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

Pronounced on: 04.03.2024

+ OMP(COMM.) 113/2017 and IA No. 1669/2020 (for stay)

DELHI DEVELOPMENT AUTHORITY Petitioner

Through: Mr. Ramesh Singh, Sr. Advocate
along with Mr. Nitin Mishra and Mr.
Ashutosh Kaushik and Ms. Aastha
Agnihotri, Advocates.

versus

M/S SPORTINA PAYCE INFRASTRUCTURE PVT. LTD.

..... Respondent

Through: Mr. Vikram Nankani, Sr. Adv. along
with Mr. Rishi Agarwal, Mr. Shravan
Niranjan, Ms. Tarini Khurana and Mr.
Prabhav Bahuguna, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("A&C Act") assails an arbitral award dated 08.08.2013.

2. The said arbitral award has been issued in the backdrop of disputes between the parties arising out of a contract of "Construction of Indoor Stadium for Badminton & Squash for Commonwealth Games 2010 at Siri Fort Sport Complex, Phase-I". The said work/contract was awarded to respondent/claimant *vide* notification of award dated 01.01.2008. The date of commencement of work was 23.01.2008; the stipulated date of



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completion was 21.05.2008; however, the work was actually completed on 25.09.2008.

3. Certain claims were raised by the respondent/claimant in the arbitration proceedings. The amount awarded in favour of the respondent *vide* the impugned award is summarized hereunder:-

Sr. No.	Claim	Amount awarded
a)	<u>Claim No. 1</u> Sum of Rs. 2,61,21,600/- on account of payment for idle men and machineries.	Rs. 21.40 lacs
b)	<u>Claim No. 2</u> Sum of Rs. 1,56,00,000/- on account of overhead expenses at site due to non-availability/delay in issue in drawings.	Rs. 21.40 lacs
c)	<u>Claim No. 3</u> Sum of Rs.7,92,000/- on account of additional cost incurred in carrying out survey work.	Rs. 82,500
d)	<u>Claim No. 4</u> Sum of Rs. 25,51,360/- on account of air freight cost for shipping water proofing material.	Rs. 8,65,640
e)	<u>Claim No. 5</u> Sum of Rs.19,80,000/-on account of work done not measured for water proofing.	Nil (withdrawn by the respondent)
f)	<u>Claim No. 6</u> Sum of Rs.23,05,647/- on account of steel escalation as per clause 10 CA.	Nil (not pressed by the respondent)
g)	<u>Claim No. 7</u> Sum of Rs.28,88,352/- on account of difference in cost market price vs. price paid as per clause 10 CA.	Rs. 18,33,140
h)	<u>Claim No. 8</u> Sum of Rs.5,76,602/- on account of cement escalation as per clause 10 CA.	Nil (not pressed by the respondent)
i)	<u>Claim No. 9</u> Sum of Rs.33,75,787/- on account of wrong deduction in the quantity of soil transported from site.	Rs. 12,57,423



j)	<u>Claim No. 10</u> Sum of Rs.4,84,308/- on account of additional cost for draining of excess water due to rainfall.	Nil
k)	<u>Claim No. 11</u> Sum of Rs.91,50,240/- on account of loss of profit on curtailment of work.	Nil
l)	<u>Claim No. 12</u> Sum of Rs.18,66,000/- on account of interest on wrong withholding of mile stone.	Nil
m)	<u>Claim No. 13</u> Sum of Rs.1,63,02,924/- on account of loss of bonus.	Nil
n)	<u>Additional Claim No. 1</u> Sum of Rs.11,57,184/- on account of contractor's claim to refund of balance security deposit lying with the department under the contract.	Rs. 11,57,184
o)	<u>Additional Claim No. 2</u> Sum of Rs.25,25,000/- towards refund of withheld amount made in the alleged final bill.	Rs. 25,25,000
p)	<u>Additional Claim No. 3</u> Interest @18% p.a. for the amounts due for pre suit, pendente lite and future.	Simple interest @9% p.a. from the date of invocation of arbitration.

Submissions of the Parties

4. Learned senior counsel for the petitioner has *inter alia* contended that the impugned award completely re-writes the contract between the parties, it does not disclose the reasons and methodology for partly allowing claim no. 1 and 2 raised by the claimant (respondent herein), and that the same is completely contrary to the material and evidence placed on record before the learned arbitrator and also contrary to the express contractual provisions.

5. With regard to claim no. 1, it is specifically contended that the award is patently illegal inasmuch as :

(i) This claim pertains to the idling of both men and machinery,



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which is directly linked to the actual execution of work, in contrast to overhead expenses, which are indirectly related to work execution. The said distinction has been completely overlooked while awarding the said claim.

(ii) This claim is an exact duplicate of the award for claim no. 2, which concerns overhead expenses.

(iii) There is no evidence either led by the claimant/respondent or so found by the arbitrator regarding the extent of engagement of men and machinery. Reliance has also been placed on the decision of the Supreme Court in *State of Rajasthan & Anr. Vs. Ferro Concrete Construction Pvt. Ltd.*, (2009) 12 SCC 1, to contend that no such claim, merely on the basis of figures in the statement of claim, can be legally granted.

(iv) It is submitted that only four documents, namely Ex.C26, Ex.C28, Ex.C32, and Ex.C38, were considered by the arbitrator as sufficient notice for financial losses. However, none of the said letters provide a specific figure regarding the alleged idling of men and machinery. Moreover, the said four letters have been addressed within a span of 1½ months between 19.03.2008 to 28.04.2008, with the last communication in terms recording that the claimant “were forced to disband the labour/T&T by end of March 2008” - which clearly means that there were no idling post March 2008. In any case, the petitioner responded to one of the communications on 11.04.2008, raising certain vital issues, which was an important piece of evidence that has been overlooked/ignored by the Arbitrator. The Arbitrator also ignored another communication from the petitioner dated



05.09.2008 where grievances were raised regarding the non-deputation of engineers. It is submitted that given these circumstances, the question of idling does not arise.

