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

Date of decision: 2nd May, 2023

+ O.M.P. (COMM) 399/2018 & I.A. 1455/2019
UNION OF INDIA Petitioner
Through: Mr.Jaswinder Singh, Adv.

versus

M/S. MULTI TECH CONSTRUCTION CO. Respondent
Through: Ms.Anusuya Salwan, Mr.Rachit
Wadhwa, Mr.Bamkim Garg, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 24.02.2018 and as further amended by Additional Award dated 02.05.2018 passed by the learned Sole Arbitrator.

2. At the outset, it is relevant to note that the petitioner has partially accepted the Arbitral Award as is reflected by its communication dated 30.07.2018 placed on record by the petitioner. The said communication records the extent/area of agreement and disagreement with respect to the nine claims raised by the respondent, in the form of a table, which is reproduced herein below:

SN	Claim No.	Total Awarded Amount (INR)	Total Accepted Amount (INR)
1	2	3	4
1.	Claim No. 1	18,31,923/-	16,48,935/-
2.	Claim No. 2	Nil	Nil
3.	Claim No. 3	4,44,962/-	4,44,962/-
4.	Claim No. 4	44,85,493/-	27,34,025/-
5.	Claim No. 5	18,00,000/-	Nil
6.	Claim No. 6	2,16,977/-	2,16,977/-
7.	Claim No. 7	Nil	Nil
8.	Claim No. 8	Interest amount calculated @ 7.5% on Claim No. 1,3,4&5 i.e. on Rs. 85,62,378/- (18,31,923 + 4,44,962 + 44,85,493 + 18,00,000) for the period from 25.02.2016 to 24.02.2018 = Rs. 12,84,357/-	Interest amount calculated @ 7.5% on Claim No. 1,3,4&5 i.e. on Rs. 48,27,922/- (16,48,935 + 4,44,962 + 27,34,025) for the period from 25.02.2016 to 24.02.2018 = Rs.7,24,188/-
9.	Claim No. 9	Rs. 5,00,000/-	Nil

3. The disputes between the parties arose out of the Agreement No.08/EE/LHD/2010-11 for the work of construction of Dharamshala for Dr. R.M.L Hospital at Mandir Marg, New Delhi, including electrical wiring.

CLAIM NO. 1:

4. As far as Claim no.1 is concerned, the respondent had claimed

inter-alia the balance amount payable against the Final Bill under the head of extra and substituted item rates. The learned Sole Arbitrator considered the said claim and *inter-alia* held as under:

“From details of RA bills paid it is seen that most of the extra/substituted and deviated quantities of work have been executed between Oct. 2012 to April 2014. As per preface given in DSR- 2013 it's rates are based on the prevailing market rates of materials in Delhi between Jan. 2013 to March 2013 and the labour rates adopted are as per minimum wages issued by Govt. of Delhi w.e.f. 1/4/2013. DSR- 2014 is based on the prevailing market rates of materials in Delhi as on 01.04.2014 and the labour rates adopted are as per minimum wages rates issued by Govt. of Delhi w.e.f. 1/4/2014. In absence of production of any documentary evidence of market rates by any party I consider average rates of DSR 2013 and DSR 2014 to be generally representative of the prevailing market rates. In some cases, rate shown as full rate in previous running account bills has been reduced drastically after completion of work in the final bill, which is not permissible, as contractor proceeded with work based upon acceptance of a higher rates.”

5. The learned counsel for the petitioner, drawing reference to the petitioner's letter dated 16.04.2018, which he claims to be an application under Section 33 of the Act filed before the learned Sole Arbitrator, submits that it is the case of the petitioner that the learned Arbitrator has awarded an excess amount of Rs.1,82,988.35 to the respondent, as was explained by the petitioner in Annexure A1 to the said communication. Primarily, the said objection is that instead of taking the average of DSR 2013 and DSR 2014, the learned Sole Arbitrator should have taken the average of DSR 2012 and DSR 2013 on account of his finding that most

of the extra/substituted and deviated quantities of work have been executed between October 2012 and April 2014.

