wages had been paid to the workmen as mentioned in Exhibit R-112. In the absence thereof, the award is perverse and without evidence.

ANALYSIS:

10. Before we proceed, it may be noted that the period in respect of the award can be divided into two parts: firstly, the period for which compensation has been allowed by the learned Arbitrator i.e., the two periods of alleged stoppage of work, *being* (a) between 18th September, 2009 to 11th December, 2009; and (b) between 11th March, 2010 to 2nd June, 2010. [*hereinafter*

referred to as ‘the stoppage periods’], and secondly, the other balance contract period, for which, the Arbitrator has held both parties responsible for delay [Issue 10 at para 205 of the Award]. In Claim No. 5, the awarded of Rs. 1,16,58,459/-, as against the claimed amount of Rs. 1,81,7,757/-, is on account of the stoppage periods.

11. To deal with the contentions urged by DG-MAP, it would be apposite to very briefly take note of the factual situation which led to Vascon raising this claim towards stoppage of work. It is an admitted position that work during the stoppage periods, had to be stopped on account of an order passed by this Court in relation to a dispute between DG-MAP and Sainath. This led DG-MAP to issue directions for stoppage of work. To cover this period and restart the work, DG-MAP granted additional/ extension of time – viz., 95 days for the first leg of the stoppage period, and 111 days for the second leg. Although, this extension was subject to “nil financial effect” shown in the deviation orders, however Vascon did not agree to the same. Nevertheless, the work was undertaken and the final bill was issued by Vascon, resulting in dispute which was then referred to arbitration.

12. Before the learned Arbitrator, Vascon contended that it had suffered losses and was entitled to be compensated on account of stoppage of work. DG-MAP, on the other hand, contended that there was only a partial stoppage of work. The learned Arbitrator disagreed with this contention holding that there is nothing on record to demonstrate as to in which area the work could be executed and where it could not be executed. Further, after examining the documents, he concluded that there were clear instructions

from DG-MAP to stop work on 11th March 2010 and to start work on 02nd June 2010, hence the stoppage could not be called partial. In that light, the learned Arbitrator interpreted Clause 11 of GGC relating to suspension of works and concluded that the stoppages referred to above are nothing but ‘suspensions of work’ on the instructions of the Project Manager and would fall under Clause 11(a)(ii) of the GCC, as it fell within reasons ‘other than the default of the Contractor’ (i.e. Vascon).

13. The learned Arbitrator then noticed that since the Project Manager has not determined the quantum of compensation despite request made by Vascon, it would then be up to the Tribunal to determine reasonable compensation towards salaries and/or wages paid by Vascon to its employees and labour at site for actually remaining idle during the period of suspension, in terms of Clause 11 (b) (ii) of the GCC. In this background, the learned Arbitrator examined the details of the Claims submitted by Vascon, which have been given the nomenclature of Details-10-A, 10-B and 10-C. Each of these claims were meticulously analysed, after which, the learned Arbitrator accepted the claims to a large extent, except for making few deductions therefrom. The relevant findings on the afore-noted documents, are as under:

“150. Detail 10-A is in respect of the period 18/09/2009 to 12/12/2009 (i.e., the first period of stoppage). Under serial no.1, claims have been made for "Site staff salary expense" and an additional "10% Head Office expense & staff". The additional 10% is not permissible under the said clause 11 as only employees and labour at site have to be considered. Under serial no.2 rent of machinery has been claimed which, also in not permissible under the said clause 11 of the GCC. The salary paid by the Claimant to its eight employees for the month of November 2009 has been shown as Rs 1,20,952/-. On this basis, the per day salary has been computed at Rs 4,032/-. The Claimant has shown the stoppage to be of 85

days when, in fact, it was of 84 days. Hence, the claim on this account would be 84 x 4,032/- which would be Rs 3,38,688/-. The salary paid has been certified by the Chartered Accountant vide certificate no. 02/08/2018 dated 28/08/2018 (page 168 of Volume 5). No contrary evidence has been provided by the Respondent apart from simply refuting the calculation. Hence, for the period 18/09/2009 to 12/12/2009 the Claimant would be entitled to a sum of Rs 3,38,688/- by way of compensation under clause 11 of the GCC.

