



2024:DHC:9399



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

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Reserved on: 29th May, 2024

Pronounced on: 3rd December, 2024

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CS(OS) No.1751/2015, I.A.22098/2015 & I.A.5626/2024

M/s Sharma & Associates, Contractor Pvt. Ltd.

Through its Managing Director,

Sh. Virender Kumar Sharma,

Having its office at F-133, Ashok Vihar

Phase-I, Delhi 110052

.....Plaintiff

Through: Mr. Sandeep Sharma, Ms. Kanchan
Semwal and Ms. Kavya Davak,
Advocates.

versus

1. M/s. Progressive Construction Ltd.

Through its authorized representative,

Flat No. 203, Plot No. 29, Sector-6,

Dwarka, New Delhi-110075

....Defendant No.1

2. Sh. B. Majumdar,

Sole Arbitrator,

1421, Sector-A, Pocket-B&C,

Vasant Kunj, New Delhi.

.....Defendant No. 2

Through: Mr. Rakesh Tikku, Senior Advocate
with Mr. Arjun D. Singh, Mr.
Gaichangppou Gangmei, Ms. Nisha
Pandey, Mr. Maitreya Mahaleya and
Mr. Yimyang Longkumer and Mr.
Monu Kumar, Advocates.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.



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1. The Petition under Section 14 of the *Arbitration Act, 1940* ('Arbitration Act' *hereinafter*), has been filed on behalf of the Plaintiff, in regard to the Arbitral Award dated 20.03.2015, which was received by the Plaintiff on 23.03.2015.
2. It is submitted that the Plaintiff is in the business of construction works for last many years. The Defendant No. 1 *M/s Progressive Construction Ltd.*, was awarded the Work of "*Construction of Power Channel Package III from RD 4032 M to 5200 M of Tanakpur Hydro-electric Project, Tanakpur, District, Nainital, Uttar Pradesh*" by National Hydroelectric Power Corporation ('NHPC' *hereinafter*) **vide Works Contract dated 31.03.1989**. The Plaintiff and the Defendant No. 1, executed a *Sub-Contract Agreement dated 18.04.1989*, which contained an *Arbitration Clause for settlement of all the disputes between the parties through Arbitration*.
3. Differences and disputes arose under the Contract resulting in Claims and Counter-Claims between the parties. Therefore, the Plaintiff invoked the Arbitration and filed an Application bearing *Suit No. 1068/1996*, before the High Court under Section 20 of the Arbitration Act, seeking appointment of the Arbitrator.
4. ***The Application was contested by Defendant No. 1***, who filed a Response under Section 33 of the Arbitration Act. This Court *vide* Order dated 17.05.2005 appointed Sh. K.L. Sahgal as the Sole Arbitrator. The Defendant No. 1 filed an Appeal bearing *FAO(OS) No.159/2005 before the Division Bench of this Court*, which *vide* its Order dated 12.09.2006, appointed Defendant No. 2, Mr. B. Majumdar as the Sole Arbitrator since the earlier Arbitrator had expired.



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5. The Arbitrator entered reference and published an *Award dated 20.03.2015*, the copy of which was received by the Plaintiff on 23.03.2015. The Plaintiff thus, made a prayer that the Defendant No. 2 be directed to file the Original Award dated 20.03.2015 and the Court after considering the propositions and the proceedings, may decide the matter, in accordance with law.

6. In response to the Notice of the Suit, the Defendant No. 1, *M/s Progressive Construction Private Ltd.* filed its Application under Section 33 of the Arbitration Act for setting-aside of the Award dated 20.03.2015 passed by the learned Sole Arbitrator.

7. Essentially, the ***grounds taken for setting-aside of the impugned Award*** were that *there was legal and procedural misconduct of the learned Arbitrator; there were patent illegalities which went to the root of the matter, in the findings of the learned Arbitrator; that the Award was arbitrary, capricious and whimsical and that it amounted to re-writing of the Contract by the learned Arbitrator; Claims were never notified to the Defendant by the Plaintiff till the commencement of arbitration; there was no evidence available with the Ld. Arbitrator to award the claims in favour of the Plaintiff; The award is in violation of the contract and law and was based on conjectures and surmises.*

8. In fact, the learned Arbitrator conducted a ghost Arbitration against NHPC even though it was not a party to the present proceedings. Moreover, the disputes that have been decided had arisen between NHPC on one side and Defendant and its assignees i.e. the Plaintiff, on the other side. The learned Arbitrator had no authority to adjudicate the disputes whether Plaintiff and Defendant, were entitled to an Award against NHPC.



