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

Date of Decision: 10th September, 2021

+ **O.M.P. (COMM) 267/2021 & I.A. 11550/2021**

VASCON ENGINEERS LTD.

..... Petitioner

Through: Mr. Arvind Sharma and Ms. Mrinalini
Khatri, Advocates.

versus

UNION OF INDIA REPRESENTED BY D G MAP Respondent

Through: Mr. Raghav Nagar, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J. (Oral):

I.A. No. 11551/2021 (seeking condonation of delay in filing petition)

1. The petition has been filed beyond the period of three months prescribed under Section 34 (3) of the Act. However, it is within the permissible extended period of limitation as provided by the Supreme Court in *Suo Motu Writ (Civil) No. 3/2020* titled ***In Re: Cognizance for Extension of Limitation.***

2. For the grounds and reasons stated in the application, delay in filing the petition is condoned.

3. Accordingly, the application stands disposed of.

O.M.P. (COMM) 267/2021

4. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as ‘the Act’*] has been filed by Vascon Engineers Ltd. (being the Claimant before the Arbitrator) [*hereinafter referred to as ‘Vascon’*] seeking setting aside of the Arbitral Award dated 31st December, 2020 [*hereinafter referred to as ‘Award’*], whereby the Ld. Sole Arbitrator has rejected certain claims of Vascon.

5. Recently, this Court had the occasion to deal with a challenge to the impugned Award at the instance of the Directorate General of Married Accommodation Project (DG-MAP), working under the Ministry of Defence, Union of India [*hereinafter referred to as ‘DG-MAP’*] in O.M.P. (COMM) 262/2021, which was decided *vide* order dated 03rd September, 2021. In the said judgment, the Court recounted the facts of the case exhaustively. Thus, for the sake of brevity, the same are not being repeated and are to be read as part of the instant order.

6. The challenge in the present petition is confined to rejection of following claims: (I) Claim No. 1 Part - III (*Additional work of Sagol/ Neeru Finish in internal plaster*); (II) Claim No. 2 (*Increase in rates of cement, steel, sand and coarse aggregates*); (III) Claim No. 4 (*Increase in labour costs*); Claim No. 9 (*Delayed / Underpayment of RARs*); (IV) Claim No. 10(a) (*Prolonged commitment to contract*); (V) Claim No. 10(b) (*Prolonged commitment of Claimant’s T&P*); and (VI) Claim No. 10(c) (*Prolongation of the validity periods of the Bank Guarantees*).

CLAIM WISE OBJECTIONS AND ANALYSIS:

I. CLAIM NO. 1 PART - III (ADDITIONAL WORK OF ‘SAGOL/NEERU FINISH’ IN INTERNAL PLASTER)

7. Mr. Arvind Sharma, counsel for Vascon, impugns the Award in respect of rejection of Claim No. 1 Part - III, by making the following submissions: -

- (i) The Contract¹ provided for getting “*even and fair*” finish in internal plaster while specifying the use of river sand from the specified source – viz. Ghodnadi/ Mungi Paithan. However on site, DG-MAP demanded “*even and smooth*” finish. This was not possible as per the specifications of the Contract, given the quality/coarseness of sand available from the specified sources. The specifications “*even and fair*” and “*even and smooth*” are two distinct requirements. The only way of getting “*even and smooth*” finish was to provide a layer of ‘sagol/neeru finish’, over the finish of plaster, which amounts to additional work, and for that Vascon should be compensated.
- (ii) Vascon, provided a layer of sagol finish over the internal plaster surfaces, on specific instructions. The additional work done was duly accepted by DG-MAP, and carried out under close supervision of DG-MAP’s on-site engineers; yet the payment was unlawfully withheld.
- (iii) Reliance is placed upon two judgments of this Court:

(a) Union of India v. Inderjit Mehta Construction Pvt. Ltd.,² wherein,

¹ 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**’].

² 2018 SCC OnLine Del 9063, at paras 16-19.

after considering similar contractual provisions, this Court upheld the arbitral award for payment of sagol finish, when the specifications provided for “fair & even” finish.

(b) *MCD v. Ravi Kumar*,³ where this Court held that by accepting additional work, notwithstanding a formal agreement, GoI/MCD was obligated make payment in respect thereof, in light of Section 70 of the Indian Contract Act, 1872 [hereinafter referred to as ‘*Contract Act*’].

