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

Decided on:- 16th February, 2024

+ **O.M.P. (COMM) 401/2020**

VIRENDER KHANNA & ASSOCIATES

..... Petitioner

versus

AIRPORTS AUTHORITY OF INDIA

..... Respondent

+ **O.M.P. (COMM) 327/2021 & I.As. 14081/2021, 14084/2021**

AIRPORTS AUTHORITY OF INDIA

..... Petitioner

versus

VIRENDER KHANNA AND ASSOCIATES

..... Respondent

Appearance:- Mr. Ramesh Singh, Senior Advocate with Mr. Ranjay N., Advocates for Virender Khanna & Associates in Item Nos. 13 & 14.
Mr. Ajay Pal Singh, Mr. Arun Sanwal & Mr. Vignesh Rajt, Advocates for Airports Authority of India in Item Nos. 13 & 14

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

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PRATEEK JALAN, J. (ORAL)

1. These two petitions, under Section 34 of the Arbitration and Conciliation Act, 1996 [“the Act”], are directed against an arbitral award dated 11.10.2019 passed by a sole arbitrator, in respect of disputes arising between the parties under an agreement dated



27.08.2007. By the said agreement, Virender Khanna and Associates [“VKA”] was contracted to provide consultancy services to the Airports Authority of India [“AAI”] for construction of the international portion of the Kolkata Airport.

A. The arbitration proceedings and award

2. VKA was the claimant before the learned arbitrator, and AAI was the respondent/ counter-claimant. Several claims and counterclaims were raised by the parties, out of which the learned arbitrator awarded two claims in favour of VKA, being claim No. 1 [for unilateral revision of contractual terms] and claim No. 2 [for unpaid bills]. In respect of claim No. 1, the learned arbitrator awarded an amount of ₹23,91,487/- and in respect of claim No. 2, he awarded an amount of ₹36,30,137/-.

3. Although the summary of the award shows that none of the counterclaims were awarded, it appears that some amounts claimed to be recoverable by AAI have been factored into the computation of the amount due to VKA under claim No. 1. For the purposes of the present petition, these include:

- a. an amount of ₹79,42,575/-, against a counterclaim of ₹1.45 crores raised by AAI on account of alleged deficiency in services rendered by VKA;
- b. an amount of ₹23,50,000/-, on account of non-submission of drawings in required Revit Software in 3D, etc; and
- c. an amount of ₹10,70,000/- on account of VKA not posting a site representative at the site.



B. Challenges raised by the parties

4. I have heard Mr. Ramesh Singh, learned Senior Counsel for VKA and Mr. Ajay Pal Singh, learned counsel for AAI.

5. VKA's principal challenge to the award arises out of the computation of the fee payable to it under the contract. According to it, AAI unilaterally altered the terms of the contract after it was signed, resulting in a reduction in the fee payable to it from over ₹20 crores to ₹15.88 crores. VKA further assails the aforesaid adjustments of ₹79,42,575/-, ₹10,70,000/- and ₹23,50,000/-, for which the learned arbitrator has given credit to AAI. The learned arbitrator has also incorporated a figure of ₹14,55,97,444/- as the payment already made by AAI to VKA which, according to VKA, ought to have been ₹13,54,73,449/-.

6. AAI also assails the award of ₹79,42,575/-, as against its counterclaim of ₹1.45 crores, in respect of alleged deficiency in services, and a nil award on account of compensation for extension of time, which the learned arbitrator has held to be covered in the aforesaid amount of ₹79,42,575/-.

7. All these figures are available from the analysis of the award in the discussion of VKA's claim No. 1, which will be reproduced in the relevant section of this judgment. The contentions of the learned counsel for the parties in respect of each of these claims are also discussed in the relevant parts of the judgment.