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9. It is further submitted that nowhere in the Petition under Section 20 of the Arbitration Act, the Plaintiff had claimed that the Defendant was responsible for delay or breaches of the Sub-Contract and all the Claims mentioned in the Petition, were against the NHPC. Once NHPC had been deleted from the array of parties, the right of reference of the Claims mentioned against the NHPC in the Petition, was lost forever.

10. It is further contended that the arbitrator's findings are self-contradictory since in Paragraph 22 of the impugned Arbitral Award, it has been observed that by not issuing Power of Attorney in favour of the Plaintiff within one month, the right of the Defendant to recover the dues from NHPC, were lost forever and it cannot derive the benefit of its own wrong. However, in Paragraph 38 (III), it has been stated that "*as claims can be correctly known only after the detail of Final Bills is known, it follows that period of limitation cannot start till the Final Bill is prepared.*" Accordingly, the findings of the learned Arbitrator that the Plaintiff's Claim was not barred even in the year 2008 even though the Claim against the NHPC was even prior to 1996, is fallacious as evidently, the Claims were barred by limitation.

11. It is further submitted that the Statement of Claim does not make any allegation of breach or default of Contract, against the Defendant. The learned Arbitrator has determined the amount due from the NHPC even though it was not a party before it. Serious procedural misconduct has been conducted by admitting documents, which were denied by the Defendant.

12. The Defendant submits that the Tribunal has directed in its Award that 98% amount shall be paid by the NHPC while 2% shall be paid by the Defendant No. 1. It is claimed that the learned Arbitrator ought to have held



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that the Defendant should pay only 2% of the Plaintiff's claim amount as commission to the Plaintiff alone.

13. The Plaintiff has violated the Contract executed between it and the Defendant and had failed to submit the Final Bill to NHPC as was required, in terms of the Contract. The cause of action mentioned by the Plaintiff was the non-issue of Power of Attorney by the Defendant, within one month. However, there was no such provision in the *Sub-Contract Agreement* providing that the Power of Attorney had to be provided within one month. It is further contended that the Plaintiff during the cross-examination, conceded that no Final Bill was taken or submitted by the Plaintiff to NHPC, so as to create disputes regarding payment of Final Bill. There was clear violation of Clause 48 and 55.5 of the Contract.

14. It is further contended that the demand of Power of Attorney, to file the Suit, was pre-mature and no action had been taken by the Plaintiff, after completion of the work for the submission of Final Bill, till filing of the Petition under Section 20 of the Arbitration Act and no Final Bill had been submitted till date. The Claim itself was not in respect of the Final Bills but about the payment of "*provisional final bill dues.*"

15. It is further contended that the Petition under Section 20 of the Arbitration Act, filed for appointment of Arbitrator itself was defective as no disputes were stated with the Defendant and the disputes stated therein were only with NHPC. The learned Arbitrator was confused in making an observation that the Defendant had failed to get an Arbitrator appointed in regard to the disputes between the Defendant and NHPC. Furthermore, the learned Arbitrator had also noted in the Award that the Claims referred in the Arbitration, were never notified to the Defendant by the Plaintiff.



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16. There were 21 Claims decided by the learned Arbitrator, which are as under:-

CLAIM NO.	HEADING	CLAIMED AMOUNT	AWARDED AMOUNT	FINDINGS BY ARBITRATOR
1.	Difference in escalation due to change in escalation formula	Not Quantified	NIL	Dismissed Para-38 (Pg-24 of Award)
2.	On account of enhancement of rates of work done beyond stipulated period	Not Quantified	31,36,000/- Deducting 2% commission for defendant.	Para-39 (pg-28 of Award) ➤ Work prolonged for 36 months ➤ Relied upon revised Annexure-E filed by claimant a/w SOC. ➤ Information received under RTI from U.P. Govt.
3.	Claim on account of Extra Leads as per actual distance covered	7,58,361/- (Revised) Annxr-C	7,35,000/- Deducting 2% commission for defendant.	Para-42 (Pg-31 of Award) ➤ Haul road was operative only on 24.09.89 ➤ Defendant only sought approval from NHPC of haul road (Ex.C30, Ltr18.06.89) ➤ Project Manager of Def himself protested the payment of less lead. (Ex. C-55, Letter 18.11.1989)
4. (a)	Claim on account of extra expenditure for bringing additional Quantity if fill material from borrow area.	1.2 Crore	NIL	Para-43-45 (Pg-33-37 of Award)
4 (b)	Claim on account of extra	70,81,992/-	NIL	Para-47 (Pg-37 of Award)