ANALYSIS

8. On this issue, the findings of the Ld. Arbitrator are as follows: -

“29. Clause 11.1.3 of Particular Specifications (at page 235 of the Contract) reads as under:

“11.1.3 All plastered/rendered surfaces shall be trowelled to fair and even surface with steel trowel (without using extra cement).”

30. It is evident that there is no mention of ‘sagol finish’. All that the contract required was that the plastered surface should be “fair and even” and this should be obtained by trowelling with a steel trowel and that, too, without using extra cement.

31. It is true that the Claimant wrote several letters (C-75, C-76, C-78, C-79, C-80/1 and C-80/2) to the Respondent, putting its case for “sagol finish” and requesting for a Deviation Order (DO) in this regard. It is also true that the Respondent did not reply to any of those letters. It is the case of the Claimant that the said finish was required because of the nature of the sand available in Pune and that the Respondent had also given a go-ahead the Claimant employing the said ‘sagol finish’. In fact, it was urged on the part of the Claimant that even the users had requested for such a finish.

32. Let me assume that the Claimant was right in submitting that a fair and even surface could not be achieved because the quality of the sand was poor and that a fair and even surface could only be achieved by giving a ‘sagol finish’ to the plastered surfaces. For the sake of argument it may even be assumed that the Claimant’s assertion that it had been given the go-ahead by the users. But, this does not enable us to detract from the contractual provisions. In particular, clause-of the GCC which specifically deals with ‘deviations’. The said clause, inter alia, provides as under:

“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 P.M.”

³ 2017 SCC OnLine Del 11902, at paras 10 and 11.

The said provision expressly prohibits the contractor from making any alteration, addition or omission in respect of the works specified in the tender documents unless and until the contractor has obtained written instruction from the project manager. In the present case it is evident that while the Claimant was repeatedly seeking written instructions from the project manager for the said sagol finish, no such written instruction was forthcoming from the project manager. It may be that the Claimant has provided the said sagol finish in respect of internal plastering work but, if that be the case, it was done without the written instructions of the project manager. When the contract is specific and clear that any deviation would have to be only on the written instructions of the project manager, any deviation carried out by the Claimant of its own accord or on some alleged instructions (of which there is no proof) cannot be to the account of the Respondent. If the Claimant were to be compensated for the sagol finish without any written instruction from the project manager, it would run counter to the contract between the parties.

33. There was a lot of debate and argument on both sides with regard to what is meant by the expression “fair and even” and “smooth surface”. It is not necessary to go into that issue at all. First of all, clause 11.1.3 of the Particular Specifications clearly stipulates that the fair and even surface is to be achieved by trowelling with a steel trowel. That is all that is specified. It does not call for a ‘sagol finish’. Secondly, if the internal plastered surfaces were to have a sagol finish it would require a specific deviation order/written instruction from the project manager. Since there was no deviation order/written instruction from the project manager to the Claimant for providing a sagol finish, even if the Claimant has provided a sagol finish, it has to be on the Claimant’s account and not on the account of the Respondent.

34. The Claimant had referred to the decision of the High Court of Delhi in Union of India v. Inderjit Mehta Construction Pvt. Ltd.: 2018 SCC Online Del 9063 to submit that in a similar case the court had allowed such a claim. That case is distinguishable on facts. This will be evident from the following extract from the said decision:

“15. As noticed above, there is no dispute that the Respondent had, in fact, provided, Neeru/Sagol finish to the internal walls; at any rate, no contention as to the use of Neeru/Sogol coat has been raised before this Court, and the finding of the Arbitral Tribunal in this regard has not been challenged by the learned counsel for the petitioner.

16. In view of the above, the Arbitral Tribunal cannot be faulted directing the petitioner to pay the cost for the same. Although the said work was not part of the contractual specifications, there ample material to indicate that the petitioner had insisted on a plaster finish that could not have been provided on the basis of the specified material and, thus, the additional coating over the plaster surface, as was performed by the respondent, was required. The finding of the Arbitral Tribunal that the petitioner (Project Manager) was insisting on a smooth finish that could not be provided by the material specified in the Contract Agreement, is a question of fact. And unless this finding is established to be perverse or based on no material, it cannot be interfered with in proceedings under Section 34 of the Act. (See: Associated Builders v. Delhi Development Authority, (2015) 3 SCC 49)

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18. The learned counsel for the petitioner had earnestly contended that the Arbitral Tribunal had erred in presuming that a smooth plastered finish was required as the contractual provisions only provided for the surface to be fair & even. This contention is unmerited, as the Arbitral Tribunal had noted that even though the contractual provisions specified 'fair & even' finish, the petitioner (the Project Manager) had been insisting on a smooth finish and had not accepted the plastered finish as provided by the respondent. This is also borne out by the letter dated 26.03.2010 empathically asserting that "the finish to plaster has to be smooth and even, the measures adopted to achieve the same is to be met by you."