C. Analysis

I. Claims and counterclaims based upon total contractual price

8. The disputes between the parties, to a large extent, centre



around a difference as to the total amount payable by AAI to VKA under the contract. In the agreement, the consideration for the services rendered by VKA is provided in clause 2.3, reproduced below:-

*“2.3 In consideration of the professional services rendered by the Consultant, he shall be paid a professional fee of **5% of the actual cost of the work or the awarded cost whichever is lower** of the subhead of the works for which consultant has rendered Professional services. In addition to the professional fee, service tax will be paid as per the Act in vogue at the time of the payment of the bill. The initial payment shall be made on approved preliminary estimated cost. The cost of the work shall not include costs of aerobridges, in-line Baggage handling Conveyor system, Baggage claim Belts, telephone exchange equipment, Specialized hand/Baggage security-scanning items, DG Sets, FIDs, CCTV, Surveillance CCTV, check-in counters, custom and immigration counters and dust bins. For effecting stage wise payments the cost of works shall be as specified in clause 4.1. Nothing extra shall be paid to the Consultant on account of Soil Investigation, site survey, vetting from IIT, presentations, model, computer simulation, presentation drawings etc.*

Items like travellators, escalators, elevators, counters, concourse and security hold chairs and furniture would be included towards payment till stage 4.

The payment to State Electricity Board for dedicated power supply may be included in the cost estimate of the project but not to be included for payment to Consultant.”¹

This is also reiterated in clause 4.1, and stages of payment are provided:

4.1 The fee payable to the Consultant shall be computed on the actual cost of works or the awarded cost whichever is lower.
The payment due to the Consultant at different stages shall be computed on the following basis:

- (i) At Stage 1 : On rough estimate of cost
- (ii) At Stage 2, 3 & 4 : On preliminary estimate of cost

¹ Emphasis supplied.



- (iii) At Stage 5 : *On preliminary estimate of cost excluding the estimated cost of works/items specified in clause 4.4*
- (iv) At Stage 6 & 7 : *On Awarded cost or actual cost whichever is lower* of the packages specified in para 2.20 of Annexure A.”²

9. The disputes arise from a subsequent communication dated 24.01.2011 addressed by AAI to VKA, which states that the agreement dated 27.08.2007 had “some discrepancies”. AAI contended that the fee for professional services mentioned in the agreement was different from that authorised by its Board. As a consequence, it declared that the professional fee payable under the agreement would be read as “**5% of the estimated cost of the work or the awarded cost whichever is lower** of the subhead of the works for which the consultant has rendered professional services”.

10. Both the formulations require VKA to be paid a fee based on the lower of two sums. According to VKA, those sums are the “awarded cost” of the project, and the “actual cost”, whereas in the AAI communication, they are the “awarded cost” and the “estimated cost”.

11. The consequence of this variance is significant. VKA was the consultant in respect of the international portion of the work, which was admittedly about 27% of the entire contracted work. There is some dispute as to the “actual cost” – VKA submits that it was to the tune of Rs. 2491 crores, whereas AAI submits that it was in the

² Emphasis supplied.



region of Rs. 1942 crores. It is, however, the admitted position that the “awarded cost” was approximately ₹1602 crores, and the “estimated cost” was approximately ₹1123 crores. As the “actual cost” on both contentions is higher than the “awarded cost” and the “estimated cost,” it is not necessary to resolve this controversy. If VKA is correct, the “awarded cost” would be the basis of computation and if AAI is correct, the “estimated cost” would be the basis. Thus, upon the reading of VKA, based upon the clause as it stands in the agreement, it would be entitled to 5% of 27% of ₹1602 crores, being the lesser of the actual cost and the awarded cost. If AAI’s contention is accepted, however, the fee payable to VKA would be computed upon the base of ₹1123 crores, being the lesser of the awarded cost and the estimated cost.

12. The contention of Mr. Ramesh Singh is that the communication dated 24.01.2011, relied upon by AAI, was a unilateral communication, and the terms of the contract cannot be modified in this manner.

13. Mr. Ajay Pal Singh, however, submits that the contractual clause reflects a mistake, inasmuch as the AAI Board had never accepted this fee arrangement. He submits that the parties had originally entered into an agreement for the international portion of Kolkata Airport in 2005, and a new agreement was proposed in 2007 to bring the contract in line with a similar agreement dated 26.09.2006 executed by AAI, with a third party, for the Madurai Airport. He submits that VKA had indeed consented to the incorporation of the terms of the Madurai Agreement, which



provided for the fee to be 5% of the estimated cost or awarded cost, whichever is lower.