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	expenditure for segregating additional Quantity of oversized material			
5.	Claim on account of forming extra embankment and subsequent lip cutting.	13,24,512/- Annxr-F	12,25,000/- Deducting 2% commission for defendant.	Para-49 & 50 (Pg-38 & 39 of Award) ➤ NHPC Ordered for 1.0 m extra filing and compaction on both sides. ➤ Ltr dated 21.09.1990 written by claimant on behalf of Defendant to NHPC. ➤ Already been accepted by NHPC and payment of Rs.4,98,960/- made in Final Bill. ➤ Never accepted by Claimant.
6.	Claim on account of Idleness losses against machinery and Labor.	3,10,11,336/- - Annxr-G(i) (Machinery) and Annxr-G (ii) (Labor-Not Pressed for)	22,93,200/- Deducting 2% commission for defendant.	Para-53 (Pg-42 of Award) ➤ Fundamental Breach of contract on part of the defendant. ➤ Admitted position heavy machinery was deployed at site till Feb, 92
7.	Claim on account of business loss coz of prolongation of contractual period.	90,30,541/-	NIL	Para 55 & 56 (pg-44 of Award)
8.	Claim on account of loss of overheads during the prolonged period.	63,78,342/- (Original 48,79,848/- (Revised))	16,31,150/- Deducting 2% commission for defendant.	Para-57 and 59 (Pg-45 & 46 of Award) ➤ Fundamental Breach of contract on part of defendant. ➤ Annexure-I (Revised) ➤ Claimant did not file any



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				document in support of the claim. ➤ Schedule-D of the Agreement. ➤ Ltr Dated 13.06.1991 (C-256) through which defendant raised the said claim on NHPC.
9.	Excess Interest on mobilization and machinery advance	2,10,608/-	NIL	Para-60, 62 & 63 (Pg-48 & 49 of Award)
10.	Claim on account of diversion of water in CD-5 of RD 4920 m	1,31,670/-	83,300 Deducting 2% commission for defendant.	Para-65 (Pg-49 of Award) ➤ General Objections by defendant ➤ Already held that Fundamental Breach of Contract on part of defendant.
11.	Claim on account of extra excavation for CD-5 at RD 4920 m	1,10,886/- Annxr-L	10,800/- Deducting 2% commission for defendant.	Para-66,68 (Pg-49 & 52 of Award) ➤ General Objections by Defendant ➤ Already held that Fundamental Breach of contract on part of defendant. ➤ Ltr dated 13.06.1991 (Ex.C-256) Letter by defendant to NHPC which clearly shows work of excavation done.
12.	Claim on account of excavation & filling for septic tank retaining wall at RD 4870 m	1,19,234/- Annxr-M	9,645 Deducting 2% commission for defendant.	Para-66, 68 (Pg-49 & 52 of Award) ➤ General Objections by defendant. ➤ Already held that Fundamental Breach of contract on part of defendant. ➤ Ltr dated 13.06.1991 (Ex.C-256) Letter by defendant to NHPC which clearly shows



