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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 24.04.2024

Judgment pronounced on: 24.07.2024

+ O.M.P. (COMM) 179/2016

UNION OF INDIA

..... Petitioner

Through: Mr Jaswinder Singh, Adv.
Ms Monika Arora, CGSC with Mr Subhrodeep Saha,
Ms Radhika Kurdukar and Ms Jyoti Tiwari, Advs.

versus

M/S VISHVA SHANTI BUILDERS(INDIA) PVT LTD

..... Respondent

Through: Mr Mohit Chaudhary, Mr Kunal Sachdeva, Mr D.
Moitra, Mr Sanjoy Bhaumik, Mr Abhimanyu Garg,
Mrs Preety Makkar and Mr Kunal Sachdeva,
Advocates

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, (J)**

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) seeking setting aside of the Arbitral Award dated 27.09.2013 passed in favor of the respondent/Vishva Shanti Builders (India) Pvt. Ltd. (“**contractor**”/“**VSB**”), specifically with respect to Claim Nos. 1, 2, 3, 6, 7, 9, 14, 15, 20, 22 and non-grant of interest on the counter claim of the petitioner/Union of India (“**UOI**”) towards recovery of mobilization advance.

Brief Facts

2. The facts giving rise to the present petition are as follows:



3. A Contract Agreement (“CA”) for the work of “Provision of Married Accommodation for ORs (525 DUs) including allied External Services at Mahipalpur (Package – II) Delhi Cantt, New Delhi” bearing CA No. DGMAP/DELHI/MHP/PHASE-I/T-1B/3 of 2004-05 (“**subject work**”) was entered into between UOI (represented by Director General, Married Accommodation Project, New Delhi) and VSB on 01.03.2005 at New Delhi. The Contract Agreement was for Rs. 32,23,20,538.92.
4. The subject work commenced on 10.03.2005 and was originally to be completed by 09.12.2006. VSB completed the subject work within the extended period of completion i.e. by 10.05.2008.
5. VSB submitted the final bill with the no claim certificate (“NCC”, which was part of the final bill as mentioned in Annexure ‘F’ of the CA) and the undisputed portion of final bill was cleared on 29.03.2011. Post receipt of the final bill, VSB *vide* letter dated 31.03.2011 registered further claims.
6. Since there were disputes between the parties, a Sole Arbitrator was appointed to adjudicate the same. VSB raised a total of 23 claims for a total amount of Rs. 25,28,65,451 (later voluntarily downsized to Rs. 23,97,82,132) and UOI raised 2 counter-claims for an amount of Rs. 2,13,00,000. Out of these, 10 claims of VSB were rejected by the learned Arbitrator, 4 were withdrawn, and 9 claims were allowed amounting to Rs. 8,10,98,728. The learned Arbitrator also awarded part of the counter-claim of UOI to the tune of Rs. 1,61,16,277.
7. Aggrieved by the Impugned Award, UOI has filed the present petition. VSB has filed a detailed reply and UOI has filed a rejoinder to the reply. Written Submissions of both parties are also on record.

Brief Submissions

8. The main contention of UOI is that once VSB has signed the NCC and payment is made under the final bill, VSB could not have raised further claims as per the agreed provisions of the CA and the learned Arbitrator



has erred in allowing these claims, making the Award patently illegal. It is denied that VSB had signed the NCC under protest and stated that no evidence was led to this effect. UOI has also raised claim-wise objections. It is alleged that the learned Arbitrator has misinterpreted and ignored express terms of the CA, as well as allowed the claims of VSB based on no evidence.

9. *Per contra*, VSB has stated that the NCC was obtained from it under coercion, duress and pressure, since UOI withheld legitimate payments and bank guarantee from VSB and denied releasing them without submission of NCC. A protest letter was lodged by VSB the same day it received payment from UOI, wherein it also reserved its right to invoke arbitration. It is stated that letters exhibiting this financial pressure were placed on record in the arbitral hearing and the learned Arbitrator's finding that the NCC was indeed given "under protest" was based on the evidence put before him. It is also stated that most claims raised by VSB before the learned Arbitrator were part of the final bill, and even if they weren't, the learned Arbitrator had the jurisdiction to adjudicate upon them as they were genuine claims. It is submitted that findings of the learned Arbitrator were well reasoned and based on evidence, and do not attract the grounds under Section 34 of the Act.
10. I have heard learned counsels for the parties and perused the documents on record. The matter was heard and reserved for judgment on 24.04.2024. However, there were some minor clarifications required for which the matter was listed on 03.07.2024, 08.07.2024, 09.07.2024, and 11.07.2024 and clarifications were obtained.
11. Prior to addressing the objections of UOI on merits, it is relevant to elucidate the scope of Section 34 of the Act.

Scope of Section 34 of the Act



12. The scope of examination of an arbitral award under Section 34 of the Act can be traced, more significantly so, in *Associate Builders v. DDA*, (2015) 3 SCC 49, *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131 and *Delhi Airport Metro Express (P) Ltd. v. DMRC*, (2022) 1 SCC 131.
13. In a nutshell, the award can be set aside on the ground of patent illegality if: a) the view taken by the arbitral tribunal is impossible or such that no reasonable person could arrive at it; b) if the arbitral tribunal exceeds its jurisdiction by going beyond the contract and adjudicating upon issues not referred to it; c) the finding of the arbitral tribunal is based on no evidence or it ignores material evidence. The illegality must go to the root of the matter and does not include mere erroneous application of law or a contravention of law which is unrelated to public policy or public interest. If two views are possible, the Court will not interfere with the view of the arbitral tribunal if it has taken one of the two views. Reappreciation of evidence is also impermissible.
14. The award can also be set aside on the ground of it being in contravention with public policy of India, the scope of which includes: a) fraud or corruption; b) violation of Sections 75 and 81 of the Act; c) any contravention with the fundamental policy of Indian law; d) violation of the most basic notions of justice or morality, so as to shock the conscience of the Court. The Court does not function as a Court of appeal, and errors of fact cannot be corrected. The arbitrator's findings on facts must be accepted, as the arbitrator is the ultimate master of the quantity and quality of evidence in making the award.
15. With this background, I will deal with the objections raised in this petition.

Analysis

I. Arbitrability of Claims



16. Before the learned Arbitrator, the main point of dispute was whether the submission of NCC by VSB would bar the claims from being arbitrable. The learned Arbitrator was of the view that the final bill payment was of a substantial amount (Rs. 280 lakhs) and was kept on hold by UOI for more than 2.5 years, putting VSB under severe financial pressure to get the payment released. He further observed that as a matter of routine, NCC is to be given by all contractors before getting the final payment, which was also done by VSB since there was no other option. However, VSB immediately recorded its protest on the same day of receiving payment i.e. on 31.03.2011 and raised a number of claims. He further held, *inter alia*, that VSB's claims were genuine, so they were arbitrable despite the NCC; VSB had reserved its right to raise additional claims and UOI had not objected to it; and that UOI had raised the objections regarding arbitrability at a much belated stage without stating any reasons. The learned Arbitrator concluded that all claims and counter claims were arbitrable.

17. Learned counsel for the petitioner has made the following submissions before this Court:

17.1 It is submitted that as per Condition 55 of the General Conditions of Contract ("GCC"), no further claims could have been made by VSB after its final bill was verified by UOI and payments were made. The said payment was received by VSB without any protest on 29.03.2011, which was wrongly noted by the learned Arbitrator as 31.03.2011. It is stated that the finding of the learned Arbitrator that the protest was lodged on the very same day is wrong and contrary to record, and VSB had given an additional NCC on 31.03.2011 bearing letter No. VSB/MHP/MAP-II/202. It is stated that Claim Nos. 1 and 9 could not have been adjudicated since they were included in the final bill by VSB and rejected by the



Department. It is further submitted that additional claims i.e. Claim Nos. 2, 3, 6, 7, 14, 15 and 20 were raised by VSB for the first time after receipt of the final bill and after issuance of the NCC by VSB, and thus stood waived and extinguished.

- 17.2** It is stated that the learned Arbitrator has ignored contractual provisions in that it failed to consider that incomplete final bill without abstracts, purchase order etc. was submitted by VSB on 11.01.2010 and was paid on 29.03.2011 after obtaining complete documents from VSB in January 2011 after prolonged correspondence. Hence, delay of 2.5 years is attributable to VSB solely. Further, the finding of the learned Arbitrator that VSB was under financial pressure on account of availing bank loan was without any material/evidence on record.
- 17.3** It is submitted that the learned Arbitrator has wrongly concluded that Conditions 55 and 56 of GCC were not followed by UOI, since: a) all claims made by VSB were considered and those which were beyond the agreed conditions were disallowed; and b) final bill had to be submitted within three months of completion of work, but in the present case, it was submitted by VSB after 20 months and was without the accompanying supporting documents being abstracts/vouchers etc.
- 17.4** It is stated that the learned Arbitrator has not given a reasoned finding in respect to argument of UOI under Section 16(2) of the Act. Reliance is placed upon *General Manager, Northern Railway v. Sarvesh Chopra*, (2002) 4 SCC 45 to argue that arbitrability of claims can be raised at three stages i.e. at the time of appointment of Arbitrator, during arbitration proceedings, or at the time of filing of objections to the award.



- 17.5** It is stated that the learned Arbitrator admitted new claims by VSB, furnished vide letter dated 25.03.2013, after it was agreed that no further claim details would be submitted (as per minutes of hearing held on 19.02.2013). It is stated that additional documents were received by the learned Arbitrator on 18.02.2013 and the last hearing before him was held on 19.02.2013. It is argued that Claim Nos. 1, 2, 14, and 18 were subject matter of the new claim details.
- 17.6** UOI also relied upon judgment of *Union of India v. Master Construction Co.*, (2011) 12 SCC 349 to urge that the party levying allegation of undue influence and coercion has to prove with evidence that there was coercion, duress and pressure. In the present case, no such evidence is produced by VSB and the learned Arbitrator has wrongly held that there was coercion/undue pressure on VSB at the time of issuance of NCC. It is also stated that the learned Arbitrator's reliance upon *Ambica Construction v. Union of India*, (2006) 13 SCC 475 is wrong.
- 17.7** Reliance is also placed upon *Rashtriya Chemicals & Fertilizers Ltd. v. Chowgule Bros.*, (2010) 8 SCC 563 to state that an Arbitrator cannot make an award contrary to terms of the contract executed between the parties.
- 18.** Learned counsel for the respondent-VSB has made the following submissions before this Court in response:
- 18.1** It is stated that the argument of UOI – that the learned Arbitrator has without any evidence held that payment of final bill was received under protest – is erroneous and untenable. It is stated that there was plethora of evidence on record to suggest that VSB was coerced into signing the NCC to receive the undisputed portion of the final bill after more than 2.5 years of submitting the final bill.



18.2 Learned counsel stated VSB's version of the facts in support of its submissions as under:

18.2.1 During pendency of the project, extension was granted by UOI for completion of the work without levy of liquidated damages. VSB reserved its right to seek compensation for escalation, overhead loss and other losses due to delay caused by UOI.

18.2.2 VSB had requested UOI to finalize the Deviation Orders ("DOs") and measurement at site after completion of work in order for VSB to submit its final bill, however, delays were caused by UOI to comply with its obligations. This caused delay in filing of final bill by VSB.

18.2.3 The final bill of net amount Rs. 24,22,50,660.10 was raised by VSB. VSB wrote numerous letters requesting for release of the amount, highlighting its precarious financial conditions to UOI, however, UOI withheld payments on various accounts and kept returning the final bill to downsize.

18.2.4 UOI asked VSB to submit the NCC as a pre-requisite for release of undisputed payment. On 31.03.2011, on submission of the NCC, Rs. 2,81,50,000 (undisputed portion, which was withheld for 2.5 years) was received by VSB, wherein UOI denied all claims and made deductions of Schedule A payments. On 31.03.2011 itself VSB sent a letter to UOI stating that payment was received "under protest" and reserved its right to initiate arbitration for pending payment against the final bill. It is also relevant to note that VSB had signed most DOs under protest and had



reserved its right to agitate certain issues. Thereafter, the parties went into arbitration.

18.3 It is stated that all claims raised by VSB formed part of the final bill. Even if they did not, since the NCC was given under protest, Conditions 55 and 56 of the GCC do not bar VSB from raising additional claims. Reliance is placed upon *Ambica Construction v. Union of India*, (2006) 13 SCC 475 and *R.L. Kalathia & Co. v. State of Gujarat*, (2011) 2 SCC 400. It is stated that even under Condition 60 of GCC (arbitration clause), VSB was not barred from making any claims which were legitimate.

18.4 It is stated that *vide* letter dated 25.03.2013, no new claim details were submitted, and the amount of earlier claims was merely downsized. The same was done on 18.02.2013 as well by VSB before the hearing of 19.02.2013. The objection was duly dealt by the learned Arbitrator and UOI was given an opportunity for hearing and/or reply, and UOI had categorically replied to the same in their rejoinder. Hence, the concerns of UOI are misplaced.

