

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.08.2021

+ **O.M.P. (COMM) 312/2018 and IA Nos. 9696/2018 & 8035/2021**

DSI IDC

..... Petitioner

versus

M/S. H.R. BUILDERS

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Ms Firdouse Qutb Wani, Advocate
with Mr Gajender Sharma and
Mr Satish Chandra, ARs for DSI IDC.
For the Respondent : Mr Avinash Kumar Trivedi, Advocate
with Mr Ayush P. Shah, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J.

1. The petitioner (hereinafter 'DSI IDC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an arbitral award dated 13.04.2018 (hereafter the 'impugned award') rendered by an Arbitral Tribunal comprising of a Sole Arbitrator.

2. The impugned award was rendered in the context of disputes that have arisen between the parties in connection with a contract awarded to HRB for refurbishment and upgradation of twenty-five

government schools. The Arbitral Tribunal has rendered a net award of ₹3,04,91,623/- along with interest, in favour of HRB.

3. Briefly stated, the relevant facts that are necessary to address the controversy are as under:

4. The Government of NCT of Delhi launched a project for refurbishment and upgradation of 198 schools run by the Government of NCT of Delhi. The respondent (hereinafter 'DSI IDC') was entrusted with implementation of a part of the project covering twenty-five schools.

5. On 08.07.2009, DSI IDC invited tenders for entire works (both civil and electrical) to be executed in respect of twenty-five schools being a part of the project entrusted to DSI IDC. HRB submitted its bid for executing the aforesaid works. After negotiations, DSI IDC accepted HRB's offer to execute the said works for a total consideration of ₹35,46,00,174/-. On 18.08.2009, DSI IDC issued a Letter of Acceptance (LoA) awarding the work of "*Integrated Infrastructure Development of Delhi Govt. Schools*" under the sub-head "*Improvement and Upgradation of 25 Government Schools Buildings in North West 'A' District (Composite Work)*".

6. The work was to commence on 28.09.2009 and it was stipulated that the work would be completed on or before 27.09.2010.

7. Thereafter, on 30.09.2009, the parties entered into a formal agreement (hereinafter 'the Agreement') for execution of the works.

8. DSIIDC did not handover the work of twenty-five schools as agreed to under the Agreement but handed over work pertaining to only twenty-three schools. There were considerable delays in completion of the works contracted to HRB and, the same were finally completed on 18.01.2012; that is, after a delay of 478 days.

9. DSIIDC withheld part payments of the Final Bill and also made certain recoveries from the amount payable to HRB. According to DSIIDC, HRB had defaulted in performance of its obligations under the Agreement within the stipulated time. HRB disputed the same. According to HRB, the delay in execution of the works was due to various reasons attributable to DSIIDC and it was not responsible for any delay.

10. DSIIDC also claimed that the works executed were faulty and sought to recover damages from HRB. HRB, on the other hand, claimed that it was not only entitled to the payments withheld by DSIIDC but was also entitled to compensation on account of escalation and prolongation of works as well as profits for the works reduced from the scope of the Agreement (work relating to two schools which were not handed over to HRB).

11. In view of the aforesaid disputes, HRB invoked the Arbitration Clause to refer the disputes to arbitration and requested that the Arbitral Tribunal be constituted to adjudicate the disputes. On 24.10.2016, the Chief Engineer of DSIIDC appointed Sh. O.P. Bhatia, Former Additional DG (Works Special), CPWD as the Sole Arbitrator

to adjudicate the subject disputes.

12. HRB filed its Statement of Claims before the Arbitral Tribunal. DSIIDC filed its Statement of Defence as well as counter claims amounting to ₹20,05,00,000/-. One of the claims (Claim No.1) preferred by HRB was greater in value than as indicated by HRB in its request for arbitration, which was subsequently referred by Chief Engineer of DSIIDC to the Arbitral Tribunal. In its request for arbitration, HRB had, *inter alia*, claimed ₹53,90,498/- as payment due under the Final Bill. However, in its Statement of Claims, HRB made a claim of ₹1,40,94,470/- as due and payable under the Final Bill.

13. In addition, HRB also claimed ₹5,00,000/- as costs of arbitration (Claim No.9). The said claim was also not included in the claims that were initially made by HRB in its request for arbitration before the concerned authorities of DSIIDC. Consequently, this claim was also not included in the disputes referred by the Chief Engineer, DSIIDC to the Arbitral Tribunal.