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				work of excavation done.
13.	Claim on account of diversion of river in borrow areas	55,080/- Annxr-N	NIL	Para-73 & 74 (Pg-54, 55 & 56 of Award) ➤ General Objections by defendant. ➤ Already held that Fundamental Breach of contract on part of defendant.
14.	Claim on account of telephone cable/lines in MES area.	66,336/-	NIL	Para-75 & 76 (Pg-56 & 57 of Award) ➤ General Objections by defendant.
15.	Claim on account of repairs of water mains near bridge in MES area	44,983/-	NIL	Para-78 & 79 (Pg-58 & 59 of Award)
16.	Claim on account of sprinkling of water in MES area	18,36,000/- Annxr-Q	4,51,580/- Deducting 2% commission for defendant.	Para-81 to 83 (Pg-59-61 of Award) ➤ General Objections by defendant. ➤ Already held that Fundamental Breach of contract on part of defendant. ➤ Work of sprinkling was done. ➤ Reimbursement for 24 months awarded @Rs.200 Per Hour. ➤ Def. disputed the rate but did not quote any rate in counter.
17.	Claim on account of extra ramps for embarkments.	4,33,900.80 Annr-R	35,280/- Deducting 2% commission for defendant.	Para-85 & 86 (Pg-62 & 63 of Award) ➤ General Objections by defendant. ➤ Already held that Fundamental Breach of contract on part of



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				defendant. ➤ Sites were handed over in piecemeal. ➤ Delay in supplying drawings of cross-drainage structures. ➤ Payments which were made earlier, were deducted in Final Bill.
18.	Claim on account of desertion of transporters, etc.	Did not Press during arguments.	NIL	Para-87 (Pg-64 of Award)
19.	Final Bills dues	Deduction in various heads of Final Bill	18,79,438/- Deducting 2% commission for defendant.	Para-88-91 (Pg-64 & 88 of Award) ➤ General Objections by defendant. ➤ Already held that Fundamental Breach of contract on part of defendant.
20.	Interest on amount dues.	15% P.A. till date of payment	10% Simple Interest on Pre-suit. 10% reckoned on Pendente-Lite simple interest. Total Amount- 2,16,39,857/-	Para-92 & 93 (Pg-89 of Award) ➤ General Objections by defendant. ➤ Already held that Fundamental Breach of contract on part of defendant.
21.	Cost of Arbitration.	2,00,000	Parties to bear their own cost.	Para-94 (Pg-90 of Award) ➤ General Objections by defendant. ➤ Already held that Fundamental Breach of contract on part of defendant.

17. Twelve Claims under which the amounts have been awarded against the Defendant, have been challenged by way of this Application under



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Section 30 and 33 of the Arbitration Act. Generally, the *grounds* of Claim are that they are violative of the terms of the Contract that they were no evidence available in regard to the Claims and also were not notified to the Defendant by the Plaintiff, at the time of commencement of the Arbitration proceedings.

18. The Defendant No. 1, in its Application has challenged Separate Claims on various common and substantive grounds as specified hereinunder:

Claim	Grounds of Challenge
Claim No. 2	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. The Plaintiff did not even allege in the Statement of Claims that the Defendant was responsible for the prolongation of the works. Therefore the Defendant is not liable to pay any prolongation cost to the Plaintiff. 3. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 4. The Claim awarded is in violation of the contract and law. 5. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 6. The quantification of this by the Ld. Arbitrator is patently wrong and the supporting material used is also incorrect. 7. <u>There is a Non-deduction of an amount of Rs. 14,07,066/- from this claim being the escalation already received by the plaintiff which amounts to the Plaintiff receiving a double payment and unjustly enriching itself.</u> 8. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant =
Claim No. 3	9. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 10. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 11. The Claim awarded is in violation of the contract and law. 12. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 13. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant



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	14. The amendment of the present claim by the Plaintiff was hopelessly beyond the period of limitation and was thus barred by time and the resultant award is accordingly liable to be set aside. 15. <u>The Plaintiff had agreed in writing that no claim for extra lead will be made and the claim made was in clear violation of the said agreement and therefore the award is in clear violation of the agreement.</u>
Claim No. 5	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 3. The Claim awarded is in violation of the contract and law. 4. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 5. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant 6. The amendment of the present claim by the Plaintiff was hopelessly beyond the period of limitation and was thus barred by time and the resultant award is accordingly liable to be set aside.
Claim No. 6	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. The Plaintiff did not even allege in the Statement of Claims that the Defendant was responsible for the prolongation of the works. Therefore the Defendant is not liable to pay any prolongation cost to the Plaintiff. 3. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 4. The Claim awarded is in violation of the contract and law. 5. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 6. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant 7. <i>The Arbitrator categorically held in the award under this claim that the Plaintiff failed to prove its losses in support of the claim. The Ld. Arbitrator also held that there was no mitigation on the part of the Plaintiff as well. Despite these critical findings against the Plaintiff, the Ld. Arbitrator proceeded inexplicably to award the claim in favour of the Plaintiff. The award is therefore patently illegal and is liable to be set aside.</i> 8. The award under this claim is based on surmises and conjecture 9. <i>Despite the fact that the Ld. Arbitrator held that the market rate of rent claimed by the Plaintiff is not correct and the hire charge rate submitted by the Defendant is Exhibit RS-5 is correct, the Ld. Arbitrator relied on the market rate of hire charge submitted by the Plaintiff for deriving 10% of idleness/underutilization of machinery. The award is therefore patently illegal to be set aside.</i>