(underlining added)

35. In that case there was ample material to indicate that the Employer had insisted on a plaster finish that could not have been provided on the basis of the specified material and, thus, the additional coating over the plaster surface, as was performed by the contractor, was required. The Arbitral Tribunal in that case returned a specific finding of fact that the Project Manager of the employer was insisting on a smooth finish that could not be provided by the material specified in the contract. This is not so in the present case. Moreover, the insistence of the Project manager in that case was borne out by a letter dated 26.03.2010 empathically asserting that "the finish to plaster has to be smooth and even, the measures adopted to achieve the same is to be met by you." There is no such letter in the present case.

36. The Claimant also sought to rely upon State of U.P. v. Chandra Gupta & Co.: 1976 SCC OnLine All 159. However, that case was also different and distinguishable. In that case there was evidence of the fact that the plaintiff therein had been orally asked to do the RCC work and this also withstood the test of cross-examination. In the present case, there is no oral evidence. All evidence is documentary. And, there is no document from the Respondent directing the Claimant to provide the "sagol/ neeru" finish. The requirement under the contract was also different. In the case at hand the requirement was for "written instructions" whereas in the case before the Allahabad High Court the requirement was "as directed" by the Engineer Incharge from time to time. And there was a drawing showing alterations and changes in the nature of work. This was treated as an order in writing. These differences are crucial and for these reasons, the said decision would not come to the aid of the Claimant. The relevant portion of the said decision is extracted below:

"12. Another submission made by the defendant's counsel was that Cls. 41 and 44 of the Special Conditions of the contract required the plaintiff to obtain an order before executing the work, and as the plaintiff did so without obtaining such a permission, he was not entitled to get the price. The submission made cannot be accepted for two reasons. The first reason being that the evidence filed by the plaintiff shows that he had been orally asked to do the R.C.C. work. The statement made by Jai Prakash, P.W.2, has already been referred to by me above, There is nothing in his cross examination which could shake his testimony. It shows that he had been orally instructed for the work which is in dispute. Reference may also be made to Condition No. 5 of the Detailed Specifications, which requires that "all work shall be carried out in accordance with the detailed drawing to be supplied or as directed by the Engineer Incharge from time to time." As the work was done

by the plaintiff in accordance with the oral instructions received by him from the Engineer Incharge, therefore, it cannot be said that the plaintiff was not entitled to get the price for R.C.C. work. Ext. 2 dated 22-2-1958, the second drawing also shows alterations and changes in the nature of work, i.e., reinforced concrete work. Therefore, this exhibit itself can be treated as an order in writing. Accordingly, the submission of the counsel for the State that as the plaintiff had not obtained any order in writing, he could not get the price for this item, is liable to fail.”

[Emphasis supplied]

9. The Ld. Arbitrator has examined the contractual provisions viz ‘deviations’ and held that under the Contract, consent of the Project Manager was necessary. Admittedly, there were no written/ formal instructions issued from the Project Manager to carry out the alleged additional work (with the ‘sagol/neeru finish’). Yet, Vascon proceeded to carry out the work, and now it seeks to justify the same as ‘additional work’ alleging that the same was essential to meet the contractual specifications. In the opinion of the Court, in the absence of contractually stipulated written instructions, the work carried out remained a unilateral exercise on the part of Vascon, without any confirmation on part of DG-MAP. There was no sanctioned additional work. If contractual specifications entailed deviation, the same had to be done as per the procedure provided, for which consent of the Project Manager was necessary. In absence thereof, the Ld. Arbitrator has rightly rejected the claim of Vascon. There is also no documentation/ correspondence to show that DG-MAP agreed to substitution/alteration of the original contractual condition. None of the correspondence relied upon by Vascon makes out a case of consent of DG-MAP, which, on the contrary continued to remind them of the contractual specifications.