(v) Reliance has also been placed on a decision of this court in ***UOI Vs. OM Construction Company***, 2019 SCC OnLine Del 9037 wherein it has been held that any such claim for idling “requires evidence to be established by the contractor.”

6. The award in respect of claim no. 2 is also asserted to be patently illegal, in view of the following:-

(i) There is no rationale provided for selecting 50% of 2.5% of the contract value as overhead expenses.

(ii) There is no evidence, whether in the form of books or otherwise maintained by the claimant/respondent, indicating an overhead figure anywhere close to the stated 2.5%.

(iii) The expenditure referred to in the statement of claim cannot be categorized as overhead expenses. Moreover, the statement of claim includes centring, shuttering, and scaffolding expenses as part of overhead expenses, although these are indisputably items listed in the Bill of Quantities (BOQ), and thus no overhead can be legitimately claimed on these grounds.

(iv) It is submitted that this court in ***Sidharth Construction Company Vs. Indian Tourism Development Corporation Ltd.***(MANU/DE/2024/2021), has held that an overhead claim on normative basis (i.e. on percentage of the contract basis) cannot be allowed as the same is not equivalent to producing proof of actual damage and that there is no principle of law that mandates the



damages must be allowed on normative basis in all cases. Reliance has also been placed on *Essar Procurement Services Ltd. Vs. Paramount Constructions*, 2016 SCC OnLine Bom 9697, wherein it is submitted that the Bombay High Court has also reiterated the very same principle.

(v) It is submitted that the Supreme Court in *Parsa Kente Collieries Limited Vs. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236 has held that the claim for fixed costs cannot be granted merely on the basis of a C.A. Certificate.

7. The award in respect of claim nos. 3 and 4 is challenged on the ground of being factually perverse and contrary to the entitlement of the respondent/claimant under Bill of Quantity (BOQ).

8. The award in respect of claim no.7 is also stated to be patently illegal inasmuch as it is in the teeth of Clause 10CA as well as 10A of the Contract. Attention is drawn to the fact that Clause 10CA specifically provides that the contractor is not eligible for any escalation for the period after the stipulated date of completion of the contract. It is submitted that allowing the said claim has the effect of disregarding contractual embargo contained in Clause 10CA.

9. The award in respect of claim no.9 is stated to be patently illegal for being in contravention of the relevant contract provisions viz. Clause 1.5.1.1 and 1.5.1.3 (which deal with the methodology of measurement).

10. The award in respect of additional claim no.1 (refund of balance security deposit lying with the contract) is challenged on the ground that the same is not consistent with the stipulation incorporated in Clause 45 of the Contract.



11. The award in respect of additional claim no.2 is challenged on the ground that in terms of Clause 37 of the Contract, the withholding of a certain amount in respect of water proofing work was to be for a period of 10 years from the date of completion of the entire work. It is pointed out that the entire work was completed on 25.09.2009 and accordingly the amount was required to be withheld till 25.09.2019. As such, it is contended that the impugned award by directing release of the said amount ignores the express contractual stipulation/s.

12. *Per contra*, learned senior counsel for the respondent has controverted the contentions raised by the learned senior counsel for the petitioner. It is submitted that the scope of interference with an arbitral award is extremely limited while exercising jurisdiction under Section 34 of A&C Act. In this regard, reliance is placed on the judgment of the Supreme Court in ***M.P. Power Generation Co. Ltd. v. ANSALDO Energia SPA***, (2018) 16 SCC 661.

13. It is submitted that finding of facts rendered in the impugned award as regards hindrances faced by the respondent and the consequent delay in the execution of the work, cannot be interfered with.

14. It is further submitted that the formula adopted by the learned arbitrator to assess the compensation payable to the respondent/claimant under Claim no(s). 1 & 2 cannot be interfered with. The said formula is sought to be justified in the following terms:-

“B. Petitioner’s Objections:

- i. *That EOT has been granted for 42 days with levy of damages.*
- ii. *That the figure of 2.5% unlisted by the Arbitrator to calculate damages was without basis.*
- iii. *That there was no evidence to accept the claims of the Respondent.*



C. Respondent's Response:

i. EOT granted without application of mind and delay was on account of Petitioner.

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ii. Formula adopted by the Ld. Arbitrator to reasonable and in terms of the decision in McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181

a. It is a settled position of law that the arbitrator is entitled to adopt a formula towards calculating damages, which formula would be dependent upon the facts and circumstances of the case [McDermott International Inc.V. Burn Standard Co. Ltd.(2006) 111 SCC 181 Paragraph 106 & Punjab National Bank v. Bijlee Construction OMP 75/2006 Paragraph 17] It is also settled law that an arbitrator can use its expert or technical knowledge or the general knowledge about the particular trade in deciding a matter. [R.R. Shah Shares and Stock Brokers v. H.H. Securities Ltd. (2012) 1 SCC 594 Paragraph 22-23].

b. The Ld. Arbitrator having concluded that the Petitioner was responsible for 85 days delay, held that the Respondent was entitled to a compensation. [Page 18 of Award]. It is humbly submitted that the formula adopted by the Ld. Arbitrator is a mathematical expression of the phrase 'justifiable and an reasonable ground for minimum required men and machineries for due performance of the contract which is just and reasonable for the delayed period: 50% of 2.5% of overhead X (total delay – EOT granted)/Total Number of days for completion [Page 18 of Award].

c. It is submitted that the formula is in essence the per date rate of the tender, multiplied by a factor taken by the arbitrator, which represents the minimum required men and machineries for the due performance of the contracts. In other words, the arbitrator by dividing the total value of the tender by the number of days for completion has arrived at the per date tender value i.e. Rs.20,14,166.67. This is then factored by 1.25% which is 50% of 25% of the over heads i.e. Rs. 25,177.083. This is the amount i.e. Rs. 25,177.083. This is the amount i.e. Rs. 25,177.083 per day the Arbitrator has awarded towards idle men and machineries. This figure is then multiplied by the number of days of delay attributable to the Petitioner i.e. 85 days for the awarded compensation of Rs. 21,40,052.08.



iii. That the Respondent's claims were in fact proved and in any event the utilization of the formula makes the figures provided by the Respondent irrelevant:

a. It has been submitted by the Petitioner that the award of compensation is without proof, however this is incorrect as the details of the claim have been specifically set out by the Respondent in its Statement of Claim. [Page 62, Statement of Claim]. It is humbly submitted that despite this, there has been no specific denial of the figures provided by the Respondent, by the Petitioner in its Statement of Defence, and accordingly the Ld. Arbitrator was entitled to rely on the same. [Page 206, Statement of Defence]. Moreover, it is submitted that the specific details of the pricing of the machinery becomes irrelevant as the basis of calculation of damage was the total cost of the tender i.e. 24,17,03,675, which amount is not disputed."