14. In view of the above, on 29.03.2017, HRB sent a letter to the Chief Engineer, DSIIDC requesting it to modify the amount of Claim No.1 from ₹53,90,498/- to ₹1,40,94,470/- and, to also refer the claim relating to costs of the arbitral proceedings quantified at ₹5,00,000/-, to the Arbitral Tribunal.

15. In response to the aforesaid request, the Chief Engineer, DSIIDC sent a letter dated 27.06.2017 to the Arbitral Tribunal forwarding HRB's communication requesting that its claim for the

enhanced value and its claim for costs be referred to the Arbitral Tribunal and, requested the Arbitral Tribunal to peruse the same and give its 'decision/observations'.

16. The Arbitral Tribunal responded to the said communication vide an e-mail dated 28.06.2017 confirming that the arbitral award would not exceed the amount of claims referred.

17. In view of the above, on 26.08.2017, HRB filed an application under Section 23(3) of the A&C Act praying that it may be permitted to amend Claim No.1 and also claim costs for the arbitration proceedings. On 05.09.2017, DSIIDC filed a reply to the said application opposing the same.

18. The said application was disposed of by the Arbitral Tribunal by an order dated 27.09.2017 allowing HRB to pursue its claim for costs but denying its prayer for considering its Claim No.1 at the enhanced value.

19. Aggrieved by the same, HRB preferred a petition before this Court under Article 227 of the Constitution of India [being *CM(M) No.1458/2017 captioned 'M/s HR Builders vs. DSIIDC'*]. While the said petition was pending, the Arbitral Tribunal rendered the impugned award. Consequently, on 10.07.2018, HRB withdrew its said petition [CM(M) No.1458/2017] with liberty to agitate its grievance by this petition under Section 34 of the A&C Act.

20. Thereafter, HRB filed a petition under section 34 of the A&C

Act [OMP (COMM) 324/2018]. The said petition was heard along with the present petition and has been disposed by a separate order rendered today.

21. Before proceeding further, it is relevant to refer to the impugned award. The tabular statement indicating the award made against the respective claims/counter-claims as summarized by the Arbitral Tribunal in the impugned award, is re-produced below:

Claim No.	Claim in brief	Amount referred by the C.E.	Amount as per S.O.C.	Amount awarded	Remarks
1.	Payment of F/bill	53,90,498	1,40,94,470	42,87,422	
2.	Release of withheld amounts and amount of illegal recoveries	1,28,71,710	1,27,96,042	1,12,37,900	
3.	On a/c of D.VAT (W.C.T.) and labor cess	3,69,490	3,69,490	2,77,117	
4.	On a/c of escalations in the extended period of contract	5,10,02,733	3,04,86,958	91,38,560	
5.	Damages	3,32,43,766	3,32,43,766	48,45,700	

	due to keeping staff, estt; and machinery in the extended period				
6.	Loss of profit due to reduction in scope of work	67,02,683	67,02,683	NIL	
7.	Revalidation charges of B.G.s due to prolongation of contract.	7,97,850	7,97,850	NIL	
8.	Interest on delayed payments of RA & F/bills, withheld amounts as well as above amounts	Amount not specified	Intt. On withheld amounts Rs.1,61,94,821 + intt. On other claims @ 15%	(i) Intt. On delayed payment of RA bills=2,27,424 (ii) Intt. @ 8.5% p.a. on amounts awarded under claim nos.1,2&3 as per details	
9.	Cost of arbitration		5,00,000+A.T.'s fee	2,00,000+2,77,500 (under	

				section 38(2) of the A&C Act-1996)	
	Total	11,03,78,73 0 + Intt.	11,51,86,08 0 + intt.	Rs.3,04,91,6 23 + intt. On amounts awarded under claim nos.1,2,&3 as per details	

Counter Claims:

1.	Loss of name, reputatio n of DSI IDC and loss of work of the DSI IDC	20,00,00,000/-	20,00,00,000/-	NIL	
2.	Cost of arbitratio n	5,00,000/- + fee and expenses	5,00,000/- + fee	NIL	
	Total	20,05,00,000/-	20,05,00,000/-	NIL	

Submissions

22. Ms Firdouse Qutub Wani, learned counsel appearing for DSI IDC, has assailed the impugned award to the extent that the Arbitral Tribunal has allowed HRB's Claim nos. 2, 3, 4 and 5 and has rejected DSI IDC's counter claims.