151. Detail 10-B is in respect of the period 12/03/2010 to 02/06/2020 (i.e., the second period of stoppage). Under serial no.1, claims have been made for "Site staff salary expense" and an additional "10% Head Office expense & staff". As stated above, the additional 10% is not permissible under the said clause 11 as only employees and labour at site have to be considered. Under serial no.2 rent of machinery has been claimed which, also is not permissible under the said clause 11 of the GCC. The Claimant has claimed an amount of Rs 1,66,987/- towards security guard and security supervisor under serial no.3. The Claimant has claimed interest on mobilization advance under serial no.4 and alleged loss due to Bank Guarantee & margin money remaining blocked under serial no. 5. These items under serial nos. 4 & 5 are clearly outside the ambit of clause 11 of the GCC and are not admissible. The salary of Supervisors, engineers and dedicated staff at site has been claimed at Rs 22,16,784/- for this period. Both the amounts of Rs 22,16,784/- and Rs 1,66,987/- have been certified by the Chartered Accountant vide the said certificate No. 02/08/2018 dated 28/08/2018 (page 168 of Volume 5). No contrary evidence has been provided by the Respondent apart from simply refuting the calculation. Hence, for the second period of stoppage the Claimant would be entitled to a sum of Rs 23,83,771/- by way of compensation under clause 11 of the GCC in respect of Detail 10-B.

152. Detail 10-C is also in respect of the period 12/03/2010 to 02/06/2020 (i.e., the second period of stoppage) but pertains to the wages of labourers at site. Referring to the Claimant's letter dated 12/03/2010 (C-14), it was submitted that the work was directed to be stopped suddenly on 11/03/2010 when the strength of the labour force engaged by the Claimant at site was 850. It was pointed out that this was clearly stated in the said letter dated 12/03/2010. There was no denial of this fact by the Respondent at that point of time. It was also contended that since the likely period of stoppage was not indicated, the workforce at site had to be continued. It was further stated that the entire workforce could not be demobilised without paying compensation to them and consequently it had to be retained till the end of March 2010 and thereafter tapered off steadily to about 150. The Claimant has worked out the wages for 20 days of March at 54,40,000/- based on the assumption of average wages of

320/-per day for 850 workmen. For the balance period up to 02/06/2010 it has computed a figure of 58,56,000/- assuming the remaining workforce to be about 300. Thereby, the Claimant has computed a total figure of 1,12,96,000/-. This amount has not been certified by the chartered accountant. Therefore, no sanctity can be placed on the amount computed by the Claimant. However, the fact remains that it would have taken time for the Claimant to demobilise the workforce at site and therefore at any point of time during the period of the second stoppage a substantial number of labourers would have been sitting idle at the site. The Respondent, however, has filed R-112 indicating, inter alia, the deployment of labour during this period. Taking those figures against the Respondent, it can be seen from the said document (R-112) that the total labour deployed (skilled and unskilled) during the period 12/03/2010 to 02/06/2010 (83 days) was 27,925 (or 337 per day on an average). Taking the number of 27,925 workmen as being idle during this period and multiplying this with the average wages of Rs 320/- per day, reasonable compensation has been worked out as Rs 89,36,000/-.

153. Hence, the Claimant is entitled to an amount of Rs 1,16,58,459/- (i.e., Rs 3,38,688/- under Detail 10-A PLUS Rs 23,83,771/- under Detail 10-B PLUS Rs 89,36,000/- under Detail 10-C). Claim No. 5 is allowed to this extent and Issue 5 is decided in favour of the Claimant to this extent.”

[Emphasis supplied]

14. Before this Court, the principal challenge of DG-MAP relates to the manner of the computation of compensation, which is based on appreciation of evidence. Here, at the outset, it must be remembered that the strict rules prescribed under Evidence Act are not applicable in the arbitration proceedings. Under Section 19 (4) of the Act, the learned Arbitrator has the power to determine the admissibility, relevance, materiality and weight of any evidence. As can be seen from the extracted portion of the Impugned Award, the learned Arbitrator has painstakingly and meticulously examined each and every document and then allowed the claims made by Vascon to the extend the same were within the ambit of Clause 11 and were reasonable. Another aspect that has been highlighted by the Arbitrator and is also germane for the present discussion is the lack of rebuttal evidence by

DG-MAP to controvert the version of Vascon. DG-MAP has neither refuted the evidence of Vascon nor produced any contrary evidence. Therefore, if the contentions of DG-MAP are to be accepted, then this court would have to re-appreciate the entire evidence produced before the Arbitral Tribunal. Further, if on certain aspects, the Chartered Accountant's certificate was not relevant, it does not necessarily mean that Vascon was not entitled to the claims. The substantive facts that justified the claims were proved on the basis of other reliable material. In fact, it can be seen from the impugned award that for amounts uncertified by the Chartered Accountant, the learned Arbitrator has proceeded with caution and not given any sanctity to the computation produced by Vascon. He has proceeded on an assumption that it would have taken time for Vascon to demobilise the workforce at site. Therefore, at any point of time during the second leg of the stoppage period, a substantial number of labourers would have been sitting idle at the site. Since stoppage of work is not in dispute, there was credible and sufficient basis for the arbitrator to proceed on this basis, having regard to the complete facts of the case. Computation for the same is done on the basis of DG-MAP document, referred to as Exhibit R-112. This approach of the Tribunal is reasonable and cannot be faulted with.