6. I am unable to find merit in the above submission of the learned counsel for the petitioner.

7. It need not be reemphasised that the jurisdiction of the Court under Section 34 of the Act is highly restricted and can primarily be invoked only where it is shown that the learned Arbitrator has acted beyond jurisdiction or has rendered a finding which is perverse, being contrary to the terms of the Agreement or the evidence on record. The Court does not sit as a Court of appeal against the Arbitral Award. In *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*, (2022) 1 SCC 131, the Supreme Court has cautioned that in exercise of its powers under Section 34 of the Act, the Court does not act as a Court of appeal and it can only enforce its powers where the learned Arbitrator has taken a view, which is not even a possible one, or has interpreted a Clause in such a way, which no fair minded or reasonable person would, or if the learned Arbitrator commits an error of jurisdiction by going beyond the scope of the contract and has dealt with matters not allocated to him.

8. In the present case, the learned Arbitrator has found that the extra/substituted and deviated quantities of work have been executed between October, 2012 and April, 2014. The preface of DSR 2013 is based on the prevailing market rates of materials in Delhi between January, 2013 and March, 2013 and the labour rates adopted are as per the minimum wages issued by the Government of Delhi with effect from 01.04.2013. The learned Arbitrator further held that the DSR 2014 is based on the prevailing market rates of materials in Delhi as on

01.04.2014 and the labour rates adopted are as per minimum wages as issued by the Government of Delhi with effect from 01.04.2014. The learned Arbitrator then proceeded to consider the average rates of DSR 2013 and DSR 2014 to be generally representative of the prevailing market rates. The learned Arbitrator further noted that in the previous running account bills, the petitioner made drastic reduction after completion of the work in the Final Bill. In the restricted jurisdiction of this Court under Section 34 of the Act, the Court will not substitute its opinion on what could have been a more fairer method of awarding the claim in favour of the respondent. The method adopted by the learned Arbitrator does not appear to this Court to be perverse so as to warrant an interference of this Court in exercise of its power under Section 34 of the Act. Accordingly, the objection of the petitioner on claim no.1 is rejected.

CLAIM 4(d):

9. The next challenge of the petitioner is to the Claim no.4(d) awarded in favour of the respondent by the learned Sole Arbitrator. The challenge to Claim no.4(d) is confined only to an amount of Rs.17,39,412/- awarded by the learned Sole Arbitrator under Clause 10CC of the General Condition of Contract (in short, 'GCC') in favour of the respondent.

10. The learned counsel for the petitioner submits that Clause 10CC of the GCC specifically states that no compensation shall be payable for a work for which the stipulated period of completion is equal to or less than the time as specified in Schedule F. He submits that in Schedule F, the period of contract to which Clause 10CC is made applicable is one exceeding 18 months. He submits that in the present case, as the period of

contract was only of 12 months, therefore, Clause 10CC shall not be applicable. He submits that the learned Sole Arbitrator has, therefore, acted against the terms of the Agreement, for which reason alone the Impugned Award is liable to be set aside. In support, he places reliance on the judgment of the Supreme Court in *State of Orissa v. Sudhakar Das (Dead) by LRS*, (2000) 3 SCC 27.

11. On the other hand, the learned counsel for the respondent submits that the Commencement Date of the contract was 11.12.2010, with the Stipulated Date of Completion being 10.12.2011, admittedly, the work was completed only on 01.05.2014. She submits that the learned Arbitrator has attributed the period of delay for completion of the work solely to the petitioner. She submits that the learned Arbitrator has thereafter proceeded to award the damages, including an amount of Rs.17,39,412/-, for which purpose the learned Arbitrator observed that there are various methods for determining such damages, however, the method prescribed under Clause 10CC may be the most appropriate. She submits that no fault can be found in the learned Arbitrator placing reliance on the formula as laid down in Clause 10CC for awarding damages to the respondent. In support, she places reliance on the judgment of this Court in *Delhi Development Authority v. Swastic Construction Company*, Neutral Citation No. 2021 DHC 2708, and of the Supreme Court in *NTPC Ltd. V. Deconar Services Pvt. Ltd.*, 2021 SCC OnLine SC 498.