23. The Arbitral Tribunal has partly accepted HRB's Claim no. 2 and awarded a sum of ₹1,12,37,900/- against certain recoveries made

by DSIIDC. Ms Wani submitted that DSIIDC had withheld a sum of ₹1,04,60,700/- on account of levy of compensation on account of delay on the part of HRB in executing the Works under the Agreement and the same has been awarded in favour of HRB. She contended that the award of the said claim is beyond the jurisdiction of the Arbitral Tribunal. She referred to Clause 2 of the Agreement and submitted that the decision of the Project Director in respect of such compensation was final and binding, and therefore, an 'excepted' matter. The dispute regarding levy of compensation was not arbitrable, and therefore, the impugned award is liable to be set aside to that extent. Ms Wani referred to the decision of the Supreme Court in ***Mitra Guha Builders (India) Company vs. Oil and Natural Gas Corporation Limited: 2020 (3) SCC 222***, in support of her contention.

24. Next, she submitted that the award of labour cess at 1% and DVAT at 3% of the quantum of the work done (quantified at ₹2,77,117/-) in favour of the HRB was also patently erroneous. She submitted that although the Arbitral Tribunal had accepted that CPWD's Manual requires that labour cess and DVAT be included as a part of the analysis of rates, yet the Arbitral Tribunal had awarded the said claim beyond the rates approved by the concerned Authority.

25. Next, she contended that the award of escalation (Claim No.4) in favour of HRB was erroneous as the Arbitral Tribunal had computed the escalation on the costs indices as approved by DG, CPWD for building works in Delhi and had not used cost indices for commodities published by the Economic Bureau for computing the

said amount. She submitted that the Agreement provided for computation of escalation on the basis of costs indices of commodities, and therefore, the Arbitral Tribunal's decision was contrary to Clause 10CC of the Agreement. She stated that the escalation for labour and material component of the works executed was required to be included in the bills submitted by HRB and since it had not done so, it is deemed that HRB had waived its claim in this regard.

26. Next, she submitted that the amount of compensation of ₹48,45,700/- awarded by the Arbitral Tribunal on account of prolongation of works is patently erroneous. Overheads were agreed to constitute 15% of the labour and material component as set out in Schedule F of the Agreement. She submitted that the Arbitral Tribunal having awarded escalation on the labour and material component of the works could award overheads at the rate of 15% of the incremental value but could not award any amount in excess of 15% of the labour and material component as finally determined.

27. Lastly, Ms Wani submitted that the decision of the Arbitral Tribunal to deny DSIIDC's counter-claim is patently erroneous as there could be no doubt that DSIIDC has suffered damages on account of loss of work. The Govt. of NCT of Delhi had withdrawn the work of development of site and construction of twenty school buildings from DSIIDC and transferred the same to PWD by its letter dated 07.05.2012. She submitted that DSIIDC was entitled to charge 5% on the value of the said works, the costs of which were estimated at ₹400

crores (twenty schools at the cost of ₹20 Crores each). She stated that DSIIDC, was thus, entitled to claim such damages from HRB.

28. Mr Trivedi, learned counsel appearing for the HRB countered the aforesaid submissions. He submitted that the Arbitral Tribunal had found that DSIIDC was responsible for the delays in execution of the works. He also referred to the extract of the hindrances sheet, which indicated the nature of hindrances and the resultant delays. He pointed out that in respect of the school at Jahangir Puri, E-Block, the effective delay was quantified at 510 days, which was not attributable to HRB. Similarly, in respect of the school situated at Bhalsawa Dairy, the delay was of 475 days. There were similar delays in respect of other schools as well. He submitted that DSIIDC had also accepted that the delay of 419 days on account of hindrance, was justified.

29. According to DSIIDC, the delay of 59 days out of the 478 days was not justified and therefore, it had imposed penalty at the rate of 1.5% per month on the tendered amount. However, the Arbitral Tribunal had examined the material and evidence on record and, concluded that DSIIDC, was in breach of the Agreement, and therefore, there is no question of DSIIDC recovering any damages from HRB.