14. Mr. Ajay Pal Singh draws my attention to four documents in support of this contention. These documents are all internal file notings of AAI, written prior to the agreement dated 27.08.2007.

The documents relied upon are summarised below:

a. The first document, entitled “Note 1”,³ is an internal file noting dated 13.07.2007. Mr. Ajay Pal Singh submits that this document shows that AAI had agreed to the present contract being executed on the same terms as the Madurai contract.

b. The second document entitled “Note 2”⁴ is also of July, 2007. The note states that since this is an agreement between the AAI and the consultant, the consent of the consultant obtained, if any, in this regard would be required to be placed on record.

c. The third document, entitled “Note 3”,⁵ is dated 30.07.2007. Mr. Singh relies upon the following extract to suggest that VKA’s consent to these terms had been obtained:

“... With reference to consent of the consultant the matter was discussed with them in the chamber of M (Plg) on 13.07.2007 who have accepted the Madurai Agreement to be followed with the modification as mentioned in N-1. Please also find attached extract of DOP 6.2.1 regarding appointment of architectural and engineering consultant for your information.

Sd/- 30.07.2007

Jt. GM (Arch)”

d. By virtue of the fourth document dated 07.08.2007, entitled

³ At page 334 of the petitioner’s list of documents in O.M.P.(COMM) 401/2020.

⁴ At page 337 of the petitioner’s list of documents in O.M.P.(COMM) 401/2020.

⁵ At page 339 of the petitioner’s list of documents in O.M.P.(COMM) 401/2020.



“Note 6”,⁶ a modified copy of the agreement adopted for Madurai Airport, which was to be followed in respect of the contract in question, was placed for approval.

15. The effect of AAI’s letter dated 24.01.2011 on the agreement dated 27.08.2007 was dealt with by the learned arbitrator in a decision dated 16.10.2015, by which he disposed of two preliminary issues. He held that the agreement dated 27.08.2007 was not a valid agreement since the party competent to contract on behalf of AAI was only authorised to sign the agreement in terms of the decision of the Board of AAI, which was to follow the Madurai Agreement. The arbitrator, however, further held that since the work had already commenced, the correct option was to restore the agreement in conformity with the Madurai Agreement, and thus it could be modified by AAI’s letter dated 24.01.2011.

16. VKA challenged the aforesaid order before this Court in O.M.P.(COMM) 31/2016. AAI however contended that the decision did not constitute an “award” at all. In view of this contention, this Court disposed of the petition by an order dated 15.09.2016, stating that the decision would be treated as an order and that the arbitrator should consider the contentions of the parties and pass the final award uninfluenced by the said decision.

17. Learned counsel for the parties join issue as to whether the analysis in the final award complies with the abovementioned order of this Court dated 15.09.2016. According to Mr. Ramesh Singh, the

⁶ At page 340 of the petitioner’s list of documents in O.M.P.(COMM) 401/2020, with a typed copy at page 342.



learned arbitrator has not decided the issue afresh, but simply reiterated his preliminary decision. Mr. Ajay Pal Singh contends otherwise.

18. I do not consider this to be a point of much significance as, even on the basis that the issue was considered afresh by the learned arbitrator, I am of the view that the award on this point is unsustainable. This is principally because this very issue had been considered by this Court in the case of the contractor for the domestic portion of the same airport project, and decided against AAI in virtually identical circumstances. The decisions of this Court were before the learned arbitrator, but have not been followed.

19. The case before this Court was between AAI and Sikka Associates [hereinafter, “Sikka”], which was the consultant for the domestic portion of the same airport. It is not in dispute that the agreement between Sikka and AAI was identical to the agreement between AAI and VKA. In Sikka’s case also, AAI attempted to vary the consideration clause, on the basis of parity with the Madurai Agreement, in terms of the decision of its Board. Sikka invoked arbitration, which culminated in an award dated 23.03.2015 in its favour, including on the issue at hand. AAI challenged the award by way of O.M.P.(COMM) 164/2017, but its challenge was rejected by this Court *vide* judgment dated 21.12.2017 in *Airports Authority of India v. Sikka Associates*.⁷ This Court held as follows:-