19. I have heard learned counsels for the parties. I find no infirmity with the finding of the learned Arbitrator under this head, which is contained in paragraph 20.3 of the Impugned Award and reads as under:

“20.3 I have heard both the parties in detail and have carefully examined and perused the relevant documents along with the judicial judgments filed by both the parties. Admittedly, the final bill payment was of substantial amount of Rs 280 lac and the Respondent had kept it on hold for more than 2 ½ years. There is no doubt that the Claimant is under pressure and would be ready and willing to do any such act as dictated by the other party who is in a dominant position. The Claimant had also during the hearing revealed that they had taken loan from the bank and were paying high rate of interest hence they were in desperate need of the legitimate money withheld with the department for such a long



time. The Claimant received the payment on 31 March 2011 through ECS for an amount of Rs 280 lac and they recorded the protest on the same day raising a number of claims. Further I know for a matter of fact that the department in all cases as a matter of routine obtains No Claim Certificate from all contractors before releasing the final payment, which was done in this case also. Since this certificate forms a part of final bill the Claimant had no option but to adhere to the demands of the Respondent, but registered his protest as soon as the money was transferred by the Respondent in the Claimant account. I have gone through the judicial decision and I am inclined in favor of the judicial judgment cited by the Claimant more particularly RK Kalathia & Co versus State of Gujarat and MD NTPC versus Reshmi Constructions. The other relevant judgments following the aforesaid are Ambica Construction versus UOI and National Insurance versus Bogra Polyfab. The judgment cited by the Respondent Master Construction Company versus UOI are distinguishable on facts since as per the judgment the protest was not lodged immediately or within a reasonable period of time after the receipt of final bill payment and after giving clear "No Claim Certificate", whereas in the present case the final bill was submitted including the claims and the payment was received under protest. I am supported in my view by the judgment of Ambica Construction cited by the Claimant where a clause 43 (2) similar to Clause 55 of the subject contract has held that there is no absolute bar on a contractor raising claims which are genuine to the subject matter even after the submission of No Claim Certificate. I am also supported in my view by the judgment of 1998 (2) Arb LR 612 State of AP versus Chandershekhar Reddy & Ors. Further from the facts, it is revealed that the Claimant had reserved his right to add and supplement additional Claims and the Respondent had not objected specifically in his pleadings. I also find that the provisions of Section 55 and 56 of GCC were not even followed by the Respondent themselves as they had amended the final bill and did not include the claims of the contractor. The Claimant on the other hand in compliance of Clause 55 of GCC raised the claim within 90 days. The Respondent did not release the amount of final bill prepared by them within 6



months as stipulated in Clause 56 of GCC. The payment released was on undisputed part of final bill and not on contractor's complete final bill. Since the provisions of Clause 55 and 56 were itself violated by the respondent the question of excepted matter does not arise. In addition to above the various exhibits filed by the Claimant clearly show that the payment was received under pressure and immediately followed by the protest letter. The amount released was substantial enough to itself create pressure since it was held for a long time. I have also taken into consideration the fact that the Respondent has submitted their pleadings in defence vide letter No 81830/MAP/DELHI/MHP/T-1B/3/668/E8 dated 27 April 2012 and no objection was ever raised on the arbitrability of claims and it was only after thought that the objections were raised much after the submission of Pleadings in Defence. I have also taken into consideration the provision contained in Section 16 (2) of the Arbitration and Conciliation Act 1996 which states that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of statement of defence. UOI has not mentioned any specific reason for raising the objections at such a belated. stage. Further I also hold that based on the facts of the case that "No Claim Certificate" is not legally valid as the contractor was forced to sign the certificate under coercion duress and pressure, in order to release his legitimate payment. I have also taken into consideration the fact that UOI themselves have raised a claim i.e. Claim No 2 for reimbursement of over payment after considerable period which is evenly applicable to the UOI as they too had signed a similar certificate as the No claim certificate which is a part of final bill. Hence, having heard and considered the submissions and arguments of both the parties and having perused the court rulings as well as exhibits relied upon by the parties I conclude that all Claims preferred by both the parties are arbitrable. After conclusion of hearing both the parties were given option to submit their written arguments in which the Claimant revised the financial effect in respect of certain claims and reduced the amount thereof. This too was objected by the Respondent stating that no new point can be raised after closing of hearing. The Claimant in reply stated



that no new point has been raised by them, only the points already given in Statement of Case and arguments during the hearing were further elaborated. The Claimant also stated that if at all the Respondent feels that certain new points were given by the Claimant they can either submit a Rejoinder or even ask for a fresh date of hearing since procedural formality cannot override the principles of natural justice of giving full opportunity to both the parties. The Respondent in their Rejoinder did not opt for further hearing but gave comments on the points raised by the Claimant. Since the amount of claim were reduced by the Claimant, the basis thereof was already given by him in the statement of Case as also during the hearing, as such I have taken into account the submissions as well as the Rejoinder by both the parties the interest of justice.”

20. I am of the view that all objections raised by UOI before me under this issue have been dealt with by the learned Arbitrator. The Arbitrator’s view that VSB had signed the NCC under protest is based on evidence. The learned Arbitrator has duly noted the letter dated 31.03.2011 bearing No. VSB/MAP/MHP-II/201 by VSB which clearly records the protest of VSB on receiving payment against the final bill, wherein VSB also reserved its right to go for arbitration for the balance payment against the bill. The letter reads as under:

“Sir,

This is to inform you, that we submitted our final bill against which we have received amount Rs. 2,81,90,997.00 (Rupees Two crore eightyone lacs ninety thousand nine hundred ninetyseven only) through ECS (Electronic clearance system) dated 31st March 2011. The above amounts is strongly received “under protest”. Please note we are not satisfied with the payment made by you and kindly note we lodge out protest reserving the right to go for arbitration for the balance payment against our final bill.

Your early action would be highly appreciated.

.... ”



21. The learned Arbitrator has further noted, being a technical expert, that generally in all contracts, the contractor has no option but to issue an NCC in order to get his pending dues from the Department. In the present case also, the final bill was submitted by VSB on 25.10.2009. VSB had written numerous letters highlighting its precarious situation and pleading UOI to process the final bill and release payment. Despite repeated requests, the bill was not processed for more than 2.5 years. It is only when VSB issued an NCC, UOI released payment of a paltry amount of Rs. 280 lakhs against a total of about Rs. 24.22 crores.
22. I am of the view that pressure, coercion and undue influence is to be inferred from facts and circumstances in each case and there is no straight jacket formula. The fact that VSB was under financial strain, the fact that VSB was requesting time and again for release of its dues, the fact that VSB's final bill was pending for more than 2.5 years with UOI, the fact that immediately on issuance of NCC the so-called undisputed amounts were released in favor of VSB clearly show that there was undue influence and coercion on VSB to issue NCC. The said aspect has been duly appreciated by the learned Arbitrator in the Impugned Award.
23. The Arbitrator has also distinguished the judgment relied upon by UOI i.e. **Master Construction Co.** (supra) from the facts of the present case and held that in the former, protest was not lodged immediately or within reasonable period of time after receipt of final bill and after giving NCC, whereas in the present case, the protest was lodged immediately. It cannot be said that the Arbitrator has failed to take the same into consideration, as alleged by UOI. The Arbitrator has also considered **Ambica Construction** (supra) relied upon by VSB to hold that there is no absolute bar on a contractor raising claims which are genuine to the subject matter even after submission of the NCC. UOI's argument that the learned Arbitrator's interpretation of **Ambica Construction** (supra) is wrong is



not tenable. This Court under Section 34 of the Act is not to act as a Court of Appeal. This Court cannot substitute its own reasoning with that of the learned Arbitrator unless it is wholly unreasonable and causes miscarriage of justice, which is not the case here.

24. Further, *Rashtriya Chemicals & Fertilizers Ltd.* (supra) is not applicable to the present cases since there was no bar in the contract to raise claims/disputes in arbitration. Judicial precedents relied upon by the learned Arbitrator, for instance, *Ambica Construction* (supra), also support this view.

25. The learned Arbitrator has also given sufficient reasoning regarding why the claims were arbitrable. He has taken into account Conditions 55 and 56 of GCC, relevant portions of which read as under:

“55. Final Bill. The final Bill shall be submitted by the Contractor on the from at Annexure ‘F’ to these Conditions in duplicate within three months of physical completion of the works to the satisfaction of the P.M.

It shall be accompanied by all abstracts, vouchers, etc., supporting it and shall be prepared in the manner prescribed by the P.M.

No further claims shall be made by the Contractor after submission of the Final Bill and these shall be deemed to have been waived and extinguished.

....

56. Payments of Bills. *Payment of those items of the Final Bill in respect of which there is no dispute shall be made within a period of six months from the date of receipt of the Bill by the P.M.*

After payment of the amount of the final bill payable as aforesaid has been made, the Contractor may, if he so desires, reconsider his position in respect of the disputed portion of the final bill and if he fails to do so within 90 days, his disputed claim shall be dealt with as provided in the Contract.

....”



26. The Arbitrator held that the aforesaid provisions would not bar the arbitrability of claims given the fact that the payments were received under protest, the claims were genuine, the conditions were themselves not complied by UOI as UOI had amended the final bill and failed to release payments within 6 months. Further, it was noted that facts of the case revealed that VSB had reserved its right to add and supplement additional claims and UOI had not objected to the same specifically in its pleadings.
27. UOI's argument regarding Section 16(2) of the Act is also untenable. Even though the Arbitrator found that UOI only filed the objections at a much belated stage and provided no reason for the delay, the Arbitrator has heard and decided the matter on merits regarding the arbitrability of claims. In view of the same, UOI's reliance upon ***General Manager Northern Railway*** (supra) becomes irrelevant.
28. The argument regarding new claims by VSB has also been duly addressed by the learned Arbitrator throughout the Impugned Award. The Arbitrator held that VSB had not raised additional or new claims but had merely reduced the amounts in respect of certain claims. In addition, the Arbitrator also duly provided adequate opportunity to UOI to file a rejoinder or ask for a fresh date of hearing. UOI chose to give comments on the points raised by VSB in its rejoinder. In addition, principles of natural justice were duly complied by the Arbitrator as UOI was given the opportunity to respond to the revised/reduced claims, which was duly done by UOI and considered by the Arbitrator. Hence, the argument of UOI that certain new claims were raised by VSB is devoid of merit before this Court since the same has been duly dealt by the Arbitrator. I find no perversity in the Arbitrator's reasoning.



29. For the reasons stated above, I am of the view that no ground for interference under Section 34 of the Act can be made out regarding arbitrability of claims.

II. Claim No. 1 “Reimbursement of payment for provision of site clearance”

30. Claim No. 1 raised by VSB in its SOC was to the tune of Rs. 65,94,900, which was subsequently reduced to Rs. 20,96,306 *vide* letter dated 25.03.2013. The learned Arbitrator partially allowed the claim to the tune of Rs. 6,18,398.

31. The learned Arbitrator observed that the condition of the site at the time of commencement of work was like a mini jungle and site clearance had to be undertaken by VSB, which was accordingly done. The point in dispute was whether rate of excavation and filling was included in the site clearance as mentioned in the contract and was hence covered in lump sum cost of the building. The learned Arbitrator held that the rate of filling was not included in the cost of site clearance as it was nowhere so mentioned. The area under cutting included jungle clearance, but the portion under filling where too jungle clearance was required constituted additional work and the payment was legitimately due to VSB. The learned Arbitrator determined that 15% of the area was under filling and partially allowed the claim.

32. Before this Court, learned counsel for UOI has made the following submissions:

32.1 It is stated that the learned Arbitrator has committed misconduct as the award is based on presumptions and conjectures. He has gone on a presumption that prior to executing work, a mini jungle existed at site and that this fact was never denied by UOI. It is submitted that this is against the facts as recorded in the minutes of the arbitration hearing held on 19.02.2013, wherein it was recorded:



“7. As minutes of site visit held were not published by the learned Arbitrator, therefore, there was difference of opinion as projected by contractor vide his letter No Nil dated 13.2.2013. UOI requested to record the factual position of site to arrest this issue:-

a. There was no mini jungle like are visible during site visit...”

32.2 The learned Arbitrator’s reliance upon the area as 15% in filling is without any basis or justification, since as per the Deviation Order (hereinafter, “DO”) signed by both parties, it was only 5%. The learned Arbitrator has not deducted the area where cutting/excavation is done for work being executed for services. This was projected by UOI but the same has not been adjudicated by the learned Arbitrator. It is also alleged that the amount awarded of Rs. 6,18,398 is vague and arbitrary.

32.3 Further, it is stated that the learned Arbitrator failed to note the reliance of UOI on DO No. 15(P) pertaining to this work which was signed by VSB without any protest or reservation. The petitioner places reliance upon the judgment of the High Court of Bombay in *UOI vs. Karthi Enterprises* 2005:BHC-OS:4125.

33. Learned counsel for the respondent has stated that the grounds raised are regarding factual issues and it is not open for UOI to raise them under Section 34 of the Act. It is stated that UOI is misrepresenting facts and that the learned Arbitrator has duly dealt with the objection.