12. I have considered the submissions made by the learned counsels for the parties.

13. On the claim of Rs.17,39,412/- awarded in favour of the

respondent, the learned Arbitrator has observed that the reasons for the delay were attributable only to the petitioner herein. He has further observed that as on the Scheduled Date of Completion, only 10% of the total value of the work had been completed, whereas the remaining 90% of the work had been executed in the extended period due to breaches on part of the petitioner. The learned Arbitrator, therefore, found the respondent to be entitled to compensation/damages in terms of the Section 73 of the Indian Contract Act, 1872 (hereinafter referred to as 'Contract Act'). The learned Arbitrator then proceeded to quantify such losses. For quantification, the learned Arbitrator *inter alia* observed as under:

"The claimant has worked out compensation amount based on the formula given in clause 10 CC in Annexure F/1 and F/2. However, the amount paid in claim No. 1 at market rates is not eligible for increase in cost and has to be deducted. Modified statement for compensation on analogy of formula in Clause 10 CC has been prepared and is attached at Annexure E. This works out to Rs. 17,39,412.00. Another way to look at escalation in prices is building cost index which is published by DG, CPWD every six months. Building cost index of Delhi as on 01/04/2010 was 136 and that on 01/10/2012 it was 170 based upon Plinth Area Rates of 2007 as base 100. Thereafter it remained constant upto 01/10/2013. Thus there is almost 25% increase in construction costs during relevant period, which in the present case would work out to approximately Rs. 65,00,000.00 and after deducting amounts of escalation calculated under Clause 10 C (Labour) and 10 CA (Cement and Steel) it gives a figure of about Rs. 30,00,000.00 which is much more than the amount worked out on the basis of formula under clause 10 CC. In view of above I conclude that Rs.17,39,412.00 as worked out above would be a reasonable

compensation for escalation in prices other than those covered under clause 10 C and 10 CA.”

14. The petitioner has not challenged the finding of attribution of the delay to the petitioner. Its limited challenge is on the invocation of Clause 10CC for award of damages. Herein, it is evident that the learned Arbitrator has observed that there are various methods by which the escalation in prices, being part of the damages for breach of contract to be awarded to the respondent, can be determined. One such method is the ‘Building Cost Index’, applying which, the respondent would have, in fact, become entitled to an amount of Rs.30 Lakhs after deducting amount of escalation calculated under Clause 10C and Clause 10CA, which was more than the amount worked-out on the basis of the formula under Clause 10CC. The learned Arbitrator, therefore, awarded the amount in favour of the respondent, calculating the damages by relying upon the formula given in Clause 10CC. Again, this is one of the various methods by which the learned Arbitrator could have determined the damages that are to be awarded to the respondent. Merely because one method may be better than the other, cannot be a ground for interference. As far as the quantification of damages is concerned, in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Supreme Court has held that this Court in exercise of its powers under Section 34 of the Act will not interfere merely because it would have preferred another method of calculating damages or taken another view on the calculation of the damages.

15. The reliance of the learned Arbitrator on Clause 10CC is only as a method to quantify the damages that are to be awarded to the respondent

under Section 73 of the Contract Act, once the petitioner was found to be in breach of the contract.

16. In **Swastic Construction** (supra), this Court in similar circumstances has observed as under:

“13. Although, Swastic had initially claimed damages on the basis of market rates analysis, however, it assessed the loss and calculated the amount as per the formulas adopted by DDA for making payments under Clause 10C, 10CA and 10CC. The aforementioned clauses are applied for determining price escalation. Thus, this serves as a good benchmark for calculating damages.

14. Claim no. 1 under Clause 10CA, comprised of three parts, as enumerated above. The learned Arbitrator has awarded damages by relying upon the formula provided under Clause 10C, 10CA and 10CC. The Court does not find merit in DDA's objection that by awarding Claim No. 1, the Tribunal has violated the aforementioned clauses for assessing damages. Reliance on these clauses cannot be held to be perverse. This Court in Anurodh Constructions v. DDA, while deciding a similar petition arising from an award passed in a similar contract, held that the Arbitrator is well within its right to award damages even dehors Clause 10CC, since the amount could be awarded under Section 73 of Contract Act. Further, in DDA v. N.N. Buildcon Pvt. Ltd., this Court upheld that award of damages for escalation for prolonged period, based on formula provided under Clause 10CC. The aforementioned judgments indicate that the Courts have accepted the formula adopted by the Arbitral Tribunal in making such assessment. The aforesaid provisions could thus be used by the Arbitrator to assist him to work out the amount of damages. The use of the applicable formulas as provided under the aforementioned clauses, is a discretion and prerogative of the Arbitrator for assessing damages.