“23. The submissions of the learned senior counsel for the petitioner that there was a mistake in the contract and therefore, the respondent cannot be paid more than what was

⁷ 2017 SCC OnLine Del 12557.



agreed to be paid under the Board Resolution, is also ill-founded. Section 22 of the Indian Contract Act provides that a Contract caused by one of the parties to it being under mistake as to a matter of fact, does not make the contract voidable. **In the present case, even otherwise, the petitioner on realising the alleged mistake in the contract, never resented the same and on the other hand not only continued with the same but also gave additional work to the respondent.** The judgment of Supreme Court in **Kanhiya Lal Mukund Lal** (Supra) relied upon by the learned senior counsel for the petitioner would have no application to the facts of the present case as it was a case where the respondent claimed to have paid certain tax due to a mistake of law and it was held that “Mistake” in Section 72 of the Contract Act comprised within its scope mistake of law as well as a mistake of fact. In the present case, there is neither a mistake of fact nor a mistake of law. **The parties agreed to a particular consideration in the agreement and are bound by the same. As observed above, a party cannot seek unilateral modification of such consideration alleging that it has been agreed by it due to some mistake, especially where more than 70% of the work had already been completed by the other party.**

24. With respect to reliance of the Petitioner on the Board Resolution passed in the 110th Meeting, the Arbitrator holds as under:

‘It is further noted that complete papers relating to the tenth meeting of AAI Board held on 17th May, 2007 were not filed before the arbitrator by the respondent. Only an extract of the board resolution in a typed version has been filed before this arbitrator. The respondents did not file a true copy of the original board resolution which was signed by the board members. Therefore, it is also not known what proposal was put up before the AAI Board, which officer chaired the board meeting as also the designations of other members involved in decision making. Also whether at any stage the claimant was made privy to the decision of the AAI board. This information is vital to understand the sequence of events which lead to formulation of clause 2.2 being different from what was approved by the board. Is it possible that the board resolution itself was improperly drafted by the officers of the



respondents without realizing its implications when they knew all along that the current market practice is lower of the tendered cost or the actual cost for calculating the fee? The respondent could not convincingly explain as to how the words tendered cost or the actual cost came to be written in the agreement when this was never their intention. Further why the respondents did not cancel or suspend further work as the contract as per their own argument was void or voidable being signed by parties not competent to contract? The reference to the constitution of India has surfaced for the first time during oral arguments only. According to the arguments put forth by the learned counsel of the respondents, the contract was voidable but the Respondent took no action in that direction had that been their intention. Therefore, clearly this argument is an afterthought. No judgment of the Apex court or any high court was cited in support of their contention. It is patently unfair to obtain full consultancy work & thereafter turnaround and modify the rates payable on some pretext. In absence of answers to these questions the arguments of the respondents are not at all convincing.”

25. The Arbitrator has rightly concluded that in absence of all material facts leading to the execution of the agreement being placed on record by the petitioner, it was not proper to rely only upon the extracts of the Minutes of Meeting. It is the duty of the party to lead the best evidence in its possession, which could throw light on the issue in controversy. It is not for the Arbitrator to go searching for the evidence which a party possess but fails to produce before him. Reliance of the learned senior counsel for the petitioner on the judgment of Supreme Court in **KP Poulouse** (Supra) is to no avail as the same was a judgment under the Arbitration Act, 1940 and as held by the Supreme Court in **Sundaram Finance Limited v. NEPC India Ltd.** (1999) 2 SCC 479, the 1996 Act is very different from the Arbitration Act, 1940 and therefore, the provisions thereof are to be interpreted and construed independently uninfluenced by the principle underlined the 1940 Act. Supreme Court in **Associates Builders** (Supra) has given broad parameters within the confines of which, Court exercising its jurisdiction under Section 34 of the Act, can set-aside an Arbitral Award. I do not find any such



ground being made out in the present case. Even otherwise, in ***KP Poulose*** (Supra) the Court was dealing with the situation where the documents had not been produced by the department though the same were relevant to arrive at a just and fair decision in favour of contractor. I cannot read the said judgment to mean that even where a document is in possession of the party who seeks to rely upon the same, but does not produce the same, there should be an obligation on the Arbitrator to call for the said document, failing which the Award can be set aside on the ground of it being in conflict with the Public Policy of India. **In any case, the agreement has to be interpreted on its own terms. The terms of the agreement being unambiguous in nature, the correspondence or the conduct of the parties prior to the execution of such agreement cannot be looked into for modifying the same.**⁸