34. I have heard learned counsels for the parties. I find no infirmity with the finding of the learned Arbitrator.

35. The learned Arbitrator in paragraph 21.1.3 of the Impugned Award gave his findings regarding the condition of the work site. He observed that:

“The Claimant in various letters had brought out condition of the site as it existed at the time of commencement of work, was like a



jungle having bushes, shrubs, weeds etc. and it was not possible to either to carry out the layout of the buildings or to take levels in such a site without clearing the jungle. The Claimant has referred to Ex C-1/2, C-1/3 and C-1/5 where it is made clear that the site was mini jungle and the photographs filed in the arbitral proceedings clearly point out the fact. During the joint site visit it was seen that the surrounding unoccupied area is like mini jungle which was not denied by the Respondent. Both the parties have agreed to the fact that the site clearance was required to be undertaken before proceeding with the work, which was undertaken by the Claimant and same was entered in the works dairy.”

- 36.** As held in a catena of judgments, the Arbitrator is the sole judge of quality and quantity of evidence and I am of the view that the Arbitrator has provided sufficient reasoning based on evidence to arrive at the finding that the condition of the site was of a mini jungle. The Arbitrator has considered the documents and photographs on record, as well as conducted his own due diligence by visiting the site. Hence, UOI's argument that the Arbitrator has acted on presumptions and conjectures is misconceived.
- 37.** The learned Arbitrator was of the view that the area under cutting included the element of jungle clearance but the portion under filling, where too jungle clearance was carried out, constituted additional work. This finding of the Arbitrator is not under challenge before this Court. What is under challenge is the rate of filling as assessed by the Arbitrator, and subsequently, the figure awarded by the learned Arbitrator.
- 38.** The learned Arbitrator in paragraph 21.1.3 of the Impugned Award records the basis for his calculations as under:

“The Respondent has argued on Note 5 of Schedule A, Special Condition 2.2 and Clause 3.5 of SSR Part I stating that the contractor should have been fully acquainted of the site condition and known that it is a prerequisite to execute the work of jungle



clearance which was not denied by the Claimant and accordingly the work was executed, but the above clauses do not speak of payment to be made for this additional work, which is legitimately due to the Claimant. The Claimant has considered a lead to a distance up to 5 Km which I am not in agreement and I have restricted the lead up to 500 m as considered in DO No 15. The Claimant has argued that 25% of the area was under filling whereas the Respondent has stated that 5% area was under filling. I have reassessed the amount from the DO paid to the contractor and as per my assessment 15% area was under filling. I therefore arrive at the decision that the claim is partially sustained and I have recalculated the amount and I award a sum of Rs 6,18,398.00 (Six Lac Eighteen Thousand Three Hundred and Ninety Eight Only) in favor of the Contractor under this Claim.”

- 39.** The present petition arises out of a construction contract and concerns issues which are not only legal, but also technical and commercial in nature. The Impugned Award has been rendered by an Arbitrator who is a specialist/expert in his field and is well-versed with the subject matter. While it is expected that arbitrators should write their awards in a clear and precise manner, reality of the situation is that not all arbitrators, especially arbitrators without legal backgrounds, possess proficiency in legal drafting. This is not to say that awards of technical arbitrators have to be seen with less scrutiny than arbitrators having legal backgrounds. The test under Section 34 of the Act remains the same, regardless of who the Arbitrator is. The reasons for arriving at a finding and the basis of calculation of awarding an amount should be borne out of the arbitral record. As long as the Court is satisfied that the same is present in the Arbitrator's award, the Arbitrator's views and calculations, as long as they are plausible and not wholly unreasonable, cannot be substituted by that of the Court sitting in a Section 34 jurisdiction.
- 40.** This view is supported by various judicial precedents which have held that mathematical calculations are not required to be given as long as the



thought process of the Arbitrator for arriving at the figures is clearly available. In *Sanyukt Nirmata v. DDA & Anr.*, 2006 (86) DRJ 120 the Court observed:

*“14. In the present case, however, it has been pointed that the rational or reason is, in fact, disclosed by the arbitrator and flows from the fact that while rebates have been allowed in respect of certain bills, they have been declined in respect of the others. In consideration of claim No. 8, the arbitrator found that the rebate availed of is not available to the respondent for payments made in the 19th, 20th, 21st and 22nd bill and the deductions made are to be refunded. Thus, what the petitioner has claimed was not allowed, but the petitioner was allowed the amount which had been wrongly deducted as rebate in respect of some of the bills. **The mind or thought process of the arbitrator is, thus, clearly available for which mathematical calculations are not required to be given.**”*

(emphasis supplied)

41. Similar view has been taken in *DDA v. Madhur Krishna*, ILR (2009) IV Delhi 509, wherein it was observed as under:

*“14.Furthermore, the arbitrator before proceeding to deal with the claims and making the award, inspected both the sites in presence of both the parties and his award is based on the pleadings, evidence and record produced before him. In our opinion, it clearly meets the requirement of reasoned award. **The arbitrator has based his calculations on the material placed on record. It was not necessary for him, in view of the legal position noted above, to give the process of mathematical calculation.**”*

(emphasis supplied)

42. In the present case, the Arbitrator has not given a mathematical breakdown of this calculations in express terms. However, the figure awarded by him can be culled out from his reasoning. In addition, learned counsel for the respondent in the hearing dated 09.07.2024 has handed over the calculations based on the reasoning given by the Arbitrator which are as under:



“Item No. 1 – Rs. 21,74,550/- (no change)

Item No. 2 – Rate changed to Rs. 47.66 per m³

Therefore, amount of Item No. 2 = 40875 x 47.66 = Rs. 19,48,102.5/-

Total of Item number 1 and 2 = Rs. 41,22,652,5/-

*Area under filling = 15% = 0.15 x 41,22,652.5 = Rs. 6,18,397.87
which has been rounded off to Rs. 6,18,398/-”*

43. Hence, I am satisfied that the same is not an arbitrary figure and finds basis in the documents placed on record and is based upon the reasoning adopted by the learned Arbitrator. As regards the percentage of filling is concerned or the deductions are concerned, I am of the view that the same is based upon site inspection by the Arbitrator and his subjective satisfaction.

44. The argument of UOI that DO No. 15(P) was wrongly not considered by the Arbitrator is untenable since the Arbitrator has already returned a finding that NCC was issued by VSB under coercion and duress. Thus, the payment with respect to the final bill has been accepted by VSB under protest, and the Arbitrator has held all claims to be arbitrable. ***Karthi Enterprises*** (supra) is distinguishable as in that case, the Arbitrator, despite observing that the revised rates were not signed under duress, proceeded to award claims based on the higher rate without giving any reasons for the same. In the present case, that is not so.

45. For the reasons stated above, the award under this head is upheld.

III. Claim No. 2 “Reimbursement for wrong preparation of DO No. 10 for change in strata in Schedule ‘A’ Section I”

46. Claim No. 2 raised by VSB in its SOC was to the tune of Rs. 26,12,400, which was subsequently reduced to Rs. 20,10,442 vide letter dated 18.02.2013. The claim was partly allowed to the tune of Rs. 10,45,642.

47. The dispute was regarding the difference in soil strata as recorded by the parties, and the consequent difference in bill amounts. The learned



Arbitrator held that during the site visit, only soil was encountered, and no rock was found, however, he noted that useful soil from excavation was less and hence soil was to be obtained from other places. Since the places were within the MD land, VSB was entitled for the lead only. He also observed that disposal at least to a distance not exceeding 50m is admissible to the contractor since rate of excavation and getting out does not include the element of segregating hard rock from other material and stacking thereof. The Arbitrator held that the DO No. 10 was only applicable to 71 blocks (where both parties agreed there was hard rock) and not to the blocks shifted subsequently (where VSB claimed but could not show presence of hard rock).

48. Before this Court, learned counsel for UOI has made the following submissions:

48.1 The Arbitrator failed to appreciate that measurement of rock had to be done as per Schedule 'A' Note 14. The Arbitrator has also misconducted in allowing claim of disposal of rock, which became property of VSB vide Schedule 'A' Note 14. This was accepted by VSB and DO No. 10 was signed by it. The learned Arbitrator failed to appreciate that DO No. 10 was signed by the contractor without any protest or reservation. No reason is given by him for not relying upon *UOI vs. Karthi Enterprises* 2005:BHC-OS:4125. The Arbitrator has committed misconduct in allowing the claim since as per Condition 9 of GCC, the time limit for raising objection against the DO was 15 days.

48.2 The claim was a new claim submitted by VSB for construction of 101 blocks on hard rock instead of 71 blocks as considered in DO No. 10, which was against Condition 55 of GCC and the learned Arbitrator has committed misconduct in allowing the said claim.



- 48.3** Even though the learned Arbitrator has held that soil was met at site, however, he has still considered that soil obtained on excavation was less and so had to be brought from outside and payment was due to VSB. No evidence was produced by VSB regarding the same. The Arbitrator has not justified how he has arrived at the figure of Rs. 10,45,642 since the amount for bringing earth has already been paid in DO No.15. This was projected to the learned Arbitrator *vide* letter dated 13.03.2013, which was not considered.
- 49.** Learned counsel for the respondent has stated that the grounds concern factual issues and it is not open for UOI to raise them under Section 34 of the Act. It is stated that UOI is misrepresenting facts. The claim was restricted to 71 blocks only and was part of the final bill. The claim amount was merely downsized, as noted by the learned Arbitrator. The Arbitrator based his findings on the material on record and judgments.
- 50.** I have heard learned counsels for the parties.
- 51.** As regards UOI's argument that DO No. 10 was signed without protest, the learned Arbitrator has dealt with the same and recorded his findings in paragraph 21.2.3 of the Impugned Award:

".....The Respondent has also raised objection on the DO No 10 stating the same has been signed without protest and this claim is not included in the final bill hence in view of UOI versus M/s Karthi Enterprises and as per Condition 55 of GCC this claim should not be adjudicated. UOI has also objected stating that the claim has been withdrawn and new claim was raised which is barred from adjudication in view of Condition 55 of GCC and Section 23(3) of ACA 1996. The Claimant has signed the final bill under protest and had given a list of claims with clear stipulation that they reserve the right to amend, modify, and add any claim during the arbitration proceedings. Since the final bill under dispute I find no justification on the argument of UOI that the clear



DO has been signed hence it cannot be adjudicated. As regards the contention of UOI that the claim has been withdrawn by the contractor at no stage the claim was withdrawn, it was only during the arguments the Claimant has amended the calculations which are based on the final bill prepared by the Respondent. Hence I do not find any strength in the argument of the Respondent that the claim is barred for adjudication....”

52. I find no infirmity with this finding. I am of the view that even otherwise, sufficient reasoning has been given in the Impugned Award on the objection of arbitrability of claims. As already discussed, **Karthi Enterprises** (supra) is not applicable to the present case (refer paragraph 44 above).

53. As regards the argument of the claim being barred due to Condition 9 of GCC is concerned, it is relevant to note that this ground was not raised by UOI before the learned Arbitrator at any stage of the arbitral proceedings and is being raised for the first time under the present petition. The ground does not find any mention in UOI’s rebuttal of Claim 2 in the Pleadings in Defence, neither does it find any mention in the written submissions against Claim 2 as submitted by UOI *vide* letter dated 13.03.2013. Even during submissions, the ground was not urged before the learned Arbitrator as is evident from the Impugned Award. The ground of UOI, as noted in paragraph 21.2.2 of the Impugned Award, is limited to the extent that “*DO No 10 was signed by the Claimant without protest hence the claim should not be adjudicated*”. This has already been dealt by the learned Arbitrator as discussed above. In my view, the claim being barred in terms of Condition 9 of GCC was never urged before the learned Arbitrator, hence never considered by him, and hence cannot be raised for the first time in a petition under Section 34 of the Act.

54. The Hon’ble Supreme Court in **Union of India v. Susaka (P) Ltd.**, (2018) 2 SCC 182 has observed as under:



“19. It is not in dispute that the appellant did not raise the plea based on Clause 13(3) of the GCC against Respondent 1 at any stage of the proceedings either in their reply filed before the Arbitral Tribunal or/and in submissions except raising it, for the first time, before this Court in this appeal.

....

21. In our opinion, the appellant could have registered their objection before the Single Judge at the time of making a reference to the Arbitral Tribunal by pointing out Clause 13(3) of GCC or could have reserved their right to raise such objection before the Arbitral Tribunal. It was, however, not done.

22. Not only that, we further find that the appellant, in their reply, filed before the Arbitral Tribunal also did not raise this plea and allowed the Arbitral Tribunal to adjudicate the said issue on merits.

23. If the appellant was so keen to place reliance on Clause 13(3) of GCC to defeat the claim of Respondent 1 relating to the award of interest on various claims, then it was necessary for the appellant to have raised such plea specifically, in their reply, before the Arbitral Tribunal. No such plea was raised even before the Arbitral Tribunal.

24. Though we find that the appellant raised this ground, for the first time, in Section 34 proceedings [see Ground (cc)] before the Single Judge but again this ground was not pressed at the time of arguments. It is clear from the perusal of the Single Judge's order. Not only that, the appellant again did not raise this plea before the Division Bench.