30. He submitted that it was not DSIIDC's case before the Arbitral Tribunal that the dispute regarding Claim No.2 (recoveries made by DSIIDC including on account of compensation for delay) was beyond the jurisdiction of the Arbitral Tribunal or was an excepted matter. He

stated that there are no pleadings to the said effect either in the Statement of Defence filed before the Arbitral Tribunal or in the present petition preferred for setting aside the impugned award.

31. He submitted that in any event, the question whether HRB or DSIIDC had breached the Agreement, is not an 'excepted' matter. The question of quantum of compensation in case it was established that the contractor had breached the agreement, is a matter of a final determination by the specified authorities, however, the Project Director is not the final adjudicator of the question whether the Agreement had been breached or whether there was any failure on the part of either party in performance of their obligations. He referred to the decision of the Supreme Court in *J.G. Engineers Pvt. Ltd. vs. Union of India (UOI) &Anr.: (2011) 5 SCC 758*, in support of his contentions.

Reasons and Conclusion

32. The first and foremost question to be examined is whether the impugned award, inasmuch as the Arbitral Tribunal has allowed Claim No.2 of HRB, is without jurisdiction. DSIIDC had withheld/deducted certain sums aggregating ₹1,27,96,042/- from the amounts payable to HRB. This included a sum of ₹15,54,400/- on account of the amount allegedly paid to PWD for certain works and ₹1,04,60,700/- as compensation for delay in completion of the works. The Arbitral Tribunal found that a sum of ₹15,54,400/- was withheld to rectify certain defects. According to DSIIDC, it had paid the said amount to

PWD for rectifying the defects. The Arbitral Tribunal found that, in fact, DSIIDC had incurred a liability of only 50% of the amount withheld for rectification of the said defects. Accordingly, the Arbitral Tribunal directed that the balance 50% of the said amount, that is, a sum of ₹7,77,200/- be paid to HRB as the same was in excess of the liability to cure the defects.

33. Ms Wani has not contested the Arbitral Tribunal's decision to award the amount of ₹7,77,200/- in favour of HRB. She confined her challenge to the award of an amount of ₹1,04,60,700/-, which was levied as compensation under Clause 2 of the Agreement on account of delay in completion of the works. According to DSIIDC, there was a delay of 478 days in completion of the works out of which HRB was responsible for a delay of 59 days. The Project Director had, accordingly, assessed the compensation at the rate of 1.5% per month of the tendered amount for a period of 59 days. The principal question to be addressed is whether Arbitral Tribunal's decision to award refund of the said amount in favour of HRB is beyond its jurisdiction.

34. The relevant extract of Clause 2 of the Agreement reads as under:

“If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract extended date of completion, he shall; without prejudice to any right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F' (whose decision in

writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete.

This will also apply to items or group of items for which a separate period of completion has been specified:-

(i) Compensation @1.5% per month of delay

for delay of work to be computed on per day basis

Provided always that the total amount of compensation for delay to be paid under this Condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given.””

35. It is not disputed that the authority as specified under Schedule ‘F’ of the Agreement is empowered to calculate the compensation payable if the contractor fails to complete the work and clear the site as agreed. The decision of the specified authority in regard to the computation of compensation is final and binding on the parties. Such decision is excluded from the scope of the Arbitration Clause. However, in the present case, the principal dispute between the parties is whether HRB is responsible for the delay in maintaining the required progress and completion of the works within the stipulated period. According to HRB, DSIIDC is responsible for the delay in execution of the works, which included delay in providing the sites and providing necessary drawings. HRB had relied extensively on the

hindrance register as well as produced other material to establish that there was no delay on its part in completion of the works in question.

36. HRB had also pointed out that in respect of one of the schools, the assessed hindrance extended to 510 days. DSIIDC has contested HRB's claim by contending that the delay has to be calculated on an overall basis and not with respect to individual items or schools. DSIIDC conceded that the delay of 419 days was not attributable to HRB but claimed that HRB was accountable for the balance 59 days delay. The Arbitral Tribunal accepted DSIIDC's contention that the delay had to be viewed on an overall basis as milestones were also fixed in relation to financial terms and no specified period had been stipulated for separate schools or separate items. However, the Arbitral Tribunal found that there was no justification for levy of compensation as the hindrances in respect of certain schools were removed barely a fortnight before the date of actual completion. The Arbitral Tribunal noted that the last of hindrances in four schools were removed on 04.01.2012, 10.01.2012, 10.01.2012 and 16.01.2012 respectively. The hindrances in question were on account of delay in handing of the sites; yet the work was completed on 18.01.2012. In view of the above, the Arbitral Tribunal found that the levy of compensation was unjustified. In addition to the above, the Arbitral Tribunal also noted that the compensation levied was not assessed with reference to any alleged damage. The actual damage or loss allegedly suffered was also not proved.