10. The Ld. Arbitrator had also taken into consideration the judgment of

this Court in ***Inderjit Mehta*** (*supra*) and rightly found it to be distinguishable on facts. In ***Inderjit Mehta*** (*supra*), the Court returned a specific finding of fact that the Project Manager of the Employer was insisting on a “*smooth finish*” that could not be provided by the material specified in the agreement; this is not so in the instant case. The reasoning given by the Ld. Arbitrator clearly enunciates the differences between the two cases, and thus cannot be faulted with. Besides, a decision of the Court under Section 34 of the Act, upholding a factual finding of an arbitral award, cannot be cited as a binding precedent.

11. Likewise, decision of this Court in ***Ravi Kumar*** (*supra*) is also distinguishable on facts. In the aforementioned judgment, the Sole Arbitrator had come to a finding of fact that the sanction for additional work had been obtained from MCD (the contracting party in arbitration). It was also held that it was for MCD to get the sanction, and not Respondent (the other contracting party) therein. In these circumstances, this Court, while examining the challenge to the findings of the Sole Arbitrator, held that the Respondent therein could not be denied payment for the additional work merely because under the scheme – the work exceeded the amount sanctioned by the Government. Holding that to be a matter *inter se* the MCD and the Government of India, Court upheld the impugned award. Thus, the facts and circumstances of the two cases are entirely different.

12. That apart, reliance upon Section 70 of the Contract Act is completely misplaced. Section 70 cannot be made applicable in the present case as there exists an express contract between the parties dealing with deviations. Thus,

the claim urged by Vascon, based on the concept of *quantum meruit*, cannot be allowed.

13. In view of the above, the Court does not find any ground to interfere with the findings of the Ld. Arbitrator on this aspect, and accordingly, this contention of Vascon is rejected.

II. CLAIM NO. 2 (INCREASE IN RATES OF CEMENT, STEEL, SAND, AND COARSE AGGREGATES AFTER JULY 2020) & CLAIM NO. 4 (INCREASE IN LABOUR COSTS)

14. Mr. Sharma impugns the Award *qua* the aforementioned claims by making the following assertions: -

- (i) The Ld. Arbitrator has failed to appreciate that DG-MAP caused delays which led to increase in costs that were borne by Vascon. They cannot be allowed to get away by merely granting time extensions to Vascon for the contract period. Vascon's claims were in terms of Section 55 of the Contract Act;
- (ii) The Contract between the parties was for a duration of ten months. Vascon had to face a time overrun of 67 months in total on account of delayed performance of obligations by DG-MAP. This included two strings of stoppages of work for a period of nearly ten months. Due to delays by DG-MAP in commencement, performance of obligations as well as completion, the original completion date - 16th July, 2010 – was made irrelevant. In these circumstances, for the extra financial burden on Vascon caused due to delay and defaults attributable to DG-MAP, it should be reimbursed.

- (iii) Vascon made claims and furnished calculations based on bills raised by supplying agencies from time-to-time and increase was calculated with reference to price data as on 16th July, 2010 – viz. the original completion date. This data was verified and certified by a Chartered Accountant and should have been accepted by the Ld. Arbitrator. DG-MAP had provided numerous Extension Performa to Vascon, giving reasons of delay, and thus delay is attributable to it;
- (iv) The Ld. Arbitrator has failed to appreciate clause 19 of the Special Conditions of Contract (‘SCC’).⁴ The said clause is applicable during the original completion period of 10-months wherein, there is no reimbursement/ refund of variations. The said clause ought to be read along with other conditions of the Contract;
- (v) The delay caused by DG-MAP, coupled with its non-compliance/ breach/ delay in performance of its prior obligations (such as handing over of sites on the date of commencement) cannot run concurrently with the contractual provision of time being the essence, as prescribed in the General Conditions of Contract (‘GCC’).⁵ Thus, DG-MAP’s belated performance of its obligation to given instructions in writing for provisional quantities of items, under Clause 7 of GCC,⁶ has to be read along with the other conditions of GCC and not in isolation;

⁴ Clause 19 of the SCC, titled ‘Re-Imbursement/Refund Of Variation In Prices’, states – “No escalation, reimbursement what so ever shall be made to the contractor for increase in prices of materials and fuel and wages of labour during contract period including extension of time as may be granted, which the contractor may have to incur during execution of the work on any account and as announced by the Central Govt or State Govt or other statutory bodies. The contractors shall quote their rates accordingly.”