20. AAI challenged the aforesaid decision before the Division Bench in FAO(OS) (COMM) 24/2018. However, the Division Bench has also rejected the challenge by judgement dated 20.02.2018 in *Airports Authority of India v. Sikka Associates*⁹:-

“22. The learned arbitrator has carefully analysed the terms of the contract entered into between the parties and observed that clause 2.2 of the agreement clearly stipulates the terms regarding the professional services to be rendered by the consultant. **The arbitrator has further taken note of the fact that similar clause has been repeated at two more places in the contract and thus, it cannot be said that the same was an inadvertent error or a typing mistake. We also find that the arbitrator has also taken note of the fact that payments were made to the respondent not on the basis of a rough cost estimated as was urged before the arbitrator and urged before us as well.** Taking note of clause 4.1 of the agreement, the arbitrator has held that payment at stage 1 only was to be made on rough estimated cost and while payments at stages 2 to 4 were required to be made on the preliminary estimated cost. **We may also note that the consultancy work had reached stage 6b(ii) which means that 70% of the total fees was payable at that stage and payments had already been made on the**

⁸ Emphasis supplied.

⁹ 2018 SCC OnLine Del 13475.



awarded costs and not on estimated cost as is sought to be urged by the appellant. We are unable to find any fault in the reasoning of the learned arbitrator. We do not find the award to be either perverse, unreasonable, not violative of public policy of India.

23. It is not in dispute that the respondent had refused to give its consent to the modification of the terms of the contract vide its letter dated 14.03.2011 and in the absence thereof the appellant could not have unilaterally modified the terms of the contract entered into between the parties on 21.08.2008. In *Bharat Sanchar Nigam Limited v. BPL Mobile Cellular Limited* reported in (2008) 13 SCC 597, the Supreme Court held that:—

“44. If the parties were *ad idem* as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. Such an exercise having not been resorted to, we are of the opinion that no interference with the impugned judgment is called for.”¹⁰

21. Similar arguments were also raised by AAI in respect of an agreement for Trivandrum Airport, where the same controversy had arisen. The arbitral award in that case was also against AAI. AAI challenged it before this Court in O.M.P.(COMM) 87/2016, which was rejected by a judgment dated 30.05.2017 in *Airports Authority of India v. Artefact Projects Ltd.*,¹¹ extracted below:-

“7. First, Mr. Rai submitted that the arbitral tribunal had grossly erred in directing that professional fees be paid at the rate of 5% of the tendered cost of the work or actual cost, whichever is lower. It is AAI's case that the fees payable to APL is to be calculated on the basis of 5% of the estimated cost or the actual cost, whichever is lower. It is claimed that this was the basis that was approved by the Board of AAI in its 79 meeting held on 28.07.2004. It is contended that inadvertently clause 2.01 of the agreements between the parties recorded that professional

¹⁰ Emphasis supplied.

¹¹ 2017 SCC OnLine Del 8776.



fees would be paid at the rate of 5% of actual total cost of the work or the tendered cost whichever is lower. Mr. Rai submitted that this was pointed out to APL on 22.02.2012. He further submitted that the person who had signed the agreements on behalf of AAI was not authorised to execute any agreement which was in variance with the decision of the Board of AAI and, therefore, the decision of the Board of Directors of AAI in respect of fees payable would prevail over the terms recorded in the agreements.

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16. The challenge laid by AAI to the impugned award must be considered having regard to the aforesaid principles. The contention that fee payable to APL ought to have been computed, not in terms of the agreements between the parties but on the decision of the Board of Directors of AAI taken in the 79th Meeting held on 28.07.2004, is wholly without merit. The terms of the agreements could not be unilaterally changed by AAI merely because they were in variance with the decision of its Board of Directors. The arbitral tribunal had considered the aforesaid contention and found that the terms of the agreements between the parties were clear and APL was entitled to fees at the rate of 5% of the actual cost of work or the tendered cost of work whichever is lower. There is also no dispute that the fees as claimed by APL was in terms of the agreements entered into between the parties.