25. In the light of the aforementioned factual scenario emerging from the record of the case, we cannot grant any indulgence to the appellant (Union of India) to raise such plea for the first time here. In our view, it is a clear case of waiver or/and abandonment of a plea at the initial stage itself.

.....



27. If a plea is available, whether on facts or law, it has to be raised by the party at an appropriate stage in accordance with law. If not raised or/and given up with consent, the party would be precluded from raising such plea at a later stage of the proceedings on the principle of waiver. If permitted to raise, it causes prejudice to other party. In our opinion, this principle applies to this case.”

55. In light of the aforesaid judgment, I am of the view that raising the ground of the claim being barred by Condition 9 of GCC at this stage cannot be permitted. Hence, UOI's arguments which rely upon Condition 9 of GCC do not find merit before this Court, as the same had to be raised before the learned Arbitrator as that was the appropriate stage.

56. Further, UOI's argument that VSB has submitted a new claim for construction of 101 blocks on hard rock as opposed to 71 blocks (as considered in DO No. 10) is untenable. Before the Arbitrator, VSB submitted that site of 30 blocks was shifted to a new location as the original site was water-logged. These blocks shifted were covered under Item 1 of Schedule 'A' for which the soil strata was considered as soil, but at the new site the rocky strata was met which is covered in Item 2 of Schedule 'A'. Since both sites were adjacent to each other there was no difference in the soil strata and the strata for these 30 blocks was similar to those of the other 71 blocks. Accordingly, VSB argued that the DO should have been prepared for 101 blocks and not 71 blocks. UOI, in response, had stated that VSB's reliance on Ex GP-17 which mentioned that blocks were shifted from plain site to rocky and jungle site could not be considered as evidence of soil strata. It relied upon contractor's letters at Ex C-2/1 to C-2/4 to show that rocky strata was met at site of 71 blocks only, and hence, VSB's claim was an afterthought. The learned Arbitrator held that *“....Since during the site visit the Claimant could not show presence of hard rock hence I arrive at the decision that this DO would*



only be applicable to 71 blocks and not to the other blocks shifted subsequently”.

57. I am of the view that the Arbitrator has considered the evidence on record to return the finding that the DO would only be applicable to 71 blocks and not 101 as claimed by VSB, and has awarded the claim accordingly. The finding does not prejudice UOI as the learned Arbitrator has given the award in respect to 71 blocks only, and not 101 blocks as argued by the petitioner. It is admitted by UOI that hard rock was present at the depth of 1.2 m for the 71 blocks and was regularized through DO, hence, there is no disagreement between the parties regarding this issue and the same is duly noted by the learned Arbitrator in the award. Hence, UOI's argument in this regard is untenable.

58. As regards UOI's arguments regarding soil brought from outside and measurement and disposal of rock, the learned Arbitrator has already returned a finding which reads as under:

“21.2.3.UOI in their arguments have stated two aspects related to site visit stating that during the site visit when excavation carried out for shifted blocks only soil was encountered and rock was not found, and second that it was seen during the site visit that no soil was brought outside the MD land. I am in agreement with the first observation that the only soil was met but I do not agree with the second observation of the Respondent that the soil was not brought outside MD land because there is no way to ascertain this fact merely by site visit. As regards the Claimant's other points brought out above regarding the pricing of DO I arrive at the decision that, these are correct in view of the following:

(a) Due to encountering of rock, the useful soil obtained from excavation was less and hence the soil was to be obtained from other places. Since these places were within the MD land only hence the Claimant is entitled for the lead only.



- (b) *Method of measurement of hard rock was clearly mentioned in the contract to be in conformity with Pages 16 & 17 of SSR Part II, as per which 50% is to be deducted for voids from the stack measurements*
- (c) *Disposal at least to a distance not exceeding 50 m is admissible to the contractor since rate of excavation and getting out does not include the element of segregating hard rock from other material and stacking therefore.*
-”

59. I find no infirmity with this finding. I am of the view that UOI's argument regarding soil brought from outside is misconstrued, as it impugns a factual finding by the learned Arbitrator. Similarly, as regards the arguments on measurement and disposal of rock, I am of the view that the same were urged before the learned Arbitrator and the award was rendered taking the same into account. It is a settled principal that the Arbitrator is the final authority on facts as well as law, and errors which fall short of perversity cannot be grounds to set aside an award under Section 34 (refer *Movie Times Cineplex (P) Ltd. v. MRG Developers (P) Ltd.*, 2022 SCC OnLine Del 4795, para 9). To my mind, the findings are based material before the Arbitrator and hence there is no infirmity.

60. As regards the amount awarded for claim is concerned, basis for the Arbitrator's calculations is recorded in paragraph 21.2.3 of the Impugned Award:

“....I have reassessed the amount of claim taking the quantities catered in DO No10 placed as Ex GP-4 of UOI and the details submitted by the Claimant as App A vide letter NIL dated 18 Feb 2013. I find that the rate adopted for approved earth brought from outside is high and I have restricted the rate for the lead up to 500m. Since during the site visit the Claimant could not show presence of hard rock hence I arrive at the decision that this DO would only be applicable to 71 blocks and not to the other blocks shifted subsequently. I therefore partly up hold the Claim and I



award Rs10,45,542.00 (Rupees Ten Lac Forty Five Thousand Six Hundred and Forty Two Only) in favor of Contractor against this Claim.”

61. During the hearing dated 09.07.2024, I was shown that the Arbitrator’s calculations are based on the Standard Schedule of Rates, 1996 (“**SSR rates**”) which were part of the CA. Even in the absence of mathematical calculations, if the basis of the awarded amount is found in the arbitral award, the Court should not interfere with the same. Though there is no mathematical breakdown of the Arbitrator’s calculations in the Impugned Award, I am satisfied that the same has a basis which is borne out of the arbitral record and the documents placed before the learned Arbitrator.

62. Learned counsel for VSB in the hearing dated 09.07.2024 has handed over the calculations based on the reasoning given by the Arbitrator which are as under:

“Rate of approved earth quoted by claimant – 3811.03 cum. @ Rs. 130/cum. = Rs. 495433.90/-

Rate of approved earth allowed by the Ld. Arbitrator – 3811.03 cum. @ Rs. 47.66/cum = Rs. 181633.69/- [wrongly calculated as 18,11,633.68/-]

Claim amount for 71 blocks by the Claimant = Rs. 13,59,442.00/-

Claim amount awarded by the Arbitrator as per above observations:

1359442 – 495433.90 + 181633.68 = Rs. 10,45,641.78/- which has been rounded off to Rs. 10,56,641/-.”

63. I find no infirmity with the same and the same need not be interfered with under Section 34 of the Act. For the aforesaid reasons, I uphold the award given under this head.

IV. Claim No. 3 “Reimbursement of payment for change in strata in items of services and less payment made under measurement of excavation and earthwork”



- 64.** Claim No. 3 raised by VSB in its SOC was to the tune of Rs. 2,76,07,600, which was subsequently reduced to Rs. 2,02,58,045 (*vide* letter dated 18.02.2013). The Arbitrator partly awarded the claim to the tune of Rs. 84,08,871.
- 65.** Before the learned Arbitrator, the point in issue was that the strata met at the site was different from the strata catered in the contract. The learned Arbitrator held that strata comprised of soft/hard soil and not rock as claimed by VSB and denied the ratio of strata proposed by it. He also held that VSB was never ordered to dispose of the soil/soft rock to a distance of 15 km and that part of the claim was hence not allowed, however, disposal of hard rock was to be paid for a distance not exceeding 50 m. The learned Arbitrator held that certain deletions were made in the final bill which were without the consent of VSB and thus the reductions in various quantities were not correct. He also noted that despite repeated protests by VSB to record correct measurements of the soil strata, it was not done by UOI. Since the entire site had same type of strata, strata considered (and accepted by both parties) in DO No. 10 should have been taken for DO No. 11 and 15. The Arbitrator also denied the claim of VSB for parking area.
- 66.** Learned counsel for UOI has made the following submissions before this Court:
- 66.1** Learned Arbitrator has awarded the amount to VSB without giving any justification.
- 66.2** Learned Arbitrator had directed VSB to reconcile its claim with the final bill, however, VSB projected a new claim wherein it raised observations/objections on DO Nos. 11 and 15 *vide* letter dated 18.02.2013. It is stated that the said DOs were duly accepted by VSB during execution of work without any protest and no objections were raised within 15 days as per Condition 9 of GCC.



- 66.3** The Arbitrator failed to appreciate that measurement of rock had to be done as per Schedule 'A' Note 14. This was accepted by VSB and DO Nos. 11 and 15 were signed by him without any protest or reservation. The learned Arbitrator has misconducted in allowing the claim after 2 years of signing the DOs as against the time limit of 15 days stipulated in Condition 9 of GCC.
- 66.4** The learned Arbitrator failed to appreciate that it has been clarified that quantities considered in few abstracts of final bill by VSB were deleted by PM/DG MAP office during technical checking of final bill since they were considered under DO No. 11. VSB had agreed to these details. It was submitted by UOI vide letter dated 13.03.2013 that copies of abstracts of final bill where corrections were done was explained to the learned Arbitrator and VSB during arbitration hearing and there was no discrepancy in general summary. VSB agreed to the same. No justification is given in the award about why this contention of UOI was not considered.
- 66.5** Counter-claim was preferred by UOI during arbitration hearing and given in writing, however, the same was not adjudicated by the learned Arbitrator.
- 67.** Learned counsel for the respondent has stated that the grounds concern factual issues and it is not open for UOI to raise them under Section 34 of the Act. It is stated that UOI is misrepresenting facts. The award is adequately reasoned. UOI was given opportunity for either hearing/reply, and it replied to the same in its rejoinder.
- 68.** I have heard learned counsels for the parties.
- 69.** I find merit in the first argument raised by UOI under this head i.e. that the Arbitrator has given no justification for awarding the amount towards this claim. The award given by the learned Arbitrator under this head reads as under:



“21.3.3 I have gone through all written submission, the rival contentions, pleadings, oral arguments and the documentary evidence produced by both the parties and the site visit conducted the hearing and my conclusion on the various issues is as under:

- (a) The mathematical errors in Schedule A Section IV Road, Path & Culvert have been corrected.*
- (b) Since DO No 10 for change in strata was accepted by both the parties the same proportion of soil strata for the DO No 11 and 15 has been considered.*
- (c) During the site visit on the new location, since existence of rock could not be shown by the Claimant, I arrive at the decision that the strata there would comprise of soft/hard soil and not rock.*
- (d) Recovery of hard rock for the same quantity as the excavation of hard rock (i.e. 50% of stack measurement) as already held by me in Claim No 2.*
- (e) Similarly, disposal of hard rock is to be paid it least to the distance not exceeding 50 m.*
- (f) The other errors pointed out in the final bill by the Claimant of his revised annexure also requires corrections being obvious errors.*
- (g) I am in agreement with the contention of UOI that the Claimant was never ordered to dispose off the soil/soft rock to a distance of 15 Km and hence not allowed.*

In addition to above I also arrive at the conclusion that it is a fact that despite repeated protests by the Claimant about consideration of the correct soil strata the Respondent did not record the measurements as per the actual as the entire site had more or less same type of strata. As such the strata considered by the Respondent himself in the foundation DO 10 should have been taken in for DO No 11 & 15. UOI has objected that the Claimant has preferred new claim which is not a fact as the Claimant has submitted only the details of the claim were revised which were necessary due to obvious errors in the audited final bill. A copy of



final bill was attached by the Respondent in their Pleadings in Defence and it was mentioned that it was a duplicate copy of the bill duly audited by the CDA. This bill contained corrections only on the summary sheet and not the corrections made by CDA in the individual abstracts. Subsequently, UOI submitted another copy of the original final bill and on comparison of the two copies of the final bill it revealed the CDAs corrections supposed to be confined to the arithmetical errors only were much beyond it. CDA had deleted certain entries in a few abstracts and these were the entries which were made by the Consultant and the Project Manager and which were even technically checked by the DG MAP also which they were not authorized. These deletions were without the consent of the Claimant as no signature was taken on these corrections, thus the reduction in various quantities was not correct. I do not agree to the Claimant contention that the strata was in the proportion of 5:10:75:10 proportion of ordinary soil, hard soil, ordinary rock and hard rock as there is no justification on the argument of the Claimant. The major portion of the area was covered by the buildings and for which a DO No 10 was prepared which had all the strata encountered during the excavation and both the parties had no objection to these details covered in this DO. It is also evident that the entire area will be having the same type of soil strata as met in the building portion. Hence I am in agreement with the contention of the Claimant that the breakup of the strata should be taken in the same proportion as that of the building portion. I am also in agreement with the arguments of UOI that the Contractor was never asked to develop the parking area nor the Contractor has produced any evidence that they were ordered to undertake the development of this portion of land. In view of above I partly uphold the claim and I have reassessed the amount and I award Rs 84,08,871.00 (Rupees Eighty Four Lac Eight Thousand Eight Hundred Seventy One Only) in favor of Contractor against this Claim.”