⁵ Clause 13 of GCC states – “Time is of the essence of the Contract and is specified in the contract documents”.

⁶ Clause 7 of GCC states – “The full amount of provisional lump sums inserted in the tender documents shall be deducted from the Contract Sum and value of work ordered and executed there under shall be ascertained by measurements or valuations as for deviations. No work under these items shall be begun without instructions in writing from the PM.”

- (vi) Clause 19 of the SCC should have been treated as void, in terms of Sections 23 and 28 of the Contract Act, as it takes away the Vascon's right to claim damages/ losses when the contract is either prolonged for defaults of DG-MAP or when Vascon would commit contractual breaches;
- (vii) The prolongation of Contract by 67 months was caused by DG-MAP. After 45 months into the Contract, DG-MAP had to carve out another phase for completion of the Contract. This phase took another 32 months for completion on account of delays attributable to DG-MAP. This could not have been ignored by the Ld. Arbitrator.

ANALYSIS

15. The Ld. Arbitrator has dealt Claim No. 2 and 4 collectively since these involved similar questions – Claim No. 2 pertains to increase in procurement rates of material with reference to purchase rates as on July, 2010; similarly, Claim No. 4 was for increase in labour costs due to prolongation beyond the 10-months stipulated period. The Ld. Arbitrator has disallowed these claims due to the contractual prohibition contained in Clause 19 of the SCC. The Ld. Arbitrator noticed that Clause 19 had been interpreted by the Supreme Court in *Union of India v. Varindera Constructions Ltd.*,⁷ and also noted the similarity in the two cases.⁸ With that understanding, he followed the view of the Supreme Court in interpreted the said clause.

16. In this light, it would be apposite to note the following observations of

⁷ (2013) (2018) 7 SCC 794.

⁸ The work therein also could not be completed in the original stipulated period fixed under the contract, but was completed within the extended period of contract.

the Ld. Arbitrator: -

“120. Clause 19 of the SCC expressly provides that no escalation, reimbursement whatsoever shall be made to the Claimant (contractor) for increase in the price of materials and fuel and wages of labour during the contract period including the extension of time as may be granted. It is clear and categorical that it applies both to price of materials and wages of labour. It is also clear that the bar on escalation/ reimbursement is operative during the contract period including the extension of time which may be granted. Therefore, on a plain reading of clause 19 of the SCC, the bar on escalation/ reimbursement relates not only to the original date of completion but also to the extended period which may be granted.

121. Exactly the same clause 19 had come up for consideration by the Supreme Court in the case of Varindera Constructions (supra). The Supreme Court observed as under:

“13. It is well-settled canon of law that parties are free to decide their own terms and conditions in case of a contract. In the instant case, Clause 19 of the special conditions deal with issue of bar on reimbursement of certain payments on account of escalation. It is apt to reproduce the said Clause 19 hereinbelow:

“19. Reimbursement/Refund of variation in prices-No escalation, reimbursement, whatsoever shall be made to the contractor for increase in price of materials and fuels and wages of labour which the contractor may have to incur during execution of the work on any account. The contractor shall quote their rates accordingly.”

On a plain reading of abovementioned clause, prima facie, it appears that the appellant made it clear that the contractor shall quote their rate after having regard to this clause that no reimbursement regarding any escalation whatsoever be made to the contractor if any such escalation takes place during the subsistence of the contract which the respondent with open eyes had agreed. The word "whatsoever" as used in Clause 19 suggests that even any escalation takes place due to the action of the Government would also not be reimbursed.

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18. 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 specifically 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 the 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.

(underlining added)

122. The Claimant is not correct in attempting to distinguish this decision on the ground that the escalation sought in that case was during the original period whereas the escalation sought in the present case was in respect of the extended period. First of all,

even in the case before the Supreme Court, the work was completed not within the original period fixed under the contract but within the stipulated extended time period of completion. This is evident from paragraph 4 of the said decision where it is stated.

“4. As per the terms of the contract, the respondent started the work of construction as per the schedule on 20-3-2007 and finally completed the work within the stipulated extended time period of completion....”

123. Secondly, Clause 19 of the SCC, but its own term, is operative in respect of not only the original contract period but also the extended period. It expressly says so. The said decision of the Supreme Court is squarely applicable to the present case also.”