15. Likewise, the formula adopted for awarding the claim no.2 is sought to be justified.

16. The award in respect of claim nos. 3 & 4 is sought to be justified on the basis that the same is predicated on pure finding of the facts which warrants no interference while exercising the jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

17. The award in respect of claim no.7 is sought to be justified on the basis of the settled legal position that the award of damages is within the realm of the arbitrator.

18. The award in respect of claim no. 9 is sought to be justified on the ground that it is predicated on the interpretation of the terms of the contract which is squarely the domain of the arbitrator. It is also submitted that the said claim was conceded by the petitioner before the arbitrator.

19. The award in respect of additional claim no.1 viz. refund of balance of security deposit is sought to be justified by referring to the cogent reasoning contained in the impugned award as regards the untenability of the recoveries sought to be effected by the petitioner.



20. Likewise, as regards additional claim no.2, the award is sought to be justified by referring to the reasoning contended in the award itself and also drawing attention to the fact that there was no warrant for making arbitrary deductions from the security deposit which were not specifically envisaged under express contractual provisions.

Analysis and Conclusion

21. I have given my thoughtful consideration to the rival contentions on behalf of the parties.

22. As regards claim no.1, which was for the compensation on account of idling of men and machinery (claimed amount Rs.2,61,21,600/-), the basis for claiming the said amount was the hindrances allegedly faced by the respondent while executing the work resulting in idling of men and machinery. After narrating the various hindrances that were faced and the delay that was occasioned, it was specifically pleaded in the statement of claim as under:-

“.....The claimants are, therefore, entitled to the compensation/damages on account of men machineries etc. The law is well settled that if there is a breach of contract the aggrieved party is to be placed in the same position. The compensation can only be in the shape of money which the Claimants had incurred due to various lapses on the part of the Respondents.

(Notice were issued by the Claimants for their financial suffering as per Exhibit-C-26 dated 19.03.2008, Exhibit-C-28 dated 26.03.2008, Exhibit-C-32 dated 21.04.2008, Exhibit-C-38 dated 28.04.2008. The details of claims are given as under;

1. 3 nos. Excavators i/c operator	@ Rs. 12 lac P.M	=Rs. 36,00,000/-
2. 50 nos. Dumpers with drivers	@ Rs. 90,000/- P.M.	=Rs. 45,00,0000/-
3. 40 nos. labours	@ Rs. 5250/- P.M.	=Rs. 2,10,000/-
4. 2 nos. Generators i/c operator	@Rs.33,000/- P.M.	=Rs. 66,000/-
5. 8 nos. Security Guards	@ Rs. 8,000/- P.M.	=Rs. 64,000/-
		= Rs. 84,40,000/-



Rs.84,40,000/- per month for 122 days which comes to =Rs. 3,37,60,000/-

Under the circumstances and position explained above. It is, therefore, prayed that the amount under claim may be awarded in favour of the Claimants.”

23. As can be seen, the amount claimed by the respondent was quantified, based on specific averments regarding the exact extent of idling that took place.

24. The impugned award renders a factual finding that the work was prolonged for a period of 127 days, and a significant part of the said days was held to be attributed to the various lapses and breaches of the contract on the part of the petitioner (DDA). It was also concluded that the reasons with regard to the delay in completion of work as referred to by the claimant (respondent herein) were not fully considered by DDA while granting extension of time. It was specifically found that out of the total delay that had taken place, a period of 85 days of delay was attributable to the DDA and that the respondent/claimant was therefore entitled to the reasonable compensation for loss suffered on this account.

25. The relevant findings in the impugned award as regards the rationale for awarding the compensation to the respondent/claimant, and the basis thereof, are as under:-

“I also find that the respondents were equally responsible for breach of contract resulting in prolongation of the work as 85 days of delay is on the part of the respondents & claimants are entitled for reasonable, compensation for losses suffered by them on this account under section 73 of Indian Contract Act. I, therefore, hold that the claimants are entitled for their losses/damages under claim for the period after the expiry of the contractual period i.e. 21.05.2008 to the actual date of completion i.e. 25.09.2008, which I assess over all on justifiable and an reasonable ground for minimum required men and machineries for due performance of the contract, which is just and



reasonable for the delayed period which worked out as under:-

50% of 2.5% of overhead i.e. 1.25% of 24.17 crores x (127 - 42)/120 = 21.40 lacs.

I, therefore, consider and decide that the claim of the claimants is on higher side for Rs.3,37,60,000/-, however, I award a sum of 'Rs.21.40 lacs in favour of the claimants under this claim.'

26. It is evident from a perusal of the award that there is no adjudication/reasoning as to why the version of the respondent/claimant, in terms of which the exact idling of men and machinery was set out, was not found acceptable.

27. Evidently, the award discards/refuses to accept the version of respondent/claimant as regards the extent of idling men and machinery. However, inexplicably, the impugned award goes on to draw linkage between claim no.1 and "overheads", even though no such linkage has been drawn by the respondent/claimant itself in its pleadings. Further, there is no averment in the statement of claim that the extent of overheads is 2.5 % of the contract price. The award adopts a completely extraneous basis for assessing the entitlement of the respondent/claimant, which is at complete variance with the case/methodology set up by the respondent/claimant itself.