- 70.** The thought process of the learned Arbitrator for awarding the amount towards this claim is not clear in the aforesaid paragraph. No basis of calculations can be borne out of the record. Even in the calculations



handed over on 09.07.2024, no justification was given by the learned counsel for the respondent for the basis of the Arbitrator's calculations under this head. In this view of the matter, there is nothing in the arbitral record to substantiate the discussion of the learned Arbitrator for allowing the claims of the respondent. The reasoning given by the learned Arbitrator is cryptic, the basis for the reasoning is not borne out from the arbitral record and hence the awarded amount is arbitrary. I am of the view that the finding of the learned Arbitrator is patently illegal and liable to be set aside.

71. A coordinate bench of this Court in *National Highways Authority of India v. Trichy Thanjavur Expressway Ltd.* 2023 SCC OnLine Del 5183 has held as under:

“70. The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforementioned mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified.

.....

87. The Court thus records its conclusions as follows:—

.....

K. The expression “modify” would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT. However, when a Section 34 Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that must be borne in mind.

.....”



72. Since this part of the award is independent and unattached to the other parts, I am of the view that partial setting aside would be valid. For the aforesaid reasons, the award towards Claim No. 3 is set aside.

V. Claim No. 6 “Reimbursement of payment for cutting chases in walls for water pipe and use of fancy type fittings including angle valves and long body stop and bib cock in lieu of ordinary one”

73. Claim No. 6 raised by VSB in its SOC was to the tune of Rs. 30,05,800. The Arbitrator awarded Rs. 13,11,410 towards the claim.

74. The point in dispute before the learned Arbitrator was whether the claim was included in the lump sum cost of the building or not. The learned Arbitrator noted that the fittings covered in the tender for internal water supply were ordinary type and not chromium plated concealed as provided on the ground. Since VSB was asked to provide chromium plated fittings and conceal the pipes, it constituted additional work which was to be paid to VSB.

75. Before this Court, it is submitted by learned counsel for UOI that:

75.1 The learned Arbitrator failed to appreciate the provision of Particular Specifications (“PS”) Clause 17.3.4. It is stated that the clause clarifies that inside the building, pipes shall be embedded in the wall/floors. However, outside the building as well, pipes had to be provided which will run on the wall. It is stated that the learned Arbitrator misinterpreted the provisions of this clause. The two provisions i.e. laying of pipe on wall and embedding in wall are for different locations.

75.2 The learned Arbitrator failed to appreciate that the measurement recorded in Measurement Book (“MB”) and signed by both parties shows that whatever has been provided at site has been measured and paid under Schedule ‘A’ Part II. No objection was ever recorded from VSB while signing the MB/Add back DO details as



against the time limit of 15 days as per Condition 9 of GCC. It is stated that the learned Arbitrator has awarded the claim without evidence and against the agreed terms of the CA.

- 76.** Learned counsel for the respondent has stated that the grounds concern factual issues and it is not open for UOI to raise them under Section 34 of the Act. It is stated that UOI is misrepresenting facts. UOI was given opportunity for either hearing/reply, and it replied to the same in its rejoinder. The learned Arbitrator has allowed the claim after due deliberations.
- 77.** I have heard learned counsels for the parties. I find no infirmity with the finding of the learned Arbitrator.
- 78.** The learned Arbitrator noted that UOI had directed VSB to provide concealed pipes and chromium plated fittings at site for external water supply, contrary to what was contracted for. This, according to the Arbitrator, constituted additional work done by VSB. The impugned finding reads as under:

“21.6.3 I have gone through all written submission, the rival contentions, pleadings, oral arguments and the documentary evidence produced by both the parties and the site visit conducted the hearing. The fittings covered in the tender for internal water supply were ordinary type and not chromium plated concealed as provided on the ground. The Respondent has brought out two provisions of the Contract viz. Clause 17.9.4 on Page 193 of contract agreement and Note 1.6 on Page 12 of Schedule A notes. As per clause 17.3 both the provisions viz. laying of pipe on wall and embedding the pipe in the wall are catered. Thus the tenderer will carry out the work as required on the ground and as catered in the respective schedule which in the instant case is laying on pipe on wall. Even Note 1.5 also clearly states that cutting chases/recess shall be provided where required and since in the present case the chases were not covered in the contract hence there is no requirement to include in the quoted rates. Since the Claimant was



asked to provide chromium plated fittings and conceal the pipes hence this is additional work which is to be paid to the Claimant. I have reassessed the details and I find that the Claimant has adopted market rates for the fittings whereas SSR rates are available and 28% CP has been included in the pricing whereas the quoted percentage is NIL. In view of above the Claim is sustained and I award a Rs. 13,11,410.00 (Rupees Thirteen Lac Eleven Thousand Four Hundred and Ten only) against this claim in favor of the Claimant.”

79. PS Clause 17.3.4 of the CA reads as under:

“All the pipe inside the building, shall be embedded in wall/floors. Pipes fixed on walls shall be secured with approved pipe hooks at about 0.75 meters intervals.”

80. The Arbitrator’s interpretation of the aforesaid clause is in paragraph 21.6.3 of the Impugned Award, and reads as under:

“....As per clause 17.3 both the provisions viz. laying of pipe on wall and embedding the pipe in the wall are catered. Thus the tenderer will carry out the work as required on the ground and as catered in the respective schedule which in the instant case is laying on pipe on wall....”

81. The reasoning for the same is reflected in paragraph 21.6.1 of the Impugned Award, wherein the Arbitrator noted the submissions made by VSB differentiating between Items 2 and 3 of Schedule ‘A’ Section II (List of works and prices for internal water supply). It was noted that when the pipes are concealed or buried, the words used are *“laid in trenches or in floors”* (as per Item 2), and hence the words *“fixed complete to walls and ceiling or laid in floors”* (as per Item 3) cannot mean that the pipes are laid or buried or concealed in wall or ceiling. Description of Item 3 clarifies that pipes are surface type and not concealed. The fittings viz. stop cock, bib tap etc. given in the Schedule are also ordinary type and not of long body concealed type.



- 82.** The Arbitrator noted that the above contention gets further support from the description of point wiring given in Schedule 'A' Part III which clearly mentions that conduits shall be concealed. VSB further submitted before the Arbitrator SSR items 2616 to 2618 which are for stop valves of cast copper alloy, stop valves fancy type chromium plated and stop valves chromium plated with long shank (concealed type). The rates of each of these items is Rs. 82.09, Rs. 112.96 and Rs. 153.29. The description as well as rate of Item 6 of Schedule 'A' Part II exactly tallies with that of stop valve cast copper alloy. On ground, VSB provided chromium plated with long shank (concealed type), and hence the difference.
- 83.** I am of the view that the learned Arbitrator has given due consideration to contractual terms before returning the impugned finding. It is an established principle that if an Arbitrator interprets a contractual term in a reasonable manner, this does not justify setting aside the award. The task of interpretation of contractual terms is primarily within the domain of the Arbitrator, unless the Arbitrator's interpretation is so unreasonable that no fair-minded or rational person would agree with it. I am of the view that the Arbitrator's interpretation of PS Clause 17.3 is neither unreasonable nor perverse. The Arbitrator scrutinized the details and awarded the claim based on the SSR rates of the fittings. I find no infirmity with the findings under this issue.
- 84.** As regards the argument that the claim was barred in view of Condition 9 of GCC, the same was not urged before the learned Arbitrator at any stage, and hence, cannot be urged before this Court under the present petition for the first time.
- 85.** Even though the calculation under this head has not been explicitly challenged by UOI, the respondent has handed over a note showing the basis of calculation, which is entirely as per the reasoning given by the Sole Arbitrator. The basis of calculation reads as under:



*“Value of Item No. 1 (as per claim) – Rs. 2,41,588.46/-
Value of Item No. 2 (as per claim) – Rs. 8,90,104.28/-
Value of fittings at SSR rates
Long Body (bib cock) = 2625 @ Rs. 112.96 = 2,96,520/-
Bib Cock (normal) = 525 @ Rs. 63.74 = 33,463/-
Angle valves – 2625 @ Rs. 63.74 = 1,67,317/-
Concealed Stop Cock – 1050 @ Rs. 140 = 1,47,000/-
Total Amount of fittings (Approx) = Rs. 6,44,301/-
Less: Amount already received in final bill = Rs. 4,59,333/-
Total = Rs. 1316660.74/- (Approx)
Awarded amount = Rs. 13,11,410/-”*

86. For the said reasons, I am of the view that the award under this head does not suffer from patent illegality and hence is upheld.

VI. Claim No. 7 “Reimbursement of payment for provision of chromium plated shower arm and provision for wash hand basin mixer in lieu of single pillar tap”

87. Claim No. 7 raised by VSB in its SOC was to the tune of Rs. 5,79,000.

The claim was partly allowed to the tune of Rs. 79,538.

88. The learned Arbitrator allowed the first part of the claim (i.e. provision of chromium plated shower arm) by stating that under Claim No. 6 it was already adjudicated that the contract originally catered for surface water conduit for which there was no requirement to provide an additional arm for fixing the shower rose. However, since VSB had provided concealed pipe, the claim for shower arm was allowed. The learned Arbitrator disallowed the second part of the claim (i.e. provision for wash hand basin mixer in lieu of single pillar tap) by stating that as per the documents, VSB was required to provide WHB mixer.

89. It is stated by UOI that this claim as well was based on the wrong interpretation of Clause 17.3.4. The water pipeline had to be provided as concealed only, shower rose had to be provided and thus a shower arm was required to attach the rose to the pipe, which is also shown in



drawing no. MAP/A/2012. It is further stated that the claim was granted without any supporting purchase vouchers evidencing purchase of the items in question and thus the finding was based on no evidence and was patently illegal.

90. Learned counsel for the respondent has stated that the grounds concern factual issues and it is not open for UOI to raise them under Section 34 of the Act. It is stated that UOI is misrepresenting facts. The learned Arbitrator has taken into account all circumstances and materials placed on record.

91. I have heard learned counsels for the parties.

92. UOI's first argument is untenable. As already held under the previous issue regarding Claim No. 6, I am of the view that the interpretation by the learned Arbitrator of Clause 17.3.4 is reasonable. The Arbitrator observed that the contract originally catered for surface water conduit for which there was no requirement to provide an additional arm for fixing the shower rose. Since VSB had provided concealed pipe for water supply, which was an additional requirement of UOI, and VSB had to provide chromium plated shower arm, which was again an additional requirement, this claim was allowed. There is no infirmity in the finding of the learned Arbitrator.

93. As regards the second argument, the learned Arbitrator has returned the following finding in paragraph 21.7.3 of the Impugned Award:

".....The Claimant has priced the Claim based on the price list of one of the makes specified in the contract, and the same was provided in the work. In view of above the claim is partially sustained and I award Rs 79,538.00 (Rupees Seventy Nine Thousand Five Hundred and Thirty Eight only) in favor of the Contractor against this claim."



94. I find no infirmity in this finding, as the same is as per the price list of one of the makes specified in the CA and to the satisfaction of the learned Arbitrator.

95. For the aforesaid reasons, I find no reason for interference and the award under this head is upheld.

VII. Claim No. 9 “Reimbursement of payment for gas hole in kitchen counters”

96. Claim No. 9 raised by VSB in its SOC was to the tune of Rs. 6,72,000. Learned Arbitrator has awarded Rs. 1,57,500 towards this claim.

97. The learned Arbitrator noted that the hole was made in RCC slab and in Cuddappah stone slab which was laid over the RCC slab, and was of the view that the provision of hole was not a minimum essential requirement because the pipe could be fixed to the burner without the hole.

98. It is submitted by learned counsel for UOI that the learned Arbitrator has erred in not giving the details of the awarded amount and has not adjudicated the submission of UOI that the cost for drilling holes is only Rs. 20. It is submitted that the award is vague and arbitrary to this extent.

99. Learned counsel for the respondent has stated that the ground concerns factual issues and it is not open for UOI to raise it under Section 34 of the Act. It is stated that UOI is misrepresenting facts. The learned Arbitrator has considered the arguments of UOI in the Award.

100. I have heard learned counsels for the parties.

101. Regarding this issue, the Arbitrator’s finding is recorded in paragraph 21.9.3 of the Impugned Award and reads as under:

“....At site I found that the hole has been made in RCC slab and in Cudappah stone slab which was laid over the RCC slab. I do not agree that the provision of hole is a minimum essential requirement because the pipe can be fixed to the burner without the hole also. In view of above I arrive at the decision that the claim is sustained and I have reassessed the rate of drilling hole in stone



and I award Rs 1,57,500.00 (Rupees One Lac Fifty Seven Thousand and Five Hundred only) in favor of the Contractor against this claim.”

102. I find merit in the argument put forth by UOI.No basis whatsoever has been given by the learned Arbitrator for arriving at his figure, especially when there is a dispute regarding the cost of drilling. Petitioner-UOI has categorically stated that the cost of drilling is only Rs. 20. The bare minimum that is required of the Arbitrator is to deal with the said argument of the petitioner. The Arbitrator has rejected the argument of the petitioner and awarded a sum which is totally without any evidence, material or discussion to support the learned Arbitrator’s findings. Even the learned counsel for VSB could not provide a basis of calculation and as to how the learned Arbitrator has arrived at the figure of Rs. 1,57,500. In the absence of any calculations or material to justify the award under this head, I am of the view that the same is patently illegal and hence cannot be sustained.