17. Clause 19 of the SCC, in the instant case, indisputably restricts escalation/ reimbursement during the contract period and also the extended period. The expression “*whatsoever*” found in the clause was interpreted by the Supreme Court to include any escalation that takes place due to action of the Government. Further, the Supreme Court in ***Varindera Construction*** (*supra*) has also noted that the Clause does not start with the word “*subject to*”, and, finding no other provision(s) that specifically allowed for reimbursement of wages in case of escalation, the court did not allow escalation for the extended period. Finding complete factual similarity, the Ld. Arbitrator’s interpretation of the Contract in light of the aforesaid judgment of the Supreme Court, cannot be faulted with. Besides, the aforesaid findings of the Ld. Arbitrator are just, reasonable, and in accordance with the decision of the Supreme Court in ***Varindera Constructions*** (*supra*) that squarely applies to the present case.

18. In ***South East Asia Marine Engineering and Construction Limited v. Oil India Limited***,⁹ the Supreme Court held that error of interpretation of a contract is considered to be an error within the exclusive domain of the

⁹ (2020) 5 SCC 164.

Arbitral Tribunal, that cannot be a ground to set aside an award. With that being the position, the Court does not find any ground to substitute the view of the Ld. Arbitrator with its own. The only room for the Court to step in is a matter of exception, where the error of interpretation is completely perverse.¹⁰

19. The other ground of challenge urged by Vascon - that Clause 19 of the SCC is invalid and void in terms of Sections 23 and 28 of the Contract Act - was rejected by the Ld. Arbitrator also by placing reliance on ***Varindera Construction*** (*supra*). This contention also merits no consideration.

20. The argument founded on Section 55 of the Contract Act too was rightly rejected by the Ld. Arbitrator, in the following words: -

“125. that time was of the essence of the contract and also submit that the second part of section 55 of the Contract Act was applicable. If time was of the essence, the second part would not apply. Even assuming that time was not of the essence and that, therefore, the second part of section 55 applied, the Claimant has no case. This is so because it is the Claimant who promised to complete the work within 10 months. Therefore, the Claimant is the promisor and the Respondent is the promisee. The right to compensation under the second part of section 55 is given to the promisee and not to the promisor (i.e., the Claimant in this case). So, whichever way one looks at the issue, the Claimant cannot fall back on or take recourse to section 55 to avoid the bar on escalation contained in clause 19.”

21. The aforementioned view is just, proper and calls for no interference. Thus, the Court does not find any merit in the contention of Vascon that it is entitled to Claims No. 2 and 4 and accordingly, the same are rejected.

III. CLAIM NO. 9 (DELAYED / UNDERPAYMENT OF RARs)

¹⁰ See: ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49 – Findings of facts of the Tribunal cannot be interfered with in absence of perversity, lack of material/ evidence or by reappreciating evidence.

22. *Qua* this claim, Mr. Sharma makes the following submissions: -

- (i) The Ld. Arbitrator has unreasonably awarded just Rs. 3,73,578/- against Rs. 35,45,629/- claimed by Vascon, by erroneously rejecting the claim for delayed payments in Running Account Receipts (RARs);
- (ii) The Ld. Arbitrator has failed to determine the reasonable period for payment of RARs, after their submission by Vascon, and thus, ignored contractual provisions;
- (iii) The Ld. Arbitrator has, erroneously, accepted certain provisions in CPWD's General Conditions of Contract, completely ignoring the relevant provisions contained in the Contract itself. CPWD's General Conditions of Contract provides for making RAR payments for 10-15 days in case of outstation works and also payment of interest where the delay is beyond 45 days. These conditions cannot be read in the present Contract between Vascon and DG-MAP. Rules for each department differ and the Ld. Arbitrator had to decide the aforesaid claim within the scope of the contractual provisions between the present parties. Further, CPWD GCC's condition of 45 days for making payment of RARs does not gel with the instant contractual condition that entitles Vascon to raise RAR claim every 30 days, and permitting 45 days for payment of RARs would delay the submission of the next RAR. In fact, Vascon's case pertained to the delay in processing payments under RARs and claim for consequential damages, and had nothing to do with the CPWD. For these reasons, reliance upon the conditions contained in CPWD's General Conditions of Contract, is misconceived and wholly erroneous;
- (iv) Since the Contract did not specify the time to be taken for compliance

of RAR payments by DG-MAP, in such cases, Section 46 of the Contract Act would be applicable which provides that a promise must be performed “*within a reasonable time*”. In the present case, the reasonable time for release of RAR payment(s) would be on the date of certification of RAR bills by the Project Manager and Station Commander.