28. The law is well-settled that an arbitral tribunal, even when it does not accept the basis of calculation of damages as presented by the claimant, it is within its domain to re-work the same, and it is even recognised in a number of cases, that for this purpose, an arbitral tribunal may resort to some "guess work" in certain situations. However, when arbitral tribunal seeks to adopt a completely extraneous basis for assessing and awarding damages, at the very least, the award must mention:

(i) reasoning for rejecting the computation/data furnished by the



claimant;

- (ii) rationale for adopting the alternative methodology; and
- (iii) adequately explain the alternative methodology.

29. In the impugned award, none of the above requirements is satisfied. As noticed, the claim as raised was founded on specific assertion as regards exact extent of idling of specifically identified and quantified machinery. The quantum of manpower rendered idle was also pleaded in precise terms. Once the same was found untenable, the impugned award at the very least should have explained the rationale for the alternative methodology to which it was resorting to. In particular, the award ought to have explained the linkage between the manpower and machinery allegedly rendered idle with “50% of the total overheads”. Moreover, the award does not disclose on what basis it has assumed that the extent of overheads was 2.5% of the contract price. The explanation sought to be offered by the respondent in these proceedings is akin to inferring some reasoning, which is not discernible from the award itself.

30. Also, when the arbitral award resorts to methodology which is different from methodology set out in the statement of claim, the same must be put to the opposite party so that the opposite party has an opportunity to make contentions with regard thereto. It is impermissible for an arbitral tribunal to spring a surprise on the parties by making an arbitral award on the basis of methodology which does not form part of the pleaded case at all and on which no submissions have been made by the respondent/claimant. This is essential to meet minimal requirements of natural justice and to ensure that the award does not hit by Section 34(2)(a)(iii) of the A&C Act.

31. In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15



SCC 131, an arbitral award was *inter alia* set aside under Section 34(2)(a)(iii) of the A&C Act, when it was found that the arbitral tribunal had relied upon certain extraneous material which were never disclosed in the arbitration proceedings and thereby directly affected the ability of a party to present its case. Relevant extracts of the said judgement are as under:

“The ground of challenge under Section 34(2)(a)(iii)

...

52. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) would be made out.

53. In New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards — Commentary, edited by Dr Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012), it is stated:

“4. Right to Comment

According to the principle of due process, the tribunal must grant the parties an opportunity to comment on all factual and legal circumstances that may be relevant to the arbitrators' decision-making.

(a) Right to Comment on Evidence and Arguments Submitted by the Other Party

As part of their right to comment, the parties must be given an opportunity to opine on the evidence and arguments introduced in the proceedings by the other party. The right to comment on the counterparty's submissions is regarded as a fundamental tenet of adversarial proceedings. However, in accordance with the general requirement of causality, the denial of an opportunity to comment on a particular piece of evidence or argument is not prejudicial, unless the tribunal relied on this piece of evidence or argument in making its decision.

In order to ensure that the parties can exercise their right to comment effectively, the Arbitral Tribunal must grant them access to the evidence and arguments submitted by the other side. Affording a party the opportunity to make



submissions or to give its view without also informing it of the opposing side's claims and arguments typically constitutes a violation of due process, unless specific non-disclosure rules apply (e.g. such disclosure would constitute a violation of trade secrets or applicable legal privileges).

In practice, national courts have afforded Arbitral Tribunals considerable leeway in setting and adjusting the procedures by which parties respond to one another's submissions and evidence, reasoning that there were "several ways of conducting arbitral proceedings". Accordingly, absent any specific agreement by the parties, the Arbitral Tribunal has wide discretion in arranging the parties' right to comment, permitting or excluding the introduction of new claims, and determining which party may have the final word.

(b) Right to Comment on Evidence Known to or Determined by the Tribunal

The parties' right to comment also extends to facts that have not been introduced in the proceedings by the parties, but that the tribunal has raised sua sponte, provided it was entitled to do so. For instance, if the tribunal gained "out of court knowledge" of circumstances (e.g. through its own investigations), it may only rest its decision on those circumstances if it informed both parties in advance and afforded them the opportunity to comment thereon. The same rule applies to cases where an arbitrator intends to base the award on his or her own expert knowledge, unless the arbitrator was appointed for his or her special expertise or knowledge (e.g. in quality arbitration). Similarly, a tribunal must give the parties an opportunity to comment on facts of common knowledge if it intends to base its decision on those facts, unless the parties should have known that those facts could be decisive for the final award."

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55. Gary Born states:

"German courts have adopted similar reasoning, holding that the right to be heard entails two related sets of rights : (a) a party is entitled to present its position on disputed issues of fact and law, to be informed about the position of the other parties and to a decision based on evidence or materials known to the parties [see e.g. judgment of 5-7-2011]; and (b) a party is entitled to a decision by the Arbitral Tribunal that takes its



position into account insofar as relevant [see e.g. judgment of 5-10-2009]. Other authorities provide comparable formulations of the content of the right to be heard [see e.g. *Slaney v. International Amateur Athletic Foundation*, F 3d at p. 592].”

56. Similarly, in *Redfern and Hunter* (supra):

“11.73. The national court at the place of enforcement thus has a limited role. Its function is not to decide whether or not the award is correct, as a matter of fact and law. Its function is simply to decide whether there has been a fair hearing. One mistake in the course of the proceedings may be sufficient to lead the court to conclude that there was a denial of justice. For example, in a case to which reference has already been made, a US corporation, which had been told that there was no need to submit detailed invoices, had its claim rejected by the Iran-US Claims Tribunal, for failure to submit detailed invoices! The US court, rightly it is suggested, refused to enforce the award against the US company [Iran Aircraft Industries v. AvcoCorpn.]. **In different circumstances, a German court held that an award that was motivated by arguments that had not been raised by the parties or the tribunal during the arbitral proceedings, and thus on which the parties had not had an opportunity to comment, violated due process and the right to be heard** [see the decision of the Stuttgart Court of Appeal dated 6-10-2001 referred to in *Liebscher, The Healthy Award, Challenge in International Commercial Arbitration* (Kluwer law International, 2003), 406]. Similarly, in *Kanoria v. Guinness*, the English Court of Appeal decided that the respondent had not been afforded the chance to present its case when critical legal arguments were made by the claimant at the hearing, which the respondent could not attend due to a serious illness.