103. The award towards Claim No. 9 being independent, unattached and capable of being incised from the other claims is hereby set aside.

VIII. Claim No. 14 “Reimbursement of payment for delay and curtailment of running payment and final bill”

104. Amount of claim raised by VSB was to the tune of Rs. 3,42,37,000. The learned Arbitrator awarded an amount of Rs. 1,65,83,922 towards the claim (calculated at 12% interest, as against the claimed 18%).

105. The Arbitrator noted that the claim was primarily raised on two grounds i.e. delay in payments of RARs and curtailment of payment of RARs. He further noted that there was no period laid down in the contract within which RAR was to be made, and therefore, the same had to be done within a reasonable period of time. After considering submissions of both parties, the Arbitrator was of the view that 7 days should be the



reasonable period and beyond that, the aggrieved party was entitled to compensation. The Arbitrator noted that in several cases, the delay was more than 7 days and the final bill was also delayed by about 792 days, and accordingly awarded the claim. The Arbitrator, however, declined compensation for less payment in RAR.

106. Before this Court, learned counsel for UOI has argued that the Arbitrator has wrongly concluded that payment of final bill was done after 792 days as against the laid down period of 180 days. In para 21.14.2 of the Impugned Award, it is recorded that VSB himself submitted the final bill after 20 months as against 3 months laid down in the condition of GCC. Reasonable period in which it was to be cleared was to be counted from the day VSB submitted the final bill. UOI cleared the bill in 192 days, hence, there was no delay by UOI. It is further stated that this delay is also attributable to VSB since it was being pursued by UOI to submit purchase vouchers of materials procured and to sign the DO details. This was completed in January 2011 and payment of final bill was made in March 2011.

107. Learned counsel for the respondent has stated that the ground is not available to UOI as it is not only factually incorrect, but also wrong and untenable in law. It is submitted that the Arbitrator has based his findings on relevant provisions of law and factual circumstances.

108. I have heard learned counsels for the parties. I find no infirmity with the finding of the learned Arbitrator.

109. UOI's argument requires this Court to re-appreciate evidence and delve into the merits of the Award. Learned Arbitrator has already returned his finding in paragraph 21.14.3 of the Impugned Award, which reads as under:

"The claim is primarily raised on two accounts i.e. delay in payments of RARs and curtailment of payments of RARs. I find that



no period is laid down in the contract within which the RAR was to be made, even so the payment has to be made within a reasonable time considering such a big work of over 33 Crore was to be completed within a period of 21 months for which the provision was made that the payments shall be made at the interval of one month.....It is clear and upheld by law that a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time, he can legitimately claim to be compensated for that delay whatever nomenclature one may give to this claim in this behalf. Accordingly, I feel that the period as considered by the Claimant i.e. 3 days is very low and the period as contended by the Respondent is unrealistically high, hence I arrive that a period of 7 days should be reasonable period and if the payment is made beyond the reasonable period the aggrieved party is entitled for compensation. A perusal of details submitted by the Claimant it is seen that in several cases the delay was more than 7 days in particular in the last four RARs the delay was abnormal. Similarly, the final bill payment was also delayed by about 792 days against the laid down time of 6 months i.e. 180 days in the contract agreement. This delay in payment of final bill has also affected the release of Claimants retention money and prolongation of bank guarantees causing him further loss.....”

- 110.** The argument raised by UOI before me amounts to asking for a different factual conclusion than that of the Arbitrator's. As per UOI, the payments were delayed because VSB itself did not submit purchase vouchers, abstracts etc. on a proper format within time. This argument was also raised before the learned Arbitrator, and the Arbitrator returned a finding, both under this claim as well as under the claim of arbitrability of claims that the petitioner was withholding payments from the respondent despite repeated requests to release them, which created a financial pressure on the respondent to unwillingly and “under protest” submit the final bill with the mandatory NCC.



111. The Arbitrator noted VSB's submissions in paragraph 21.14.1 of the Impugned Award that the work was completed on 10.05.2008 and while the full amount should have been paid on 25.11.2008, only 33 lakhs were paid, leaving a balance of more than Rs. 2 crores even as per the reduced final bill. The same was paid after much reduction on 31.03.2011.

112. Learned Arbitrator has considered the submissions and documents on record to arrive at the finding. The finding is factual in nature and is neither arbitrary, capricious or perverse. This Court cannot go into the merits of the case and re-appreciate evidence merely because a party is unsatisfied with the result.

113. For the said reason, the award under this head is upheld.

IX. Claim No. 15 "Reimbursement of payments for escalations on abnormal increase in steel, cement, aggregate, sands and bricks"

114. Claim No. 15 raised by VSB in its SOC was to the tune of Rs.7,70,66,300, which was subsequently reduced to Rs. 6,22,59,389 vide letter dated 18.02.2013. The claim was partly allowed to the tune of Rs. 2,54,95,776.

115. The learned Arbitrator noted that the contract was awarded on 10.03.2005, to be completed on 09.12.2006 i.e. within a period of 21 months and the value of work was more than Rs. 33 crores. The work got completed on 10.05.2008 i.e. beyond a period of 17 months from 09.12.2006. Hence VSB's claim for escalation. The Arbitrator noted that in the absence of an escalation clause, he could allow the claim for escalation provided extension for the period for completion of work was granted without levy of compensation, and where the contractor had notified its claim. In such situation, prohibitory clause (disallowing compensation against such claims), as was present in this case, becomes redundant. The Arbitrator held that these ingredients were present in the case at hand. The claim was partly allowed taking into consideration the



increase of rates of cement and steel (being controlled items, as opposed to brick, sand and aggregate which are locally produced/without authentic justification).

116. It is stated by the learned counsel for UOI that the learned Arbitrator allowed this claim despite a clear prohibition in the contract that no escalation is permissible. Reliance is placed upon Condition 19 of GCC, which reads as under:

“No escalation, reimbursement what so ever shall be made to the contractor for increase in prices of materials and fuel and wages of labour which the contractor may have to incur during execution of the work on any account. The contractors shall quote their rates accordingly.”

117. Learned counsel for the respondent has stated that the ground concerns factual issues and it is not open for UOI to raise it under Section 34 of the Act. It is stated that UOI is misrepresenting facts.

118. I have heard learned counsels for the parties. I find no infirmity with the finding of the learned Arbitrator, which reads as under:

“21.15.3Before I deal with this claim, it is important to note the date of start of the project which was 10 March 2005 and the completion date was 09 Dec 2006 i.e. the original period of the contract was 21 months and the value of the work was more than Rs 33 Crore. It is but natural that the contractor was required to complete the work in the stipulated period, however this did not happen. The work got completed on 10 May 2008 which is not denied by the Respondent, thus the total extended period of the contract was 17 months resulting in the time taken to complete the work as 38 months against the original period of 21 months. It is evident from the records filed in the arbitral proceedings that out of Rs 33 Crore, the contractor had executed the work of Rs. 12.47 Crore between 09 Dec 2006 and 10 May 2008 during which period the Claimant has projected an increase of 54% after absorbing anticipated escalation of 10% for all the materials viz. cement, steel, bricks, sand and aggregate for which the Claimant has



submitted the vouchers of the material purchased. It is also seen that the RAR No 18 to 23 were raised after 09 Dec 2006 and it is pertinent to mention that the Claimant had notified the intention to claim damages through Ex C-15/1 to C-15/3. I must state that the above Exhibits are substantial compliance of Section 55 and Section 73 of the Indian Contract Act 1872, because through these exhibits the Claimant had duly notified his intention to claim escalation and damages and loss in the extended period of contract. It is also a fact that the contract agreement does not have any escalation clause and on the contrary the contract prohibits any form of compensation. However, the impact of Ex .C-15/1 is that in effect it nullifies the prohibitory clause and brings about a variation in the terms of contract. I have also noted the fact that the Respondent did not respond to Ex C-15/1. Since the Respondent did not reply the Exhibit which meant that they in principle and in the law had agreed to the demand of the Claimant. In this work extension of time has been granted up to the completion period i.e. 10 May 2008 without levy of compensation, the fact which is required to be noted which when translated contractually means that the delay of 17 months cannot be held attributable to the Claimant. If it were to be, surely the Respondent was well within their contractual rights to levy compensation and no one could have questioned that? However the Respondent was the best judge of the situation and circumstances and in their wisdom granted full extension of time without any levy of compensation for the extended period. I have also taken into consideration the Supreme Court judgment in case of PM Paul Versus UOI in which the Hon'ble Supreme Court has held at Para 12 and 14 as under:

.....

The Respondent had filed one Supreme Court Judgment 2002 (L) Arb LR 505 (SC) General Manager Northern Railway and Others Versus Sarvesh Chopra wherein the Hon'ble Supreme Court in Para 14 and 15 on Page 514 and 515 of the judgment has held as under:

.....



From the above two judgments, it can be concluded that in the absence of escalation clause the Arbitrator can allow claim of escalation provided extension has been granted without levy of compensation, and where the contractor has notified his claim in such situation prohibitory clause becomes redundant which has been done in this case. In the present case the Respondent accepted the performance of Claimant even after 09 Dec 2006 and up to the stage 10 May 2008. I have also examined the documents and various exhibits filed by Claimant and the Respondent on record and I have carefully examined the same. Though Respondent had granted extension without levy of compensation up to the date of completion it cannot be said the entire delay was attributable to the Respondent alone..... The Respondent in their argument has stated. that during the period 2004-05 the variation in prices of construction material have been to the tune of 75-100%, which was not supported by any documentary evidence. The contractor has claimed the escalation for cement, steel, bricks, sand and stone aggregate but the vouchers of cement and steel only have been produced during the hearings, hence I will restrict my findings only on the increase of prices in respect of cement and steel. I have also taken into consideration that in a competitive tender a contractor can anticipate a reasonable increase in his quotation which in this case has been taken as 10%, whereas the actual increase for cement has been more than 100% and that of steel about 80%. Such unprecedented increase can no way be considered by a bidder while quoting his tender. The Respondent has also raised the objection stating that the Claimant has preferred the claim during the entire period of contract rather than the extended period. In this connection I have taken in to consideration the fact that in contracts which have the escalation formula the payment for reimbursement is made right from the commencement of work up to the completion date. In view of above I arrive at the decision that the claim is partially sustained i.e. I have taken into consideration the increase pertaining to cement and steel, since these being controlled items and have separate WPI whereas the other items viz brick, sand, aggregate are local produced items hence no authentic justification of the increase if rates can be ascertained. I



have considered the amount pertaining to cement and steel from the revised details submitted by the Claimant and I award Rs 2,54,95,776 (Rupees Two Crore Fifty Four Lac Ninety Five Thousand Seven Hundred and Seventy Six Only) in favor of the Contractor against this claim.”

- 119.** The Arbitrator held that the actual time taken to complete the work was 38 months as opposed to original stipulated period of 21 months. As per records, out of Rs 33 Crore, VSB had executed the work of Rs. 12.47 crores between 09.12.2006 and 10.05.2008 during which period VSB projected an increase of 54% after absorbing anticipated escalation of 10% for all the materials viz. cement, steel, bricks, sand and aggregate for which VSB submitted the vouchers of the material purchased. The Arbitrator also noted that RAR No 18 to 23 were raised after 09.12.2006. VSB had notified its intention to claim damages through Ex C-15/1 to C-15/3.
- 120.** The Arbitrator was of the view that these letters (Ex C-15/1 to C-15/3) were in substantial compliance of Section 55 and Section 73 of the Indian Contract Act, 1972. UOI not only did not reply to the letters of the respondent informing UOI that they would be charging escalation for delay but in fact continued with the work to be performed by the respondent.
- 121.** Considering the factual matrix and relying upon the judgments in *P.M. Paul v. Union of India*, 1989 Supp (1) SCC 368 and *Northern Railway v. Sarvesh Chopra*, (2002) 4 SCC 45, the Arbitrator held that the prohibitory clause i.e. Condition 19 of GCC became redundant and the claim of escalation could be allowed provided extension was granted without levy of compensation, and where the contractor had notified its claim. In the present case, the learned Arbitrator was of the view that these ingredients were met.



122. The operative portion of judgment of the Hon'ble Supreme Court in ***Northern Railway v. Sarvesh Chopra***, (2002) 4 SCC 45 reads as under:

“15.Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.”

123. Condition 19 of GCC does not explicitly take into account a situation where the period for completion of subject work is extended. The clause, as it reads, does not indicate that the parties intended that no escalations could be claimed in the event the contract was extended. Thus, it is silent about a situation such as in the present case. Hence, while one can strictly interpret the clause, as proposed by UOI, to state that no escalation prices could have been provided in any case whatsoever, however, another reasonable way to interpret the same could be what was done by the learned Arbitrator. I find no infirmity in the finding of the learned Arbitrator.