37. It is apparent from the impugned award that the Arbitral Tribunal did not engage in any exercise of assessing the quantum of compensation payable in terms of Clause 2 of the Agreement. The Arbitral Tribunal restricted itself to examining whether there was any delay on the basis of which any compensation could be paid.

38. In *J.G. Engineers Pvt. Ltd. vs. Union of India (UOI) & Anr.:* (*supra*), the Supreme Court had examined the questions whether an arbitrator was precluded from adjudicating the issue, whether there was any delay on the part of the contractor or the department in view of clauses (2) and (3) of the agreement that was before the Supreme Court in those proceedings. The said clauses are somewhat similar to the relevant clauses in the Agreement. The Court had analyzed the import of those clauses and concluded that, the decision of the specified authority on the question whether the contractor is responsible for the delay is not final and binding. However, the decision of the specified authority on the consequential issues of quantification of compensation is final. The relevant extract of the said decision is set out below:

“17. Clauses (2) and (3) of the contract relied upon by the respondents no doubt make certain decisions by the Superintending Engineer and Engineer-in-charge final/final and binding/final and conclusive, in regard to certain matters. But the question is whether Clauses (2) and (3) of the agreement stipulate that the decision of any authority is final in regard to the responsibility for the delay in execution and consequential breach and therefore exclude those issues from being the subject-matter of arbitration. We will refer to and analyse each

of the “excepted matters” in Clauses (2) and (3) of the agreement to find their true scope and ambit:

(i) Clause (2) provides that if the work remains uncommenced or unfinished after proper dates, the contractor shall pay as compensation for every day's delay an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work as shown in the tender. *What is made final is only the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for every day's delay, that is, whether it should be 1% or lesser. His decision is not made final in regard to the question as to why the work was not commenced on the due date or remained unfinished by the due date of completion and who was responsible for such delay.*

(ii) Clause (2) also provides that if the contractor fails to ensure progress as per the time schedule submitted by the contractor, he shall be liable to pay as compensation an amount equal to 1% or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work for every day the due quantity of the work remains incomplete, subject to a ceiling of ten per cent. *This provision makes the decision of the Superintending Engineer final only in regard to the percentage of compensation (that is, the quantum) to be levied and not on the question as to whether the contractor had failed to complete the work or the portion of the work within the agreed time schedule, whether the*

contractor was prevented by any reasons beyond its control or by the acts or omissions of the respondents, and who is responsible for the delay.

(iii) The first part of Clause (3) provides that if the contractor delays or suspends the execution of the work so that either in the judgment of the Engineer-in-charge (which shall be final and binding), he will be unable to secure the completion of the work by the date of completion or he has already failed to complete the work by that date, certain consequences as stated therein, will follow. *What is made final by this provision is the decision of the Engineer-in-charge as to whether the contractor will be able to secure the completion of the work by the due date of completion, which could lead to the termination of the contract or other consequences. The question whether such failure to complete the work was due to reasons for which the contractor was responsible or the Department was responsible, or the question whether the contractor was justified in suspending the execution of the work, are not matters in regard to which the decision of the Engineer-in-charge is made final.*

(iv) The second part of Clause (3) of the agreement provides that where the contractor had made himself liable for action as stated in the first part of that clause, the Engineer-in-charge shall have powers to determine or rescind the contract and the notice in writing to the contractor under the hand of the Engineer-in-charge shall be conclusive evidence of such termination or rescission. *This does not make the decision of the Engineer-in-charge as to the*

validity of determination or rescission, valid or final. In fact it does not make any decision of the Engineer-in-charge final at all. It only provides that if a notice of termination or rescission is issued by the Engineer-in-charge under his signature, it shall be conclusive evidence of the fact that the contract has been rescinded or determined.