In the circumstances, the court decided that ‘this is an extreme case of potential injustice’ and resolved not to enforce the arbitral award.

11.74. Examples of unsuccessful ‘due process’ defences to enforcement are, however, more numerous. In *Minmetals Germany GmbH v. Ferco Steel Ltd.*, the losing respondent in an arbitration in China opposed enforcement in England on the grounds that the award was founded on evidence that the Arbitral Tribunal had obtained through its own investigation.



An English court rejected this defence on the basis that the respondent was eventually given an opportunity to ask for the disclosure of evidence at issue and comment on it, but declined to do so. The court held that the due process defence to enforcement was not intended to accommodate circumstances in which a party had failed to take advantage of an opportunity duly accorded to it.”

57. In *Minmetals Germany GmbH v. Ferco Steel Ltd.*, the Queen's Bench Division referred to this ground under the New York Convention, and held as follows:

“The inability to present a case issue.—Although many of those States who are parties to the New York Convention are civil law jurisdictions or are those which like China derive the whole or part of their procedural rules from the civil law and therefore have essentially an inquisitorial system, Article V of the Convention protects the requirements of natural justice reflected in the audi alteram partem rule. Therefore, where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcer has not been given any reasonable opportunity to present its case in relation to the results of such investigations. Article 26 of the Cietac rules by reference to which the parties had agreed to arbitrate provided:

‘26. The parties shall give evidence for the facts on which their claim or defence is based. The Arbitral Tribunal may, if it deems it necessary, make investigations and collect evidence on its own initiative.’

That, however, was not treated by the Beijing court as permitting the tribunal to reach its conclusions and make an award without first disclosing to both parties the materials which it had derived from its own investigations. *That quite distinctly appears from the grounds of the court's decision — that Ferco was, for reasons for which it was not responsible, unable “to state its view”. Those reasons could only have been its lack of prior access to the sub-sale award and the evidence which underlay it. I conclude that it was to give Ferco's lawyer an opportunity to refute this material that the Beijing court ordered a “resumed” arbitration.”*

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73. Given these parameters of challenge, let us now examine the arguments of the learned counsel on behalf of the appellant. There can be no doubt that the government guidelines that were referred to and strongly relied upon by the majority award to arrive at the linking factor were never in evidence before the Tribunal. In fact, the Tribunal relies upon the said guidelines by itself and states that they are to be found on a certain website. The ground that is expressly taken in Section 34 petition by the appellant is as follows:

“It is pertinent to mention here that no such guidelines of the Ministry of Industrial Development had been filed on record by either of the parties and therefore, the Tribunal had no jurisdiction to rely upon the same while deciding the issue before it. Accordingly, the impugned award is liable to be set aside.”

74. The learned counsel for the respondent also agreed that these guidelines were never, in fact, disclosed in the arbitration proceedings. This being the case, and given the authorities cited hereinabove, it is clear that the appellant would be directly affected as it would otherwise be unable to present its case, not being allowed to comment on the applicability or interpretation of those guidelines. For example, the appellant could have argued, without prejudice to the argument that linking is de hors the contract, that of the three methods for linking the New Series with the Old Series, either the second or the third method would be preferable to the first method, which the majority award has applied on its own. For this reason, the majority award needs to be set aside under Section 34(2)(a)(iii).”

[emphasis supplied]

32. Garry B. Born in his book **“International Commercial Arbitration”** (Second Edition, S25.04[B], p.3249), notices “*surprise decisions by arbitrators*” as a ground to set aside an arbitral award.

Relevant extracts from the book are reproduced hereunder:

““Surprise” Decisions by Arbitrators. If the arbitrators rest a decision on factual materials or (less clearly) a legal theory not advanced by the parties, without providing the parties an opportunity to be heard, their award is subject to annulment. One English decision correctly summarizes the approach of many courts to this issue:

“In truth, we are simply talking about fairness. It is not fair



to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors-then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it.”

This rule follows from parties’ general right to an opportunity to be heard, and is related to the arbitrators’ obligation not to exceed the scope of the parties submissions.

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As the above excerpts indicates, however, even where this reasoning is adopted, courts have annulled awards that rested on authorities or arguments that the parties did not address and could not reasonably have foreseen as relevant. Where the arbitral tribunal adopts a legal position or theory different from that previously communicated to the parties or where its decision, for other reasons, came as a surprise to the parties, the tribunal is required to inform the parties and permit them an opportunity to be heard on the issue.

Other national courts have annulled awards where the arbitral tribunal rested its decision on legal provisions or argument raised sua sponte by the arbitrators and not addressed by the parties. In the words of one French decision, “the principle of due process implies that the arbitral tribunal cannot introduce any new legal or factual issue without inviting the parties to comment on it.”

[emphasis supplied]

33. In a recent decision, Singapore Court of Appeal in **CEF & Anr. v CEH**, [2022] SGCA 54, partially set aside an arbitral award having found that the tribunal’s chain of reasoning in respect of the damages was not one



which the parties had reasonable notice that the tribunal could adopt, nor did it have a sufficient nexus to the parties' arguments. Relevant extracts from the said judgment are as under:

"The fair hearing rule

110. On appeal, the appellants submit that the Damages Order was issued in breach of natural justice and/or that the appellants were unable to present their case. The Tribunal had rejected and/or found the respondent's evidence in support of its five heads of reliance loss to be deficient. Despite this, it inexplicably proceeded to adopt a "flexible approach" and to award the respondent 25% of each head of reliance loss, without first telling the parties it would be doing so or giving them the opportunity to address the Tribunal on the same. Had the Tribunal indicated beforehand that it would apply this flexible approach, the appellants would have had the opportunity to decide whether to ask the respondent to produce the source documents, or to take a forensic risk by resting their defence only on the burden of proof.