124. In addition, as per the mandate of ***Sarvesh Chopra*** (supra), VSB duly informed the petitioner that they will claim escalation of rates due to delay, and the petitioner, in spite of VSB putting the petitioner to notice, accepted the performance by VSB. Ex C-15/1 being the letter dated 05.10.2005 bearing No. VSB/MAP/MHP/86 is important in this regard and reads as under:



“Dear Sir,

This is to inform you, that, Para 16, of notice of tender at page 8 does not say that, contractor will not be granted extension of time, which is consumed in the clearance of the site. Hence, we are entitled to extension of time due to site clearance, which is of mammoth proportion. Further, it may be noted that we will be entitled to compensation such as escalation overhead loss for the extended period of contract. Though loss of turnover our endeavor would be to complete the work in time i.e. on or before 9.12.06.”

125. The learned Arbitrator further held that in a competitive tender, a contractor can anticipate a reasonable increase in his quotation which in this case was taken as 10%, whereas the actual increase for cement has been more than 100% and that of steel about 80%. The Arbitrator observed that such unprecedented increase could not be considered by a bidder while quoting his tender. Further, the Arbitrator restricted his award to the increase pertaining to cement and steel only, since these are controlled items and have separate wholesale price index (hereinafter, “WPI”) whereas other items viz. brick, sand and aggregate are locally produced and hence no justification of the increase in rates can be ascertained for them. I am of the view that the finding is reasonable and not hit by the parameters under Section 34 of the Act.

126. In addition, the petitioner has not challenged the calculations or its basis.

127. The Court under Section 34 of the Act is merely to see that the Arbitrator’s view is a plausible and reasonable one and is based on reasoning and evidence. I am of the view that the Arbitrator’s view is a plausible and a reasonable one and does not go against the provisions of the contract. For the said reasons, the award under this head is upheld.

X. Claim No. 20 “Reimbursement of payment for loss and damage on account of various breaches of contract on part of department”



128. Claim No. 20 raised by VSB in its SOC was to the tune of Rs. 3,91,39,500. The claim was partially allowed for Rs. 2,73,97,671.

129. The learned Arbitrator noted that UOI took differing stands regarding the reasons for delay in work and held that UOI was unable to justify why it did not levy compensation on VSB for extension of period of completion of work when the remedy to penalize for any delays was available in the contract. He further held that VSB vide letter dated 05.10.2005 had notified its intention to claim damages including escalation, overhead loss and loss of turnover which was received and yet not replied to by UOI. Applying the same reasoning as under Claim No. 15, the Arbitrator held that the prohibitory clause for damages in the contract became redundant. He further stated that courts have accepted different formulae for assessing losses to effectively compensate the suffering party and held that 30% delay period was on account of VSB and 70% was on account of UOI.

130. It is stated by UOI that the award is in contravention to Condition 13(B) of GCC, which reads as under:

“No claim in respect of compensation or otherwise, however arising, as a result of extensions granted under condition mentioned above shall be admitted.”

131. Learned counsel for the respondent has stated that the ground concerns factual issues and is not open for UOI to raise under Section 34 of the Act. It is stated that UOI is misrepresenting facts.

132. I have heard learned counsels for the parties.

133. The impugned finding reads as under:

“21.20.5 I have gone through all written submission, the rival contentions, pleadings, oral arguments and the documentary evidence produced by both the parties. The date of commencement of the work was 10 March 2005 and the scheduled date of completion was 09 Dec 2006 but the work got completed on 10



May 2008 i.e. 17 months after the original date of completion. The Claimant in his letter at Ex C-15/1 dated 05 Oct 2005 itself had notified his intention to claim the damages such as escalation, overhead loss and loss of turnover and this letter was received by the Respondent. I further hold that in view of the matter Section 55 and Section 73 of Indian Contract Act 1872 had become applicable and further in light of the contractor's letter at Ex C-15/1 the prohibitory clauses for damages in the contract became redundant....

.....I have also taken into consideration that the Respondent on one hand has requested to reject the claim because the Claimant has preferred the claim on IAFW-2249 conditions but at the same time they have relied on the various judgments which are based on IAFW 2249 and not on the GCC of MAP. A careful perusal of IAFW - 2249 and GCC of MAP reveals that both the conditions are identical in wording and spirit hence reference of any of the condition does not change the spirit of the contract. It was also seen that the Respondent throughout the argument were stressing on the point that the delay is on the part of the Claimant and in the process they have been negating their own stand taken during the execution of the work. The Respondent could not give any satisfactory justification on their action of having granted extension of time to the Claimant when as per their version the delay was on account of the Claimant. I have also noted that the Respondent have not been able to justify their stand for not levying the compensation which was a huge amount and was a clear remedy available in the contract to penalize the contractor for his delays. On the contrary the extension of time was granted by the executives clearly stating that the delay was beyond the control of the contractor. During the hearing the Respondent agreed that an element of 15% towards overhead and profit is being followed in the contracts for arriving at the market analysis which the Claimant has also considered in the details of this claim. The Hon'ble Madras High Court Division Bench 2006 (Suppl) Arb LR 88 (Madras) (DB) Zonal General Manager IRCON International versus Vinay Hearing Equipment in Para 26 has held:



"The loss of profit and overheads which has been claimed for the prolongation of contract period beyond six months is based on Hudson Formula which has been accepted by the courts as representing a logical method of calculating loss of profit. The Respondent has brought to court notice that the loss of profit and overhead has not been claimed for the contract period of six months. Considering the fact that the contract was prolonged for no fault of the Vinay Hearing Equipment and on the other hand they were compelled to retain its infrastructure at the site during the prolonged period. The Respondent has also placed relevant material in form of letters to show that the prolongation of contract was due to the fault of appellant IRCON. In these circumstances granting amount towards loss of profit and overhead by the Arbitrator cannot be faulted with." It is thus evident from above that the courts have accepted different formulae as one of the ways of assessing losses and can be effectively adopted to compensate the suffering party. However, I am also inclined to the fact that the entire delay of the project cannot be attributed to only one party i.e. the Respondent. Since UOI was in the dominant position and had all the remedies available to them to levy compensation or grant extension of time, and having agreed to grant of extension of time for the full period of delay, I arrive at the decision that 30% delay period is on account of the Claimant and balance 70% was on account of the Respondent....."

- 134.** Learned counsel for VSB has argued that as per the combined reading of Condition 13(A)(vii) and 13(B) of the GCC, no claim for compensation could be raised as a result of extensions, even if the delay is beyond the contractor's control. Operative portion of Condition 13 reads as under:

"13(A)....If the Works be delayed:-

....

(vii) by reason of any other cause, which in the absolute discretion of the Accepting Officer is beyond the Contractor's control;

then, in any such case, the Accepting Officer may make fair and reasonable extension in the completion dates of individual items or groups of items of Works for which separate periods of



completion are mentioned in the contract documents or Works Order, as applicable.

....

13(B) No claim in respect of compensation or otherwise, however arising, as a result of extensions granted under condition mentioned above shall be admitted.”

135. In the present case, it has been held by the learned Arbitrator that majority of the delay was been caused by the petitioner. The reasoning for the same is borne out of the record, as recorded in paragraph 21.20.1-21.20.4 (which records the submissions of the parties) as well as the documents on record. It is further corroborated by the fact that UOI did not levy any compensation of VSB, despite the fact that the contract empowered it to do so. The extension was granted for reasons being “*beyond the contractor’s control*”. Before the Arbitrator, UOI was not able to justify why it did not levy compensation on VSB for extensions. Hence, the Arbitrator was of the view that majority of the fault for delay was attributed to UOI. Relying upon judicial precedents, he observed that where no fault could be attributed to the contractor, granting amount towards loss of profit and overhead could not be faulted with. The Arbitrator has also relied upon the reasoning under Claim No. 15 to state that since VSB had put UOI to notice that it would claim damages due to extension, and UOI had granted the extension and continued the work without replying to the said notice, the same would make the prohibitory clause redundant, especially in light of *Sarvesh Chopra* (supra). I find no infirmity in the said reasoning.

136. While learned counsel for VSB has chosen to interpret the contractual term in a literal way, the interpretation by the Arbitrator takes into account the factual exposition of the case. A reasonable interpretation of a contractual term by an Arbitrator includes one which avoids a conclusion which is against the objective of law. The Arbitrator’s interpretation takes



into account and circumvents a scenario where the delays are caused by UOI and VSB is barred from claiming damages because of it.

137. There are various judgments which have taken differing views on whether such a clause as Condition 13 of GCC in the present case will bar an arbitrator from awarding a claim on damages. These judgments were also cited before the learned Arbitrator by both parties, as is recorded in paragraph 21.20.2 and 21.20.4, but also in paragraph 21.15.3 of the Impugned Award.

138. In *Simplex Concrete Piles (India) Ltd. v. Union of India*, 2010 SCC OnLine Del 821, a coordinate bench of this Court has observed as under:

“15. The issue therefore boils down to whether rights which are created by Section 73 and 55 of the Contract Act can or cannot be contractually waived. If there is a public policy or public interest element in these Sections, then the rights under these sections cannot be waived. Let us examine the matter....

.....

In view of the observations of the Supreme Court in the case of India Financial (supra) and the Division Bench of this court in Ircon International (supra) and again of the Supreme Court in the case of M.G. Brothers, the expressions “public policy” and “if permitted will defeat the provisions of law” in Section 23 have to be interpreted to further the object of the Contract Act and not defeat the same. That being so, it is clearly a matter public policy and public interest that the sanctity of the contracts are preserved. To permit a contractual clause having the object to defeat the very contract itself, is a matter of grave public interest. If such a Clause is allowed to stand, then, the same will defeat the very basis of existence of the Contract Act.

16. Provisions of the contract which will set at naught the legislative intendment of the Contract Act, I would hold the same to be void being against public interest and public policy. Such clauses are also void because it would defeat the provisions of law which is surely not in public interest to ensure smooth operation of



commercial relations. I therefore hold that the contractual clauses such as Clauses 11A to 11C, on their interpretation to disentitle the aggrieved party to the benefits of Sections 55 and 73, would be void being violative of Section 23 of the Contract Act. The interpretation given by the Supreme Court in the Ram Nath International case is a literal and strict interpretation of clauses whereby the expression “reason beyond the control of the contractor” has been so strictly and literally interpreted to include even those cases which are on account of the defaults of the employer itself and but for the said judgment I would have preferred to interpret the clauses in the manner which the Arbitrator has done and not strike them down by applying Section 23 of the Contract Act. I have also reproduced above the reasoning given in the Award which in my opinion, would otherwise have been enough to dispose of this case, however, the said findings in the award being totally against a direct opposite interpretation given to such clauses by the Supreme Court, would therefore have to give way.

.....

*19. In my opinion, if I look at the issue from both the micro and macro positions, keeping in focus the intendment of legislation called the Contract Act, then, the judgment in the case of Asian Techs Ltd. can be said to laying down a law which would further the object and purpose of the Contract Act. I must hasten to add that I am still doubtful whether I am entitled to decide the aspect that out of two decisions of Supreme Court, which one is to prevail, therefore, my observations are strictly in terms of the limited parameters of the facts of the present case required to decide the aspect of the entitlement or the disentanglement to damages in view of the provisions of Section 55 and 73 of the Contract Act. I would with all due respect to the learned senior counsel for the petitioner, would not venture further and would leave it finally for a larger Bench of this court or the Supreme Court itself to consider whether at all there is any conflict between the judgments of Ram Nath International and Asian Techs Ltd and if there is a conflict, the ratio of which of the two judgments ought to prevail. **I am***



therefore, deciding this case, to make things very clear, only on the basis of the decision that contractual clauses which prohibit the entitlement to rightful damages of a person is clearly hit and are void by virtue of Section 23 of the Contract Act. ”

(emphasis supplied)

139. The said judgment is also cited before the learned Arbitrator. I am of the view that the judgment is applicable to the facts of the present case since it is held by the learned Arbitrator that extensions were granted due to the fault of UOI. Condition 13 of GCC cannot be interpreted to mean that if extensions are granted due to the fault of the petitioner, the respondent waived off its right to claim damages.

140. As regards the computation of the awarded amount under this head, there is no challenge to the same in the petition. However, on 09.07.2024 learned counsel for the respondent had given the basis of calculation of the awarded amount, which is borne out of narration of the Arbitrator in the Impugned Award and reads as under:

“Observations by Ld. Arbitrator

1) On the basis of available record and assessment thereof, it was held that 30% of the delay was on account of the Claimant and the remaining 70% [wrongly stated as 30%] delay was on account of the Respondent.

Basis of Calculation

- Therefore 70% of the claimed amount was awarded.
- 70% of Rs. 3,91,39,530 = Rs. 2,73,97,671/-”

141. For the said reasons, the award under this claim is upheld.

XI. Claim No. 22 “Past, pendente lite and future interest on above claims”

142. The learned Arbitrator has awarded interest in paragraph 21.22.4 of the Impugned Award, which is as follows: (i) past and *pendente lite* interest is awarded on the arbitral amount @ 12% (simple interest) per annum, calculated w.e.f. 01.03.2009 till publication of the award; (ii) period of 3 months from date of award is granted to UOI for making payment of final



bill and the award, failing which, awarded amount shall carry 12% simple interest per annum till date of actual payment, except Claim No. 14; (iii) there shall be no further interest on amount of past and *pendente lite* interest calculated as per (i) above.