(v) After determination or rescission of the contract, if the Engineer-in-charge entrusts the unexecuted part of the work to another contractor, for completion, and any expense is incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, the decision in writing of the Engineer-in-charge in regard to such excess shall be final and conclusive, shall be borne and paid by the original contractor. *What is made final is the actual calculation of the difference or the excess, that is, if the value of the unexecuted work as per the contract with the original contractor was Rs. 1 lakh and the cost of getting it executed by an alternative contractor was Rs. 1,50,000 what is made final is the certificate in writing issued by the Engineer-in-charge that Rs. 50,000 is the excess cost. The question whether the determination or rescission of the contractor by the Engineer-in-charge is valid and legal and whether it was due to any breach on the part of the contractor, or whether the contractor could be made liable to pay such excess, are not issues on which the decision of Engineer-in-charge is made final.*

18. Thus what is made final and conclusive by Clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was

responsible for the delay or the Department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. 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.

19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.”

39. Further, the Supreme Court had also referred to its earlier decision in *State of Karnataka v. Shree Rameshwara Rice Mills, Thirthahalli: (1987) 2 SCC 160*, wherein the Court had observed as under:

“7. ... Even assuming for argument’s sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of

damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

8. We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed.”

40. The decision of the Supreme Court in *M/s. Mitra Guha Builders (India) Company v. Oil and Natural Gas Corporation Limited: (supra)* was rendered in the context of a clause, which empowered the Superintending Engineer to decide on the contract value for the whole week where the work remained un-commenced and unfinished. It also provided milestones of the work to be followed and provided the proportion of the work to be completed in case the time allowed for completing the work exceeded one month. In the context of the said clause in that question, the Supreme Court found that it provided a complete mechanism for determination of liability as

well as its quantum and therefore, held that the same was beyond the scope of the arbitration clause in that case.

41. As noticed above, Clause 2 of the Agreement in this case is somewhat similar to the clause as considered by the Supreme Court in *J.G. Engineers Pvt. Ltd. v. Union of India (UOI) & Anr. (supra)*.

42. Having stated the above, it is also important to note that before the Arbitral Tribunal, DSIIDC did not raise any question regarding the jurisdiction of the Arbitral Tribunal to entertain Claim No.2. The said claim was specifically referred to the Arbitral Tribunal without any reservation by the CE, DSIIDC. This Court has also examined the Statement of Defence filed by DSIIDC and there is no averment to the effect that the determination of liability under Clause 2 of the Agreement is an excepted matter. On the contrary, DSIIDC had joined the controversy as to whether the compensation as recovered was leviable. Even before this Court, DSIIDC has not made any averment in the present petition to challenge the decision of the Arbitral Tribunal allowing HRB's Claim No.2 as being without jurisdiction or on the ground that the said claim was not arbitrable. There is no averment to the effect that the said dispute (claim) adjudicated by the Arbitral Tribunal falls is an 'excepted' matter. The contention advanced by Ms Wani is clearly an afterthought and, not supported by pleadings. In this view as well, it would not be apposite to permit DSIIDC to question the jurisdiction of the Arbitral Tribunal at this stage.

43. Considering the above, this Court is unable to accept that the Arbitral Tribunal's decision to award a sum of ₹1,04,60,700/- recovered by DSIIDC on account of delay in execution of the works, warrants any interference in these proceedings.

44. The next question to be examined is whether the Arbitral Tribunal's decision to allow HRB's claim for labour cess at the rate of 1% and DVAT at the rate of 3% of the amount of work done, is patently illegal.

45. Ms Wani contended that the said amounts were included in the rates quoted and the Arbitral Tribunal has committed an error in awarding the same over and above the said rates. She submitted that awarding the said amount has effectively subverted the tendering process as there may have been bidders, who would have included labour cess and DVAT in the price bid by them for executing the works in question. The said contention is misconceived. HRB's claim was restricted to recovery of labour cess and DVAT on deviated items. Obviously, these were items, which were not part of the bid as submitted by HRB. HRB had submitted its analysis of rates for payment of deviated items. DSIIDC made payments for these deviated items on the basis of the analysis of rates as approved. However, it also recovered labour cess at the rate of 1% and DVAT at the rate of 3% from such payments. HRB raised a claim regarding the said levies as it claimed that the same did not form a part of the rates approved for the deviated items.

46. The Arbitral Tribunal had examined the material on record and had found that labour cess and DVAT were required to be included in the analysis of rates. The Arbitral Tribunal drew support from the fact that the CPWD Manual also requires such levies to be included in the rates. The Arbitral Tribunal accepted that the same did not form a part of the approved rates and therefore, allowed HRB's claim in this regard. Clearly, the said decision warrants no interference in these proceedings. The decision of the Arbitral Tribunal is well reasoned. It is based on material placed on record and the same cannot be faulted. In any view of the matter, the said decision cannot be considered as either patently illegal or violative of the fundamental policy of Indian law.