The law

111. In the recent decision of this court in *BZW and another v BZV* [2022] SGCA 1 ("BZW"), this court stated that a breach of the fair hearing rule could arise from the chain of reasoning which the tribunal adopts in its award (at [60(b)]):

"... a breach of the fair hearing rule can also arise from the chain of reasoning which the tribunal adopts in its award. To comply with the fair hearing rule, the tribunal's chain of reasoning must be (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments (JVL Agro Industries at [149]). A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if: (i) it arose from the parties' pleadings; (ii) it arose by reasonable implication from their pleadings; (iii) it is unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (iv) it flows reasonably from the arguments actually advanced by either party or is related to those arguments (JVL Agro Industries at [150], [152], [154] and [156]). To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such that "a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award" (Soh Beng Tee & Co Pte Ltd



v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 (“Soh Beng Tee”) at [65(d)].”

xxx

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116. *In our view, the Tribunal’s chain of reasoning in respect of the Damages Order was not one which the parties had reasonable notice that the Tribunal could adopt, nor did it have a sufficient nexus to the parties’ arguments.*

117. *First, the Tribunal had expressly stated that there were deficiencies in the respondent’s evidence due to the respondent’s failure to produce the relevant supporting documents or to explain how the existing documents substantiated its claim. In our view, both parties would have expected that the Tribunal would only award the respondent loss that the respondent could prove. They would have expected that if the Tribunal disagreed with the appellants about the state of the evidence adduced by the respondent in support of its reliance loss, it would award the respondent its claim in its entirety, ie, it would then award 100% of the respondent’s claim for reliance loss. Similarly, if the Tribunal were to award 25% of the claim for reliance loss, this would be because the respondent had only proved 25% of its claim for reliance loss (and failed to prove the other 75%). In our view, a reasonable litigant in the appellants’ shoes could not have foreseen the possibility of reasoning of the type revealed in the Award – ie, that the Tribunal, having noted all the deficiencies in the respondent’s evidence, would then go on to adopt a figure of 25% of the amount claimed as being the loss incurred. Instead, the parties would have expected the Tribunal to dismiss the claim for reliance loss in its entirety.*

118. *Second, the Tribunal’s chain of reasoning did not have a sufficient nexus to the parties’ arguments. The Tribunal justified its reasoning with reference to the “flexible approach” in Robertson Quay...*

119. *Even in the respondent’s own reply post-hearing submissions, the respondent did not cite Robertson Quay for the proposition that, if the Tribunal was not satisfied as to the state of the respondent’s evidence concerning proof of its loss, the Tribunal could then rely on the “flexible approach” to justify awarding a certain percentage of the respondent’s total claim (assuming the case could have been cited for that proposition which seems doubtful). In fact, the respondent had cited Robertson Quay in support of its argument that the question was simply “whether the Tribunal is satisfied that [the respondent’s] evidence on the loss and quantification is more likely to be true than not” [emphasis added]. Thus, even the respondent acknowledged that,*



on the “flexible approach”, the Tribunal had to first be satisfied that the respondent’s evidence was “more likely to be true than not” in order to award any damages to the respondent. In our view, therefore, the Tribunal’s reliance on the “flexible approach” in *Robertson Quay* had no connection to the issue before the Tribunal of what the appropriate award for the respondent’s alleged reliance loss should be. Once the Tribunal found that the respondent had not proved its reliance loss, the only appropriate percentage to award was 0% – the “flexible approach” did not allow the Tribunal to randomly select a figure of 25%.

120...

121. Third, we consider that this breach of natural justice was connected to the making of the Award (BZW at [62]), as the Tribunal awarded the respondent 25% of its claimed reliance loss based on the “flexible approach”. In our view, this breach of natural justice prejudiced the appellants’ rights. Had the Tribunal informed the parties of its intention to apply the “flexible approach” in this manner, the appellants would have had the opportunity to inform the Tribunal of its objections to such an approach, or the appellants would have had the opportunity to decide whether to ask the respondent to produce the source documents or to take a forensic risk by resting their defence only on the burden of proof. This compliance with the rules of natural justice could reasonably have made a difference to the outcome of the Arbitration (BZW at [63]).

[emphasis supplied]

34. The English High Court in *The Republic of Kazakhstan Vs. World Wide Minerals Limited & Paul A Carroll QC*, [2020] EWHC 3068 (Comm), also set aside an arbitral award when it was found that the tribunal had awarded damages to the respondents therein by reference to an argument not advanced during the hearing and in respect of which the petitioner had no real opportunity to respond.

35. Furthermore, the Supreme Court in *Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1, has held that ordinarily unintelligible awards are to be set aside. Relevant extract of the said



judgment is as under:

*“35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. **On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award.** Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.”*

[emphasis supplied]

36. Accordingly, the award in respect of the claim no.1 is set aside.

37. Likewise, the award in respect of claim no.2, is completely out of sync with the case set up by the respondent/claimant itself. The pleaded case of the respondent/claimant as regards claim no.2 is as under:-

“Claim no. 2 overhead expenses at site due to non-availability/delay in issue of drawings Rs.1,56,00,000/-

That the Claimants have already given the causes of delay with the support of various exhibits under brief facts and also under claim no.1 above which justifies delay not attributable to the Claimants and are not repeating for the sake of brevity. All the delays were wholly and solely attributable to the Respondents and the Claimants are the real sufferer. Thus the Claimants are entitled to damages for breach of Contract on the part of the Respondents. The breach has been proved un doubtedly on the part of the Respondents. The claimants



are therefore, entitled to the compensation/damages on account of overhead expenses etc.