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Claim No. 8	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. <i>The Plaintiff did not even allege in the Statement of Claims that the Defendant was responsible for the prolongation of the works. Therefore the Defendant is not liable to pay any prolongation cost to the Plaintiff.</i> 3. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 4. The Claim awarded is in violation of the contract and law. 5. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 6. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant. 7. <i>The Ld. Arbitrator held that the Plaintiff could not produce evidence to establish the claim. However, despite this determinative finding, the Ld. Arbitrator proceeded inexplicably to award the claim in favor of the Plaintiff</i> 8. The award under this claim is based on surmises and conjecture 9. The amendment of the present claim by the Plaintiff was hopelessly beyond the period of limitation.
Claim No. 10	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 3. The Claim awarded is in violation of the contract and law. 4. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 5. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant
Claim No. 11	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 3. The Claim awarded is in violation of the contract and law. 4. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 5. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant



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Claim No. 12	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 3. The Claim awarded is in violation of the contract and law. 4. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 5. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant
Claim No. 16	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 3. The Claim awarded is in violation of the contract and law. 4. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 5. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant 6. <i>There is a non-deduction of an amount of Rs. 14, 07,066 from this claim being the escalation already received by the Plaintiff, which amounts to the Plaintiff receiving a double payment and unjust.ly enriching itself.</i>
Claim No. 17	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 3. The Claim awarded is in violation of the contract and law. 4. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 5. The Defendant is not liable to satisfy the Award passed against the NHPC by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant 6. The award under this claim is based on surmises and conjecture
Claim No. 19	1. No such claim was ever notified to the Defendant by the Plaintiff till the commencement of arbitration. 2. There was no evidence available with the Ld. Arbitrator to award this claim in favour of the Plaintiff. 3. The Claim awarded is in violation of the contract and law. 4. The Ld. Arbitrator Made out a new contract for the plaintiff to award this claim in its favour 5. The Defendant is not liable to satisfy the Award passed against the NHPC



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	by the Arbitrator. The Arbitrator also had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the Award amount against should be borne by the Defendant 6. The amendment of the present claim by the Plaintiff was hopelessly beyond the period of limitation and was thus barred by time and the resultant award is accordingly liable to be set aside. 7. <i>The Plaintiff itself prayed before the Ld. Arbitrator under Claim No. 16 that even though it was entitled to a high amount, the award should be limited to the amount referred by this court for arbitration for arbitration and the prayer of the Plaintiff was accepted by the Ld. Arbitrator. Under Claim No. 19, the amount referred for arbitration by the High Court was admittedly only Rs. 10 Lakhs. Therefore, the awarding of an amount above Rs. 10 Lakhs is even otherwise illegal and the resultant award is liable to set aside.</i>
Claim No. 20	1. Award is liable to be set aside as all the claims that have been awarded are also liable to be set aside. 2. <i>The reason mentioned for determining the starting date of award of interest in para 93 of the award is also patently incorrect. It has been stated in the award that for the first time the Plaintiff raised claims against the Defendant in the petition dated 21.05.1996 filed before this Hon'ble Court. It is respectfully submitted that the claims raised in the petition dated 21.05.1996 were against the NHPC. Therefore, on this ground also interest could not have been awarded from the date of filing of the petition.</i>

19. ***The Plaintiff in his detailed Reply*** to the Application under Section 30 and 33 of the Arbitration Act of the Defendant, has taken the *Preliminary Objection* that there is no error apparent on the face of the Award.