47. The contention that the escalation awarded in favour of HRB (HRB's Claim No.4) is patently illegal, is also unpersuasive. It was contended by Ms Wani that the escalation award is contrary to Clause 10CC of the Agreement. However, it is seen that it was DSIIDC's case before the Arbitral Tribunal that Clause 10CC is not applicable to the contract in question since the works were to be completed within 12 months. The Arbitral Tribunal had also noted DSIIDC's contention to the effect that Clause 10CC does not form a part of the Agreement.

48. Before the Arbitral Tribunal, it was contended on behalf of DSIIDC that Clauses 10C and 10CA of the Agreement were applicable and the escalation was to be paid under the said clauses but HRB has not raised bills under the said clauses. The Arbitral Tribunal found that HRB had raised one bill under Clause 10CA for a sum of

₹16,03,271/-, but that too was not paid. It had sent letters regarding escalation. However, DSIIDC did not call upon HRB to raise claims under the said clauses.

49. The Arbitral Tribunal further reasoned that the time allowed for the completion of the works was twelve months but there was an inordinate delay of 478 days. The Arbitral Tribunal observed that in the competitive bidding system, no contractor could cushion his quoted rates to cater to such extended period. The Arbitral Tribunal also held that since major part of the delays resulting in prolongation were attributable to DSIIDC, HRB was entitled to escalation.

50. This Court finds no fault in the aforesaid reasoning. The contention that the Arbitral Tribunal has erred in applying cost indices by CPWD instead of cost indices for commodities issued by the Economic Bureau, is also unsubstantial. Clause 10CA of the Agreement, contemplates that increase and decrease in prices would be determined on the basis of the All India Wholesale Price Indices of Materials as published by the Economic Advisor to the Government of India, Ministry of Commerce and Industry. However, it is pointed out that escalation calculated on the basis of such indices would be higher than that allowed by the Arbitral Tribunal. The Arbitral Tribunal had considered the indices adopted by DG, CPWD to be more appropriate and accordingly, moderated the amount claimed by HRB. Considering that time for completion of the works had far acceded the initial period as contemplated under the Agreement, the Arbitral Tribunal's decision to award escalation on the basis of indices

published by DG, CPWD cannot be held to be perverse or unreasonable. This Court is unable to accept that the same is patently illegal and warrants interference in these proceedings.

51. The contention that the Arbitral Tribunal had committed a patent error in awarding ₹48,45,700/- as overheads on account of prolongation of works, is unmerited. The Arbitral Tribunal had awarded the said amount to compensate HRB for its overheads expenses by using the widely accepted Hudson Formula. The Arbitral Tribunal found that HRB was required to be compensated for the prolongation of works on account of overheads incurred by it during the extended period. Although HRB had claimed a sum of ₹3,32,43,766/- on account of prolongation of works, the Arbitral Tribunal had moderated it significantly by applying the Hudson Formula. The view taken by the Arbitral Tribunal is a plausible view. This Court finds no patent illegality in the said award and thus, finds no reason to interfere with the same.

52. Ms Wani had also contended that the award of interest and costs is exorbitant. The said contention is bereft of any merit. There is no prohibition for grant of interest and the interest rate of 8.5% per annum cannot be stated to be exorbitant or patently illegal.

53. Ms Wani had also sought to assail the Arbitral Tribunal's decision to reject DSIIDC's counter claim of ₹20 crores on account of loss of name, reputation and loss of work. However, this Court finds no infirmity with the decision of the Arbitral Tribunal to do so. The

Arbitral Tribunal had noted that DSIIDC had not raised any such claim at the material time nor had it asserted that it had incurred any loss. The Arbitral Tribunal, accordingly, observed that the counter claim was raised as a counterblast to the arbitration invoked by HRB. There was no evidence of DSIIDC suffering any direct loss and the calculation submitted by it was hypothetical.

54. This Court finds that there is no material to establish that DSIIDC had suffered any loss attributable to HRB.

55. In view of the above, the petition is dismissed. All pending applications are also disposed of.

AUGUST 11, 2021
nm/RK

VIBHU BAKHRU, J