ANALYSIS

23. Vascon raised the aforesaid claim contending that it was liable to receive RAR payments by DG-MAP on the dates such RARs were certified by the Project Manager and the Station Commander. The findings of the Ld. Arbitrator, on this issue, are given as under: -

“198. It is clear that no period for payment of RARs has been provided in the Contract. In view of section 46 of the Contract Act, the payments would have to be made within a 'reasonable time'. The explanation to the said provision makes it clear that 'what a reasonable time' is, in each particular case, a question of fact. The Respondent has pointed to CPWD contracts where 45 days' time is fixed beyond which the payor would incur interest. In my view, considering the provisions of clause 54 of the GCC which requires certification of the Project Manager and the Station Commander as well as Clause 56 of the GCC which, inter alia, requires all payments due under the Contract to be made by the concerned PCDA/ CDA, a period of 45 days would also be reasonable in the present case. Looking at the said Annexure 2 to the Statement of Case, all payments (other than in respect of RAR Nos. 25 & 26) have been made within 45 days. Insofar as RAR 25 is concerned the delay beyond 45 days is of only 6 days. The interest amount would be Rs 5,996/- (at interest rate of 8% p.a. as indicated below). As regards RAR 26, which is the final bill, clause 56 of the GCC provides for a period of 6 months for payment in respect of which there is no dispute. The same was, in any event paid within 70 days as per Detail 12.

199. The Claimant is right in submitting that while the Respondent has replied to the Claimants case for delayed payment of RARs, it has not controverted the Claimant's case in respect of under-payment of RARs, the details of which are provided in Detail 12: Part III in Volume 5. The amount claimed under this head is Rs 8,95,295/-. But this has been computed by taking the interest rate of 20% p.a. This is an exorbitant rate of interest. In my view, the rate of interest provided under the Contract for mobilization advance would be the reasonable rate. Clause 26.1 of the SCC stipulates that rate to be 8% per annum simple interest. Accordingly, the amount would have to be recalculated on the basis of interest at the rate of 8% p.a., which would come to Rs 3,67,582/-.”

24. The aforesaid reasoning of the Ld. Arbitrator is an interpretation of the terms of the Contract, which the Court finds to be reasonable, and therefore, no ground for interference is made out. The Ld. Arbitrator has noted that no condition was stipulated in the Contract for a specified period for processing the RARs by DG-MAP. Therefore, relying upon Section 46 of the Contract Act, he proceeded to decide as to what would be a “*reasonable period*” for processing the RARs. On this aspect, he relied upon CPWDs’s General Conditions of Contract, as it specified that in case of delay in making the payment of the bills after 45 days’ time, interest would accrue. On this basis, the Ld. Arbitrator proceeded to award interest @ 8% (simple interest) for any delayed payment beyond 45 days’ time period. It is not perverse for an arbitrator to look at similar provisions in comparable contracts, in order to arrive at his findings on reasonableness, when the Contract in question is silent on an aspect. This finding is reasonable and warrants no interference.

25. Accordingly, this ground of challenge of Vascon is rejected.

IV. COMMON CLAIM FOR CLAIMS NO. 10 (A), (B) & (C) (ON ACCOUNT OF ALLEGED CONTRACTUAL BREACHES)

26. Mr. Sharma impugns the Award in respect of the aforesaid claims by making the following assertions: -

- (i) Claim No. 10 (A) was for Vascon’s overstay and commitment to contract for nearly 67 months; Claim No. 10 (B) was for Commitment of Vascon’s tools and plants and construction machinery at site for a period much longer than terms of the Contract; and, Claim No. 10 (C) was for prolongation of bank guarantees due to default of DG-MAP.