17. The arbitral tribunal held that “the claimant have entered into the contract with the clear understanding that payment shall be made on the basis of the lower of the two i.e. tendered cost or the actual cost of work. The same cannot be unilaterally changed subsequently by the respondent.” This court finds no infirmity with the aforesaid view and no interference with the arbitral award on this ground is called for.”¹²

22. It is not disputed that the aforesaid judgments of this Court were passed in respect of contracts which were virtually in identical terms, and the factual circumstances in which the controversy arose were also substantially similar. The contentions of AAI, which are very similar to the contentions raised in the present case, were

¹² Emphasis supplied.



rejected, and AAI did not carry the matter further.

23. Mr. Ajay Pal Singh, however, urges me to come to a contrary conclusion in this case, on the basis of the fact that the file notings referred to in paragraph 14 hereinabove were not placed before the learned arbitrator, or before the Court, in the case against Sikka. He submits that both the arbitrator in the Sikka arbitration and this Court in proceedings arising therefrom, were mindful of the fact that the only document placed before the learned arbitrator in that case was the minutes of the internal meeting of AAI.

24. To my mind, however, the present case is no better. The documents placed on record here are also all internal documents of AAI alone. There is no consent of VKA signified in any document. These are all file notings, which are prior to the execution of the agreements. Indeed, all the Notes cited deal with the cases of VKA and Sikka both. Note 2 requires the consent of the consultant to be placed on record. According to Mr. Ajay Pal Singh, this consent is placed on record by virtue of Note 3. Note 3 also does not distinguish between VKA and Sikka, and only states that the matter was discussed with the consultants by the representative of AAI on 13.07.2007, who have accepted the Madurai Agreement with the modifications mentioned in Note 1. Note 6 refers to a “modified copy” of the agreement adopted for the Madurai Airport. The modifications are not enumerated in the said note. These documents, thus, do not make out the case that VKA consented to the Madurai agreement, or to a subsequent variation of the agreement dated 27.08.2007. In any event, these are all pre-contractual internal



documents of AAI. This Court, in the judgment in the case of *Sikka*, has made it clear that in the face of an unambiguous agreement, correspondence or the conduct of the parties prior to execution of the agreement cannot be looked into for modifying the same. The learned arbitrator has proceeded directly contrary to this approach.

25. Mr. Ajay Pal Singh's only other submission is that the learned arbitrator, in the present case, has taken into account that VKA had made a claim for refund of the security deposit placed under the earlier agreement of the year 2005, on the basis that the 2007 agreement did not contain a clause for security deposit, in line with the Madurai Agreement. In this regard, the learned arbitrator has come to the conclusion that VKA itself is relying upon the terms of the Madurai Agreement and, therefore, must also have agreed to the payment of fees in terms of that agreement.

26. This submission is also unmerited. First, the arbitrator has not, in fact, awarded any amount in respect of VKA's claim for a refund of the security deposit withheld by AAI under the 2005 agreement. Second, no such award, one way or the other, is challenged in these proceedings. Third, it is an entirely speculative exercise to suggest that, simply because a party relies upon or accepts one clause based upon the Madurai Agreement, it must have accepted all clauses based on the said agreement. The fact that the Madurai Agreement was modified, for the purposes of the contract between VKA and AAI, is undisputed. The reasoning of the learned arbitrator misses the fact that the case of VKA on both these points was not inconsistent. In both cases, the claims stemmed from the express



terms of the 2007 agreement.

27. In sum, it is evident that the finding of consent on the part of VKA, to the modification of the agreement, is based on no evidence at all. Reliance is placed only on pre-contractual documents. These documents also do not in fact signify VKA's consent, but are only an internal assertion of AAI that VKA had consented. In virtually identical circumstances, AAI has been subjected to awards in favour of contractors, its challenges have been rejected by this Court, and it has taken the matter no further.