15. From the judgments referred above, it clearly

emerges that the formula provided under Clause 10C, 10CA and 10CC can be relied upon for assessment of damages, even if the said clauses are not specifically made applicable. The Court does not find the findings to be perverse or completely unreasonable. The award of damages is thus, as per contractual terms.”

17. In **Deconar Services Pvt. Ltd.** (supra), the Supreme Court distinguished the judgment of **Sudhakar Das (Dead) by LRS** (supra), observing that in **Sudhakar Das (Dead) by LRS** (supra) the Court was not seized of the issue of the grant of escalation charges beyond the period of contract or with respect to the delay and, therefore, the said judgment has a limited application. The same would squarely apply to the facts of the present case. The learned Arbitrator was considering the consequence of the delay in the execution of the work caused by reasons attributable to the petitioner. The learned Arbitrator has invoked Clause 10CC only to determine such damages that are to be awarded to the respondent as a more reasonable and fair method for such determination. No fault can be found in the Award on this account.

18. The challenge of the petitioner to Claim 4(d) is accordingly rejected.

CLAIM NO. 5:

19. The next challenge of the petitioner is to Claim no.5, which is damages for prolongation awarded to the sum of Rs.18 Lakhs in favour of the respondent.

20. The learned counsel for the petitioner submits that the learned Arbitrator has awarded the said amount without any basis. In this regard, he submits that the learned Arbitrator has concluded that a compensation

of Rs.75,000/- per month would be sufficient to set off the losses suffered by the respondent for the period of delay. However, the basis of determination of this amount has not been disclosed in the Impugned Award. The learned Arbitrator has, thereafter, awarded a sum of Rs.18 Lakhs against the claim of the respondent. Drawing reference to the Statement of Claim filed by the respondent before the learned Arbitrator, he submits that the respondent had made the claim of losses and damages due to prolongation of the contract restricted to a period of six months of delay against the total delay of 28.5 months. He submits that even if the damages at the rate of Rs.75,000/- per month are to be accepted, the quantification of total damages at Rs.18 Lakhs for a period of six months is incorrect as the same would work out to be only Rs.4.5 Lakhs. He submits that, therefore, there is absolutely no basis for award of Rs.18 Lakhs in favour of the respondent.

21. On the other hand, the learned counsel for the respondent submits that the total period of delay for which Claim no.5 was made, was 28.5 months. She submits that there was a clerical error in the Statement of Claim, wherein it mentioned that the claim of only six months is being made before the learned Arbitrator. She submits that the calculation of the total claim in the Statement of Claim itself showed that the claim was made for 28.5 months of delay. On the Award of Rs.18 Lakhs, she submits that the learned Arbitrator in the Award has, in fact, reduced the claim of the respondent not only to the period of delay actually found, but even lesser. She submits that the delay found was of 737 days. On this period of delay, the amount at the rate of Rs. 75,000/- per month would work out to more than Rs.18 Lakhs, however, the learned Arbitrator has

confined the claim only to Rs.18 Lakhs, for which no fault can be found. She submits that the learned Arbitrator has awarded a sum of Rs.75,000/- per month, which is, in fact, on the lower side, as the claim of Rs.1,68,124/- per month was made by the respondent as overheads calculated at the rate of 7.5%, which is stipulated in the contract itself.

22. I have considered the submissions made by the learned counsels for the parties.

23. In the Statement of Claim filed by the respondent, Claim no.5 was made on the following basis:

“CLAIM No.5:-Losses and damages due to prolongation of the contract Rs.4374000/-.

xxx

The claimants submits that the stipulated date of completion of the work was 10.12.11, the time being 12 months, but due to various latches and hindrances attributed to the respondents, i.e. the work continued on 01.05.14 as per the date of completion recorded by the respondents i.e. the work continued for extra about 28.5 months which was never anticipated by the claimants while quoting their rates. Due to prolongation of the contract, the claimants had to keep and maintain staff, establishment and T&P for an Extra period of 28.5 months. Thus the claimants have been put to loss due to breaches committed by the respondents. The law is very clear that a party in breach- should compensate the other party who has suffered due to the said breach. The amount of compensation/damages can be calculated on the simple yard stick adopted by the respondents, i.e. as per schedule 'F' the component of profit to cover everything is 15% in which 7.5% is profit and 7.5% is overheads.