- (ii) DG-MAP cannot get away with delays in performance and decision-making which led to Vascon deploying its resources on site for over 67 months – which is way beyond the 10 months contemplated under the Contract, especially when the Contract provided for time being of essence; this was unanticipated by Vascon. DG-MAP was aware of the contractual terms and the consequences in case of defaults(s). In terms of Section 55 and 73 of the Contract Act, Vascon was, therefore, justified in making claims in compliance with the aforesaid provisions;
- (iii) The Ld. Arbitrator erred by not returning any findings on: (a) the matter of time being of essence in this Contract; nor on (b) the matter of commission of contractual breaches by DG-MAP; despite these aspects brought out expressly in Vascon's claim statement. Further, no reasons were given for his 'summary rejection' of Vascon's claims.
- (iv) The Ld. Arbitrator wrongly refused the amount claimed on account of delays caused owing to default on part of DG-MAP, in terms of: (a) the extended/ prolonged time the tools and plants (T&P)/machinery provided by Vascon stayed on site for a period longer than originally anticipated for viz. till September 2011, instead of July 2010; and (b) the prolongation of Bank Guarantees due to delays caused by DG-MAP;
- (v) The reasons for the delay, as revealed by DG-MAP, were not attributable to Vascon. Despite the existence of record(s) as provided by DG-MAP, the Ld. Arbitrator has wrongly attributed delay on the part of Vascon;
- (vi) The Ld. Arbitrator also erred by failing to appreciate that the claim awarded for Claim No. 5 is not inclusive of compensation for idle

labour under this Claim.

ANALYSIS

27. The findings of the Ld. Arbitrator on this issue are given as follows: -

“201. The Claims under this issue are predicated on the contention that the Respondent was solely responsible for the delays which led to the prolongation of the contract period by 67 months and thereby breached the Contract. Several, time extensions were sought for by the Claimant and also granted by the Respondent. All the three Phases, I, II & III were completed within the respective extended periods.

202. On the one hand the Claimant alleges that it was the Respondent who was responsible for the delays because of, inter alia, delay in decision making, delay in providing details for provisional items, additional work was ordered without drawings/ sketches/ plans, frequent Deviation Orders were issued and delay in the Respondent complying with its obligations in respect of ‘Bull Electric Supply’. On the other hand, it is the case of the Respondent that the delays were due to the Claimant on account of, inter alia, lack of full mobilization of men and machinery, failure to deploy technical staff, failure to provide Time and Progress Chart/CPM Charts, slow progress of work despite repeated reminders by the Project Manager/ Consultant and poor workmanship resulting in delays on account of required rectifications of the Claimant.

203. At this juncture, it may be pointed out that the Claimant has already been awarded compensation under Issue 5 above as was permissible under the Contract for the two period (18/09/2009 to 11/12/2009 and 11/03/2010 to 02/06/2010) when work was stopped/ suspended by the Respondent.

204. In respect of the balance period of delay, there is extensive correspondence on both sides to support their respective claims that the other side caused the delay. I have gone through the entire correspondence referred to in the pleadings of the parties and referred to by the learned counsel during arguments. On an overall assessment, apart from some delay for which neither party was reasonable, I am of the view that the responsibility for the delay/ prolongation rests equally and concurrently on both the Claimant and the Respondent.

205. In these circumstances, the three claims put forth by the Claimant under this issue cannot be allowed. Accordingly, Issue 10 is decided by holding that both the parties are equally to blame for the delay and prolongation (apart from the two periods of stoppages/ suspensions which has been separately dealt with under Issue 5) and since the Claimant is an equal contributory to the delay, its claims covered by the Issue cannot be sustained.”

28. The aforesaid findings reveal that the Ld. Arbitrator has rejected the afore-noted claims by holding both parties to be equally responsible for delay. The Ld. Arbitrator has also taken note of the fact that Vascon was awarded

compensation under Claim No. 5 for the two periods where the works were paused/ suspended by DG-MAP [18th September, 2009 to 11th December, 2009, and, 11th March, 2010 to 22nd June, 2010]. For the balance period of delay, the Ld. Arbitrator, on the basis of correspondence exchanged between the parties and overall assessment of the case, found that for some part neither party was responsible, and for others, the prolongation was made equally and concurrently on part of both the parties. These findings were based on analysis of factual circumstances and the evidence led before the Ld. Arbitrator. The re-appreciation of evidence led before the Tribunal, to redetermine which party is responsible for the delay, cannot be done in present proceedings. The Court finds that the Ld. Arbitrator has, in a reasonable and just manner, after a detailed analysis of the documents on record, arrived at these factual findings and rightly rejected Claims No. 10 (A), (B) and (C).

CONCLUSION

29. There is no merit in the challenge raised by Vascon. The Court finds no ground to interfere with the findings on any of the issues raised.

30. In view of the foregoing, the present petition, along with the pending application, is dismissed.

SANJEEV NARULA, J

SEPTEMBER 10, 2021

as/nd/hd

(corrected and released on 3rd November, 2021)