(Notice were issued by the Claimants for their Financial suffering as per Exhibit-C-26 dated 19.03.2008, Exhibit-C-28 dated 26.03.2008, Exhibit C-32 dated 21.04.2008, Exhibit C-38 dated 28.04.2008. The details of the claims are given as under:-

Overheads on account of staff and establishment.:-

Project Manager	1 no.	@ Rs.60,000/- p.m.	= Rs. 60,000/-
Engineers	5 no.	@ Rs.50,000/- p.m.	=Rs. 2,50,000/-
Supervisors	6 no.	@ Rs.30,000/- p.m.	= Rs. 1,80,000/-
Store Keeper	2 no.	@ Rs.10,000/- p.m.	= Rs. 20,000/-
Accountant	1 no.	@ Rs.15,000/- p.m.	= Rs. 15,000/-
Computer Operator	1 no.	@ Rs.12,000/- p.m.	= Rs.12,000/-
Chowkidars	6 nos.	@ Rs.8,000/- p.m.	= Rs. 48,000/-
Peon	1 no.	@ Rs.6,000/- p.m.	= Rs. 6,000/-
Motors & Pumps Set Etc.		@ Rs.20,000/- p.m.	= Rs. 20,000/-
Centring, shuttering scaffolding etc.			
10000 sft. To			= Rs. 60,000/-
15,000 sft. Per month lum sum.			
Per Month =			Rs. 6,71,000/-

Rs.6,71,000/- per month for 122 days which comes to: Rs.26,84,000/-

Under the circumstances and position explained above, it is therefore prayed that the amount under claim may be awarded in favour of the Claimants.”

38. The award in respect of the claim no.2 is as under:-

“After perusal of the records and consideration of the documents, pleadings, submissions, Judgments referred to and arguments advanced by the parties, It has already been decided by me while



discussing the issue of delay under claim No: 1 that the work was prolonged for the period of 127 days and not 122 days as intimated by the claimants. The work was equally delayed by the respondents due to various lapses and breaches of contract. The respondents cannot take advantage of their own lapses and put the claimants to suffer the losses for 'such delays. The claimants have also given sufficient notice for their financial suffering as per exhibit C-26 dated 19.03.2008, exhibit C-28 dated 26.03.2008, exhibit C-32 dated 21.04.2008, and exhibit C-38 dated 28.04.2008.

The claimants have engaged required technical staff as specified and requirement of contract as per the respondents their own admission as certified, in exhibit R-7 para 7. The details of the, claim as given by, the claimants for Rs.26,84,000/- in the statement of facts, whereas the claim amount referred to by the competent authority is for Rs.1,56,00,000/-. I also find that the respondents was equally responsible for breach of contract resulting in prolongation of the work and claimants is entitled for reasonable compensation for losses suffered by them on this account under section 73 of Indian Contract Act. I, therefore, hold that the claimants are entitled for their losses/damages under this claim for the period after the expiry of the contractual period i.e. 21.05.2008 to the actual date of completion i.e. 25.09.2008 as the respondents have been issuing drawings upto 5-6-2008 as evident from exhibit R-2. Therefore, I assess over all on justifiable and an reasonable ground for minimum overhead expenses, for due performance, of the contract, which is just and reasonable for the delayed period as per detail given below :-

50% of 2.5% of overhead i.e. 1.25% of 24.17 crore x (127 - 42)/120 = 21.40 lacs

I, therefore, consider and decide that the claim of the claimants is on higher side for Rs.26,84,000/-, however I award ,a sum of Rs.21.40 lacs in favour of the claimants under this claim.

39. It is noticed that although the claim no.2 is quite different from claim no.1, founded on separate/distinct averments, the same formula which has been adopted for the claim no.1 has been *ipso facto* adopted for the purpose of assessing and awarding claim no.2 as well. No reason/rationale for the same has been set out in the award. There is also no reasoning whatsoever in the impugned award dealing with the correctness/ incorrectness of the claim



as raised in the pleadings.

40. Again, it is nowhere disclosed as to why and how the extent of overhead has been assumed to be 2.5%. Further, the award does not purport to offer an explanation or rationale as to the formula being adopted.

41. There is also nothing in the award to suggest that the petitioner or the respondent were notified as to the alternate methodology proposed to be adopted by the arbitrator. As in the case of Claim no. 1, the same assumes significance in the light of the fact that the methodology on the basis of which the claim has been awarded is completely distinct from methodology asserted by the respondent/claimant. No doubt, it is permissible for an arbitral tribunal to scale down the amount assessed/claimed by the claimant and to award a lesser amount depending upon the material/evidence placed on record, however, where an award proceeds to adopt a methodology which is completely alien to the pleadings of the claimant, at the very least, it must contain reasons explaining the rationale for the formula and the source of the various ingredients/assumptions made (as to why overhead has been assumed 2.5%; why the formula referred in the award refers to “50% of the 2.5% of overheads”; what is the rationale/source of the other inputs to the formula). These cannot be a matter of assumptions/speculations. Accordingly, the award in respect of the claim no.2 is also set aside.

42. As regards the award in respect of claim no. 3 is concerned, I find that the same is predicated on pure findings of fact; the relevant findings are as under:-

“After perusal of the records and consideration of the documents, pleadings, submissions, conditions of contract referred to and arguments advanced by the parties, I consider the view of both the parties and found that the respondents themselves admitted that the



layout plan was given to the agency on 24.01.2008 & 30.01.2008. The respondents also admitted in, their submission date 21.12.2010 that final layout Plan (revised) was issued to the agency on 13.02.2008. The claimants have made specific reference vide exhibit-C-7 dated 21.01.2008 exhibit-C-14 dated 09.02.2008, exhibit-C-17 dated 20.02.2008, replies on these references have not been placed on record by the respondents. The respondents cannot take advantage of their own lapses and put the claimants to suffer the losses for such delays.

I, therefore, hold that the claimants are entitled to claim for at least one time instead of three times as per Agreement rate, which works out to Rs.82,500/- is just and reasonable. I award a sum of Rs.82,500/- in favour of the claimants under this claim."

43. No fault can be found with the above findings, particularly when examined on the touchstone of Section 34 of the A & C Act.

44. Likewise, in respect of claim no.4, the impugned findings are as under:-

"On consideration of the documents, pleadings, submissions, BOQ item, arguments advanced by the Parties and after perused the exhibit R-9, I consider the' view of both' the parties and I find that there was specific instruction from the Respondent, as per exhibit R-9 to the claimants that one lot may be procured immediately as per the technical specification submitted. exhibit-R-9 further states that the final approval shall be given after receipt of the test report as compared with the specification of the manufacturer. The respondents cannot take advantage of their own lapses and put the claimants to suffer the losses/expenses .