28. For the aforesaid reasons, I find that the findings of the learned arbitrator on the unilateral modification of the agreement are liable to be set aside. Although the Court's jurisdiction under Section 34 of the Act is limited as far as contractual interpretation and appreciation of evidence are concerned; interference is warranted when findings are based upon no evidence at all, and when both interpretative and evidentiary conclusions are manifestly illegal or perverse. For the reasons elaborated above, I am of the view that the impugned award is vitiated on both these counts.

II. Effect of these findings

29. The consequence of the learned arbitrator's findings on claim No.1 are reflected in a table contained in the award, which is reproduced below:-

<i>"SI. No.</i>	<i>Description</i>	<i>Amount in Rs</i>	<i>Rem.</i>
1.	Overall Project cost (estimated cost)	11,23,41,80,000	
2.	Share of Project cost in this agreement (27.02%)		
3.	Consultancy fee @ 5%	15,88,51,506	



4.	<i>Payment already made (i/c Rs. 3,25,30,783/- adjusted from the previous agreement)</i>	14,55,97,444	
5.	<i>Balance payment {Rs. 15,88,51,506 (-) 14,55,97,444}</i>	1,32,54,062	(A)
	Recoveries		
6.	<i>Levied compensation as per WAB held on 01.08.2012 Rs. 1,45,00,000/-. However, as per Clause 10 of agreement maximum 5% compensation on account of deficiency in services and delay can be levied i.e. on Rs. 15,88,51,506 @ 5%</i>	79,42,575	
7.	<i>Levied compensations for payment for not posting site representative at site to site representative (50% of the total fee paid).</i>	10,70,000	
8.	<i>Levied compensations for EOT Rs. 25,06,900/-. However, this factor already covered SI. No.6 above. Hence, this part of recovery is NIL.</i>	Nil	
9.	<i>Recovery due to non submission of drawings in required Revit software in 3D etc. (10% of stage-6 Fee)</i>	23,50,000	
10.	<i>Adjust amount already withheld at stage 6(a) for not posting of Architect at site. (as this recovery is taken at SI. No. 7 above.</i>	(-) 5,00,000	
11.	<i>Total recoveries</i>	1,08,625,75	(B)
12.	<i>Net Payable amount (A-B)</i>	Rs. 23, 91,487"	

30. By reason of the findings hereinabove, the first entry in the table, pertaining to estimated cost, is found to be misconceived as the basis upon which consultancy fee in serial No. 3 of the table was to be calculated. The correct figure in serial No. 1, in terms of clauses 2.3 and 4.1 of the agreement dated 27.08.2007, should have been the "awarded cost" of the project, being less than the "actual cost". All subsequent entries in the table would also undergo consequent amendment.

III. Other line items from the above table

31. It is necessary to consider the parties' arguments on some of the other entries in the above table because the learned arbitrator has



incorporated several other claims and counterclaims in his analysis of claim No. 1.

(a) AAI's claim for refund of excess payments

32. AAI's counterclaim No. 1 was for a refund of the excess amount paid between 2007 and 2011, which was paid on the basis of the clauses of the contract as it stood. That decision, even according to the learned arbitrator, is subsumed in his decision on VKA's claim No. 1. The decision on claim no. 1 having been set aside, the decision on counterclaim no. 1 is also set aside.

(b) Adjustment for payments already made

33. The next point of contention is the entry at serial No. 4, by which the arbitrator adjusts the payment already made. There is a dispute between the parties as to the exact amount to be adjusted under this head. As the award with regard to the base amount, from which these deductions are being made, has been set aside, it is not necessary to enter into that dispute, and parties are free to agitate the same in any future proceedings.

(c) AAI counterclaim on account of deficiency in service

34. A further point of contention is with regard to serial No. 6 of the said table. This amount of ₹79,42,575/- is referable to counterclaim No. 3 of AAI, which was for Rs. 1.45 crore, and was based upon alleged deficiency in services provided by VKA. The claim was made under clause 7 of the agreement dated 27.08.2007, which reads as follows:-