15. The view taken by the Tribunal and the methodology for computation of compensation is not so grossly unreasonable as to shock the conscience of the Court to warrant interference in the present proceedings. This Court, in *NHAI v. ITD Cementation*,¹ has taken the view that the use of honest guesswork by arbitral tribunals was justified. Therein, the arbitral tribunal

¹ MANU/DE/0264/2010.

had awarded damages, on the basis of percentages, for use of materials and labour during the extended period of completion of contract due to delay by NHAI. The High Court affirmed the assessment done by the arbitral tribunal, including the percentage arrived at for calculating the same, on the basis that an arbitrator is not bound by the principles of Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872, and instead is guided by Section 19(4) of the Act to determine the admissibility, relevance, materiality and weight of any evidence.

B. Claim No. 3

16. On the captioned claim, the following submissions were made by DG-MAP:

- (i) Clause 25 of Special Condition of Contract ('SCC') requires submission of supporting documents along with the claim. However, Vascon did not submit any document relating to increase in excise duty, payment proof etc. Thus, Vascon failed to prove the claim, and the awarded amount *qua* Claim 3 could not have been awarded without verification of cogent evidence.
- (ii) As per Section 28 (3) of Act, the Arbitrator was under obligation to take into account the terms of the contract.
- (iii) The Arbitrator has not only ignored the express terms of the contract, but also not afforded full and equal opportunity to DG-MAP. Hence, the award is patently illegal and opposed public policy.

ANALYSIS:

17. *Qua* claim No. 3, relating to increase in Excise Duty, an amount of

Rs. 9,96,678/- has been allowed by the Tribunal. Initially, Vascon had claimed Rs. 14,07,109/- in its statement of claims, to which DG-MAP submitted its defence statement. Later, Vascon modified its claim by way of an application, which was allowed, and the claim was restricted to Rs. 9,96,678/-.

18. The grounds of challenge of DG-MAP are unspecific and vague. The learned Arbitrator has held that increase in excise duty by 2.06% was after the last date of submission of tenders. Consequently, in terms of Clause 25.1 itself, Vascon was entitled to be reimbursed for the same. There is no irrationality or arbitrariness in the same. Nevertheless, as the challenge relates to appreciation of evidence, the Court does not find any ground for interference in the same.

C. Claim No. 11 & 12

19. In this regard, the grounds of challenge by DG-MAP are as follows:

- (i) The learned Arbitrator has unlawfully allowed interest at 8% p.a. on Rs. 9,96,678/- awarded under Claim No. 3 for increase in custom duty from 03rd August 2017 till the date of award i.e., 31st December 2020. It has been argued that the Tribunal has failed to appreciate that Vascon was not sure of the amount of increase in custom duty till 02nd November 2018, when Vascon prayed for modification of claim and submitted supporting information in Detail 8; hence, the award of interest for any date prior to 02nd November 2018 is illegal.
- (ii) As Vascon is not entitled to the amounts awarded under Claim No. 3, it is also not entitled to any interest on the same.
- (iii) Against the Claims of more than Rs. 10 Crores, the claims of only

about Rs. 1.7 Crores were found admissible by the Arbitrator, which is less than 20% of claims. Yet, the learned Arbitrator had awarded 80% of the costs to Vascon. Hence, the Arbitrator committed grave error in awarding the amount of Rs. 25,85,153/- as costs to Vascon.

ANALYSIS:

20. The court does not find merit in the afore-noted contentions. Once the learned Arbitrator found that Vascon was entitled to claims including the one towards excise/customs duty, the award of interest was justified. Even if the claim for excise/customs duty was modified, it would not disentitle Vascon from award of interest, since the claim has been upheld. The interest will run concomitantly and relate back to the date when the amount fell due. Besides, the Tribunal has not accepted the claimed rate of interest of 20%, but has rather reduced it and awarded only 8%, which is found to be reasonable, warranting no interference. Likewise, the award of cost is also substantially reduced against the claimed amount. Succeeding in the arbitration, albeit for an amount less than originally claimed, cannot be a ground to interfere with the award of costs. The challenge in this respect, too, is devoid of merit.

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

SANJEEV NARULA, J

SEPTEMBER 3, 2021/v
(corrected and released on 20th October, 2021)