I, therefore, hold that the claimants are entitled to at least 50% of the air freight cost for, shipping water proofing material received by the respondents on 27-5-2008 and 28-5-2008 vide invoice No. 164 dated 30-4-2008 & 172 dated 17-5-2008 respectively as per MAS Register filed by the respondents vide letter dated 11-11-2010, which I assess over all on justifiable and an, reasonable ground as per C-40 & C-41 filed by the claimants. I, therefore, consider and decide that the claim of the claimants is on higher side however, I award a sum of Rs.8,65,640/- i.e. 50% of Rs.17,13,280/-, excluding demurrage charges, in favour of the claimants under this claim."

45. Again, in proceedings under Section 34 of A&C Act, it is not



permissible for this Court to re-examine/re-appreciate the relevant material placed before the learned arbitrator and to arrive at a different conclusion. Further, the award, despite rendering finding of fact in favour of the respondent/claimant awards only 50% of the amount claimed. In this background, I see no justification for interfering with the impugned award on the touchstone of Section 34 of the A&C Act, 1996.

46. While awarding claim no.7, the impugned award takes into account the factual position that the work was prolonged due to various lapses/breaches on the part of the petitioner/DDA. The said claim itself was based on Sections 55 and 73 of the Contract Act, 1872. In the statement of claim, it was sought to be asserted that in the extended period, there was substantial increase in the cost of execution of work which was not fully compensated by the price variation formula in the contract.

47. The impugned award finds that the respondent/claimant was entitled to the compensation on account of “increased cost of material due to prolongation of work”, and awards compensation to the extent of 1.5% of the proportionate work done during the justified period.

48. In so awarding, the Arbitrator does not adopt a methodology which is contrary to / at substantial variance with that was asserted by the claimant, but rather scales down the claim. The law is well-settled to the effect that even where the contract contains a provision debarring a contractor from claiming enhanced rate on any ground, still it is permissible for damages to be assessed and awarded on the touchstone of Section 73 of the Contract Act. In this regard, reference is apposite to the observations made by the Supreme Court in *K.N. Sathyapalan v. State of Kerala*, (2007) 13 SCC 43, wherein it has been held as under:



“31. The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the original agreement and a specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of escalation of costs and whether the arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.

32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad case and also Patel Engg. case. As was pointed out by Mr Dave, the said principle was recognised by this Court in P.M. Paul where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George case.

33. We have intentionally set out the background in which the arbitrator made his award in order to examine the genuineness and/or validity of the appellant's claim under those heads which had been allowed by the arbitrator. It is quite apparent that the appellant was prevented by unforeseen circumstances from completing the work within the stipulated period of eleven months and that such delay could have been prevented had the State Government stepped in to maintain the law and order problem which had been created at the worksite. It is also clear that the rubble and metal, which should have been available at the departmental quarry at Mannady, had to be obtained from quarries which were situated at double the distance, and even more, resulting in doubling of the transportation charges. Even the space for dumping of excess earth was not provided by the respondents which compelled the appellant to dump the excess earth at a place which was far away from the worksite entailing extra costs for the same.

34. In the aforesaid circumstances, the arbitrator appears to have acted within his jurisdiction in allowing some of the claims on account of escalation of costs which was referable to the execution of the work



during the extended period. In our judgment, the view taken by the High Court was on a rigid interpretation of the terms of contract and the supplemental agreement executed between the parties, which was not warranted by the turn of events.”

49. Even if there exists a price variation clause in the contract, an arbitral tribunal is not *per-se* precluded from awarding additional compensation, on the touchstone of Section 73 of the Contract Act, in a situation where there is an extraordinary increase in cost of execution, and where the employer is responsible for the delay.

50. The award in respect of claim no.9 is in the following terms:-

“On consideration of the documents, pleadings, submissions, Clauses of CPWD Specification as referred to and arguments advanced by the parties and after perused of the same, I consider the view of both the parties and I find that the deduction @ 20% as voids instead of 5% is not justified, therefore, the claimants are entitled for the claim for the work executed at site as per details given at page-28 of the statement of facts & claim for Rs.12,57,423/-, which the respondents also agreed during course of hearing held on 03.10.2011. Accordingly, I award Rs.12,57,423/- in favour of the claimants against claimed amount of Rs.33,75.187/- under this claim.”

51. The findings of the arbitrator in respect of claim no. 9 are based on interpretation of the provisions of the contract, which is the domain of the arbitral tribunal. I see no reason to interfere with the interpretation accorded by the arbitrator to the relevant contractual provision/s. It has been held in a number of the cases that an error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction. [See: *Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum*, (2022) 4 SCC 463]

52. The award in respect of additional claim no. 1 is in the following terms:-



“After hearing both the parties, I find that there was no justification for holding the remaining- security deposit at this stage. The work was completed on 25.09.2008 i.e. more than four years have already elapsed. No liability has so far been established against the claimants. The respondents are not entitled to recovered or adjustment without proper adjudication of the claim of the respondents, if any. The respondents could refer the matter before the competent Forum as per the provisions of contract, I, therefore, consider and decide that the balance amount of security deposits Rs.11,57,184/- is refundable to the claimants as per claim. I, therefore, award Rs.11,57,184/- in favour of the claimants under this additional claim.”

53. The above findings/conclusions in the award cannot be faulted; it was impermissible for the petitioner/DDA to withhold any amount on an alleged “deviation items without any adjudication by the competent authority”. Hence, the concerned amount was rightly directed to be refunded to the respondent/claimant.

54. With regard to additional claim no.2, the award rightly finds that the withholding of the security amount to the extent withheld was not consistent with the contractual provisions. I see no reason to interfere with the relevant findings and the directions to refund the said amount.

55. In the circumstances and for the above reasons, the impugned award is set aside to the extent of claim no. 1 & 2. The rest of the award is upheld.

56. There shall be no orders as to the costs.

57. The present petition along with pending application stands disposed of, accordingly.

MARCH 04, 2024/AT/hg,ss

SACHIN DATTA, J