Therefore the detail of claim is as under:-

*Tendered amount of the work = Rs.26899818 to be done in 12 months
Work to be done per month = $26899818/12 = 2241651/-$.
Overheads per month @ 7.5% = 7.5% of 2241651 = 168124/-
Overheads for 6 months of delay (although delay is 28.5 months) = 47,91,530/-."*

24. As is evident from the above, the overheads per month claimed by the respondent was Rs.1,68,124/-. Though in the subsequent portion of the claim, the respondent states that the overhead of 6 months delay is Rs.47,91,530/-, this is clearly a clerical error. The said amount can be reached only if the claim is for the total period of 28.5 months. The petitioner cannot take advantage of this apparent clerical mistake in the Statement of Claim to now lay a challenge to the amount awarded by the learned Arbitrator.

25. As far as award of Rs. 18 lakhs against this Claim is concerned, as noted hereinabove, the learned Arbitrator has found the full delay to be attributable only to the petitioner. The petitioner does not challenge this finding. The total delay is of 737 days, translating to roughly 24 months. The learned Arbitrator has found Rs.75,000/- per month to be the reasonable amount of damages to be awarded to the respondent. For 24 months, the total damages would, therefore, work out to Rs. 18 lakhs, the amount awarded by the learned Arbitrator. The plea of the learned counsel for the petitioner that the amount of Rs. 18 lakhs has been arbitrarily fixed, is, therefore, not sustainable.

26. As far as the basis of Rs. 75,000/- per month awarded by the learned Arbitrator is concerned, the learned Arbitrator, in the impugned

Award, observed as under:

“f. Now, in the present case, in view of aforementioned discussion I conclude that claimant is entitled to compensation. As far as it's quantification is concerned I find that claimant has not produced any details and /or proof of actual loss and has based it on the theoretical formula similar to Hudson's. He has limited the claim to overheads @ 7.5% which is provided for in the agreement itself, and has not claimed any loss of profit. However in absence of any proof of actual deployment and expenditure incurred on Overheads, claimant can only be compensated notionally.

g. As per conditions of contract, contractor was obliged to keep required T&P at site throughout the execution period and there is no complaint from the respondent's side about non-deployment of required T&P at any stage. Also there is no plea taken by respondent of non engagement of required technical persons at site. Further as per running and final bills no recovery for non-engagement of technical personnel has been proposed, therefore it can be presumed that they were engaged throughout till completion as per contract provisions.

h. Considering the facts and circumstances of the case, cost of engagement of required technical personnel and T&P as per contract provisions and other miscellaneous expenditures, I conclude that a compensation @ Rs.75,000.00 per month should be sufficient to set off such losses. The claimant is accordingly entitled to payment of Rs.18,00,000.00 against this claim.”

27. The learned Arbitrator has, therefore, awarded Rs.75,000/- per month based on his estimate of cost of engagement of required technical personnel and T&P as per the contract provisions and for other miscellaneous expenditures. The said amount is far lesser than 7.5% of the overhead charges that were being claimed by the respondent. The



learned Arbitrator being the best judge in these matters, I find no reason to interfere with the finding of the learned Arbitrator on this account.

AWARD OF COSTS:

28. The last challenge of the petitioner is to the award of costs of arbitration of Rs.5 Lakhs in favour of the respondent. The learned counsel for the petitioner submits that the arbitration proceedings before the learned Arbitrator commenced on 30.01.2017, culminating with the final arguments on 30.11.2017, and, therefore, the Award of Rs.5 Lakhs as cost is not only completely *ad hoc* but also far excessive. He further submits that the Award on this claim is totally unreasonable.

29. I am unable to agree with the submission of the learned counsel for the petitioner.

30. In awarding the costs, the learned Arbitrator has considered the fact that the respondent has been able to establish most of its claims before the learned Arbitrator. The learned Arbitrator has further considered the expenditure incurred on arbitration, for awarding the said amount. The petitioner has not given any details of the charges paid to the learned Arbitrator or the fee that may have been incurred by the respondent in such arbitration proceedings. Once the learned Arbitrator has considered the relevant factors in awarding of the costs, this Court will not sit in appeal over this issue.

31. For the reasons stated herein above, I find no merit in the present petition. The same is dismissed.

32. There shall be no order as to costs.

NAVIN CHAWLA, J

MAY 2, 2023/Arya/am/Ais