"7.0 ADEQUACY OF DESIGN

The services to be rendered by the consultant shall be based on



relevant IS codes and sound Engineering Practices. The structural designs and drawings have to be approved by any of the IITs, whose cost to be borne by the Consultant. Consultant shall intimate the Authority the details of IIT from which structural designees and drawings will be got approved. Consultant shall coordinate the time schedule to be taken by IIT so as to ensure adherence of over all time of submission by the Consultant as specified. No additional time period not any cost shall be allowed to the consultant for IIT vetting of designs and drawings. Major engineering decision and specification shall be reviewed by Authority to the extent desired. Approval of any design/ drawing by IIT shall however, not relieve the consultant in discharging his responsibilities regarding the adequacy of design and proper functioning of the works. The consultant shall be fully responsible for adequacy, accuracy and the quality of the entire services performed under this contract and shall guarantee that the services performed by him shall be in accordance with the accepted standards of safety, environment project and public health. The consultant shall be solely responsible for the adequacy of the structural design and safety of the structure.

The Consultant shall in order to safeguard the interests of the Authority, endeavour to incorporate appropriate provisions in the specifications for purchase of equipment/ appointment of contractors to ensure that the suppliers of equipment/ contractors provide modern reliable and safe to operate equipment system together with the necessary guarantees of performance. The Consultant's obligation in this regard shall be limited to providing technical assistance to the Authority procuring such guarantee.

Consultant shall submit necessary drawings and documents to all statutory bodies including Environmental Clearance as required and obtain necessary sanction/ approval for construction. Except the actual fee payable to the statutory bodies, nothing will be paid extra to Consultant for obtaining approval."

35. Mr. Ramesh Singh submits that the aforesaid clause does not stipulate any penalty payable by VKA for alleged deficiencies in service, but only places an obligation upon VKA with regard to the adequacy and quality of services rendered. He, therefore, submits



that AAI was required to prove its damages on this account in order to recover damages.

36. Mr. Ajay Pal Singh submits that these damages are based upon a show cause notice dated 03.11.2011, on the basis of which AAI came to the conclusion that it would levy a recovery of 9.25% of the consultancy fee payable to VKA. He submits that the award on this count, and consequent adjustment, should have been to the extent of ₹1.45 crores.

37. As both parties have challenged the award on this count, with the consent of learned counsel for the parties, the award of ₹79,42,575 is set aside. The question of the amount recoverable by AAI, if any, on account of alleged breach of Clause 7 of the agreement by VKA is left open, to be agitated in subsequent proceedings, if any.

(d) AAI's claim for compensation for extension of time

38. Serial No. 8 of the table is a nil award in favour of AAI, and does not allow for any reduction from the amount payable to VKA on account of compensation for the extension of time. Although no separate counterclaim was raised on this ground, AAI had claimed an adjustment of ₹25,06,900/- to compensate for extensions of time allegedly necessitated by delays on the part of VKA. The learned arbitrator has held that this amount is covered in the recovery under counterclaim No. 3. Mr. Ramesh Singh accepts that this reasoning of the learned arbitrator is erroneous, although he does not admit any liability on this account. The said issue is also left open for decision in appropriate proceedings.



(e) Non-submission of drawings in Revit software

39. The next contention of VKA concerns a recovery allowed by the learned arbitrator of ₹23,50,000/-, on account of non-submissions of drawings in the required software. This amount is admittedly not referable to any of the counterclaims asserted by AAI. It is left open to the parties to agitate their respective contentions in this regard in any future proceedings.

(f) Non-posting of site representative

40. The last point urged by Mr. Ramesh Singh is with regard to serial No. 7, which is the recovery of compensation of ₹10,70,000 in favour of AAI, for VKA's failure to post a site representative. According to Mr. Ramesh Singh, this claim too bears no basis in the contractual clauses. While Mr. Ajay Pal Singh disputes this contractual position, he submits that this dispute may also be left open for adjudication in appropriate proceedings, if required.

D. Conclusion

41. Having regard to the above position, I am of the view that the impugned award dated 11.10.2019 is wholly unsustainable. Both petitions are therefore allowed, and the impugned award is set aside in its entirety. The parties are free to take steps in accordance with law for invocation of arbitration afresh. In such an event, parties will be at liberty to take the benefit of Section 43(4) of the Act.

42. The parties will bear their own costs.

PRATEEK JALAN, J

FEBRUARY 16, 2024/'pv/SM'/