- 143.** It is stated by learned counsel for UOI that as per the Interest Act, 1978 interest can be claimed from the date the notice of claiming interest is given by the claimant. In the present case, the said notice was given by VSB on 07.04.2011, however, the learned Arbitrator has awarded interest from 10.03.2009 i.e. when even the final bill was not submitted by VSB. It is also stated that the learned Arbitrator has erred while awarding past and *pendente lite* interest on awarded amount on all claims, which is tantamount to awarding duplicate interest on Claim No. 14 as the interest component has already been awarded under the said Claim No. 14.
- 144.** Learned counsel for the respondent has stated that the ground is not open for UOI to raise under Section 34 of the Act.
- 145.** I have heard learned counsels for the parties.
- 146.** Learned Arbitrator's reasoning for granting interest is in paragraph 21.22.3 of the Impugned Award, which reads as under:

"Claim and award of interest in arbitral references is justified where legitimately due payments of one party are unauthorized held back or denied or delayed by the second party thereby inflicting financial injury. Hon'ble Supreme Court of India in case of Secretary Irrigation Department Govt of Orissa Versus GC Roy & Ragunath Mahapatra (AIR 1992 SC 732) after critical analysis had held that in situations where agreement does not provide for grant of interest nor does it prohibit such grant, the interest may be awarded on the following principle:

(a) A person deprived of use of money to which he is legitimately entitled has a right to compensation for deprivations call it by any name. It may be called interest, compensation, or damages. The interest is an implied term of the agreement between



the parties and therefore when the parties refer all their disputes or refers the disputes as to the interest as such to the arbitrator, he shall have power to award the same.

(b) An arbitration is an alternate forum of resolution of disputes arising between the parties and hence arbitrator has powers to award the interest to avoid multiplicity of proceedings.

(c) Arbitrator is the creature of an argument and hence open to the parties to confer upon him such powers.

(d) For doing the justice between the parties such powers should be exercised by the Arbitrator.

An arbitrator has power to award interest for pre-reference period i.e. period commencing from the date of dispute till the arbitrator enters upon reference in terms of Hon'ble Supreme Court judgment in State of Orissa versus BN Agarwalla & others (AIR 1997 SC 925)."

147. As regards the first argument under this head is concerned, I am of the view it is within the domain of the Arbitrator to award interest. Referencing to Section 31(7)(a) of the Act, Hon'ble Supreme Court in ***Delhi Airport Metro Express (P) Ltd. v. DMRC***, (2022) 9 SCC 286 has held as under:

"17. It could thus be seen that the part which deals with the power of the Arbitral Tribunal to award interest, would operate if it is not otherwise agreed by the parties. If there is an agreement between the parties to the contrary, the Arbitral Tribunal would lose its discretion to award interest and will have to be guided by the agreement between the parties. The provision is clear that the Arbitral Tribunal is not bound to award interest. It has a discretion to award the interest or not to award. It further has a discretion to award interest at such rate as it deems reasonable. It further has a discretion to award interest on the whole or any part of the money. It is also not necessary for the Arbitral Tribunal to award interest for the entire period between the date on which the cause of action arose and the date on which the award is made. It can



grant interest for the entire period or any part thereof or no interest at all.”

(emphasis supplied)

148. In the present case, as already noted by the learned Arbitrator, there was no clause in the agreement for grant of interest. Hence, it lies within his discretion to award interest for any period from the date the cause of action arose, which again is a factual finding. Hence, I am of the view that there is no infirmity in the Arbitrator’s finding in this regard.

149. UOI’s argument regarding duplicate interest on Claim No. 14 is misconstrued. As regards pre-award interest is concerned, it is held by the Hon’ble Supreme Court in ***Hyder Consulting (UK) Ltd. v. State of Orissa***, (2015) 2 SCC 189 that once the interest is combined with the principal amount in the award, the original amount and the interest cannot be separated and viewed independently. The interest then loses its identity as "interest" and becomes part of the total "sum" for which the award is granted. The Hon’ble Supreme Court has made the following observations:

“27. Section 31(7)(a) employs the words “... the Arbitral Tribunal may include in the sum for which the award is made interest...”. The words “include in the sum” are of utmost importance. This would mean that pre-award interest is not independent of the “sum” awarded. If in case, the Arbitral Tribunal decides to award interest at the time of making the award, the interest component will not be awarded separately but it shall become part and parcel of the award. An award is thus made in respect of a “sum” which includes within the “sum” component of interest, if awarded.

28. Therefore, for the purposes of an award, there is no distinction between a “sum” with interest, and a “sum” without interest. Once the interest is “included in the sum” for which the award is made, the original sum and the interest component cannot be segregated and be seen independent of each other. The interest component



then loses its character of an “interest” and takes the colour of “sum” for which the award is made.

29. There may arise a situation where, the Arbitral Tribunal may not award any amount towards principal claim but award only “interest”. This award of interest would itself then become the “sum” for which an award is made under Section 31(7)(a) of the Act. Thus, in a pre-award stage, the legislation seeks to make no distinction between the sum awarded and the interest component in it.

30. Therefore, I am inclined to hold that the amount award under Section 31(7)(a) of the Act, whether with interest or without interest, constitutes a “sum” for which the award is made.”

150. Hence, there is no patent illegality in the finding of the learned Arbitrator.

For the aforesaid reasons, the award under this head is upheld.

XII. Claim No. 2 of UOI “Reimbursement of over payment due to non-recovery of mobilization advance in final bill raised as counterclaim”

151. Amount of claim raised by UOI was to the tune of Rs. 2,03,00,000. The learned Arbitrator awarded Rs. 1,61,16,277 in favor of UOI, directing that the said amount due to UOI shall only be recovered/deducted from the amount arrived after adding the awarded amount and the interest payable to VSB till the date of implementation of award.

152. The learned Arbitrator held that the claim was not a counterclaim, but rather an independent claim. He further noted that there was no proper scrutiny carried out before release of payment to VSB which is evidenced from the fact that the claim was raised before the Arbitrator for the first time on 31/18.12.2012, when the subject work was completed on 10.05.2008 and final bill was paid to VSB on 31.03.2011. Thus, the fault was on part of UOI and not VSB and granting of interest on the overpayment would amount to granting a premium on the fault committed by UOI. He also noted that the interest on mobilization advance as laid down in Condition 26 of GCC has already been deducted



from RARs, hence there was no reason to recover interest over the interest on the said amount.

153. Before this Court, learned counsel for UOI has made the following submissions:

153.1 Learned Arbitrator has wrongly concluded that UOI has also signed the NCC in the final bill. The same is factually incorrect since as per Condition 55 of GCC, NCC is to be signed by the contractor i.e. VSB only, while UOI claimed overpayment as per the special Condition 26 of the Contract Agreement and agreed Condition 57(e) of GCC which empowers UOI to conduct post audit technical check of final bill and enforce recovery when overpayment is detected. It is stated that the same cannot be concluded as an extra claim being demanded by UOI against agreed terms of the contract.

153.2 The award is vitiated by patent illegality on account of non-award of interest to the petitioner on its counterclaim awarded to the tune of Rs. 1,61,16,277. It is stated that interest payable is as per the agreed terms of the contract and has not already been recovered since in the final bill, the overpayment is made to contractor on 21.03.2011.

154. Learned counsel for the respondent has stated that it is noted by the learned Arbitrator that the said claim is new and independent claim and not a counter claim. It is also noted that the interest claimed by UOI on the overpayment would amount to granting a premium on fault committed by UOI. It is submitted that the claim was first raised during arbitration and not during settlement of the final bill as per UOI. It is further stated that the ground concerns factual issues and is not open for UOI to raise under Section 34 of the Act.

155. I have heard learned counsels for the parties. I find no infirmity with the finding of the learned Arbitrator.



156. As regards the first argument of UOI under this head that the learned Arbitrator has returned a factually incorrect finding, I am of the view that the same does not find merit under the present petition. It is relevant to note the context in which the finding has been given by the learned Arbitrator, and the same reads as under:

“22.2.3.I find that UOI in their arguments has nowhere brought out any reason for the delay in raising the counter claim at such a belated stage. I am also clear that UOI has defaulted by not raising this counter claim at the time of submission of statement of defence to the arbitral tribunal. UOI in their argument has stated that there is no objection of limitation period raised by the contractor hence it is not barred by limitation Act. On this argument I observe that the subject work was completed on 10 May 2008 and neither during the currency of the contract nor during the various hearing up to 31 Dec 2012 UOI has never raised any such claim thus clearly showing that the claim has been raised much beyond the limitation period of 3 years. I have also noted that the UOI in their defence on all the claims of the contractor had been arguing that the claims raised by them are waived and extinguished as they had signed a no demand certificate. In this case also I find that UOI had signed a no claim certificate as given on Page 129 of the contract agreement which reads as under:

"Certified that there are no demands outstanding against the contractor in respect of the contract agreement" which is signed by the AAO, PM SAO of CDA? Accordingly, on the same plea this claim falls in the same category as the claims of the contractor.

Thus both the parties have put forth the argument depending on their convenience and both arguments to admit or to reject the subsequent claims is argued by both the parties. In order to arrive at the decision I hold the reasons which I have elaborated in the beginning of the award in dealing with the Contractor's claim hold good in case of the claim of UOI also. In view of my above finding I arrive at the decision that the claim is arbitrable and I will now proceed on the merits of the case.”



157. Hence, regardless of the fact that whether UOI had signed the NCC or not, the Arbitrator has adjudicated the arbitrability of this claim in favor of UOI and then decided the case on merits. Further, the same is a factual finding as admitted by UOI and entirely within the domain of the learned Arbitrator. “No Demand Certificate For DG MAP Contractors” (interchangeably used as NCC in the Impugned Award) at Annexure ‘G’ (Page 129) of the GCC shows that the same required signatures of AAO CDA, Project Manager and SAO, CDA under Part ‘B’. Hence, the argument raised by the petitioner is misconceived.

158. As regards the argument that the present claim was not an extra claim but rather a counter-claim the learned Arbitrator has held as under:

“22.2.3.UOI has projected this as a counter claim and as per the legal terms the definition of counterclaim is "a claim raised by a defendant opposing the claim of plaintiff and seeking some relief from the plaintiff for the defendant." A careful reading of the above reveals that this claim is not a outshoot of Claim No 14 of the contractor as this claim is independent in nature, thus strictly speaking, it is a new claim and not a counterclaim as argued by UOI....”

159. I find no infirmity with the Arbitrator’s finding on this issue.

160. As regards the second argument under this head, the learned Arbitrator has returned the following finding in paragraph 22.2.3 of the Impugned Award:

“....It is a fact as admitted by UOI in their arguments in Claim No 14 earlier that they had a very elaborate method of release of payment to the contractor as the checking was being carried out at four different and independent levels which had resulted in delay in payment of RARs as brought out above. The subject work got completed on 10 May 2008 and the final bill was paid to the contractor on 31 March 2011 i.e. almost after three years and in spite of such elaborate checks the contractor was allowed an over payment of such huge amount. This overpayment remained



undetected at all levels till 31/18 Dec 2012 when for the first time the claim was raised in this arbitral tribunal which clearly proves that no proper scrutiny was carried out before release of payment to the contractor. It is thus evident from above that the payment released to the contractor was on the fault of UOI and not on the contractor. I am in agreement with the argument of the Contractor that the interest claimed on the overpayment will amount to granting a premium on the fault committed by UOI. I have also taken into consideration Condition 55 of GCC which specifically deals with the recovery from Contractor and it clearly states that the amount due against the contractor can be withheld against any sum becoming due to the contractor. I have also taken into consideration that the interest on the mobilization advance as laid down in Condition 26 of GCC has already been deducted from the RARs hence there is no reason to recover interest over the interest on the said amount....”

161. Hence, the arbitrator was of the view that the delay was attributable to the petitioner. That being the finding of fact based upon evidence, this Court under Section 34 is not required to look into the same. In addition, in the absence of a provision regarding interest in the contract, grant or non-grant of interest is purely within the domain of the Arbitrator, as also observed by the Hon'ble Supreme Court in ***Delhi Airport Metro Express (P) Ltd.***(supra) and ***Hyder Consulting (UK) Ltd.*** (supra). I find no infirmity with the Arbitrator's reasoning and it does not warrant interference by this Court.

162. For the said reasons, the award under this head needs no interference.

Conclusion

163. For the reasons stated herein, the Impugned Award dated 27.09.2013 is partially set aside. Award towards Claim Nos. 1, 2, 6, 7, 14, 15, 20, 22 of the respondent is upheld. Award towards Claim Nos. 3 and 9 is set aside in favor of the petitioner. In addition, the non-grant of interest on Claim No. 2 of the petitioner is upheld.



- 164.** Documents handed over in Court on 09.07.2024 and 11.07.2024 are taken on record.
- 165.** The petition, along with pending applications, if any, is accordingly disposed of.

JASMEET SINGH, J

JULY 24th, 2024/skm

Click here to check corrigendum, if any