20. Reliance has been placed on Mahanagar Telephone Nigam Limited vs. Fujitsu India Private Limited., reported as Arb.L.R. 2015(2)-332 (Delhi) (DB) and Rakesh Kumar and Company vs. Union of India through the Dy. Chief Engineer, reported as 2015 (3) Arb. L.R-531 (Delhi) (DB) wherein it has been observed that the Arbitral Tribunal is the master of factual arena and has right to even go wrong on deciding the factual issues. If there are two views possible and one view has been taken by the Arbitral Tribunal, then it would not be a ground to interfere with the Award.



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21. ***On merits***, it is admitted that Work Contract for *Package-III from RD 4032M to RD 5200M* for Rs.2,81,41,335/-, was awarded to Defendant No. 1 by NHPC *vide* Letter dated 31.03.1989. Defendant No. 1 executed a sub Work Contract for this Package-III with the Plaintiff, on the terms and conditions as agreed in the Agreement dated 18.04.1989, executed between them.

22. The Plaintiff submitted that as per the Sub- Contract, the Bills for the work executed, were prepared by the NHPC and the cheques were paid to Defendant No. 1, who after deducting the commission as provided in the Agreement dated 18.04.1989, used to make the balance payment by way of cheques to the Plaintiff. It is further asserted that in terms of *Clause 15* of the Agreement dated 18.04.1989, Defendant No. 1 was to execute a Power of Attorney in favour of the Plaintiff, who was to act on behalf of the Defendant No.1, on site. All correspondences were undertaken with NHPC by the Defendant No. 1 either through their Head Office officials/their Resident Engineer at site Sh. S.N. Reddy or under their instructions through their attorney, Sh. Surinder Kumar Sharma.

23. For the value of the executed work, NHPC preferred to prepare interim Bills which were never prepared by Defendant No. 1 and the question of submitting these Bills by the Plaintiff, is completely out of question. However, the Plaintiff was regularly submitting *the progress and the amount of work done Report* to Defendant No. 1, as per the provisions of the Contract.

24. It is further asserted that the Defendant No. 1 being the Contractor of NHPC, was required to prepare and submit the Bills but because it was not done, the running Bills got prepared by NHPC, without inviting joint



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measurements from the Defendant No. 1. The NSL levels were taken by the Defendant No. 1's Resident Engineer, Mr. S.N. Reddy jointly with NHPC and joint final measurements were taken by NHPC, on which final Bill could be prepared, as per the procedure agreed between the Defendant No. 1 and NHPC. However, they both failed to follow this procedure for unknown reason. It is asserted that the plea taken that the Plaintiff was expected to submit the Final Bill within two months of completion of work, is totally false and incorrect.

25. The Plaintiff has further explained that after the invocation of the Arbitration through Legal Notice dated 02.12.1994 by Defendant No. 1 against NHPC, they did not take any further steps for appointment of the Arbitrator. In view of this, the Plaintiff requested Defendant No. 1 to issue a Power of Attorney in favour of the Managing Director of the Plaintiff, to enable him to initiate the Arbitration proceedings on their behalf and to take all the actions in the matter as required.

26. The Defendant No. 1 denied to issue the Power of Attorney, the reason of which is disclosed in Rejoinder filed by Defendant No. 1, to the Petition under Section 20 of the Arbitration Act. It was stated that Mr. Virender Sharma on behalf of the Plaintiff, had visited the Office of the Defendant No. 1, after receiving Letter dated 22.08.1995 when he was told that the Power of Attorney requested would be issued only subject to Plaintiff's not pressing the payment in respect of another Work, namely, *"Construction of left afflux bundh and bridges"*. Since the same was not acceptable to the Plaintiff, he itself ultimately filed the Petition under Section 20 of the Arbitration Act, for appointment of the Arbitrator. The Defendant No. 1 instead of issuing Power of Attorney stated that the same



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already stands granted in favour of Mr. Surender Kumar Sharma. Plaintiff had made repeated requests for issuance of fresh Power of Attorney in favour of Mr. Virender Kumar Sharma and even a draft of Power of Attorney was sent to the Office of Defendant No. 1. Sh. G.R.V. Prashad, after reading the same, refused to sign the Power of Attorney. Instead it sent a *Reply* that it can issue a Power of Attorney in lieu of the earlier one, issued in favour of Mr. Surender Kumar Sharma. However, the Power of Attorney earlier given to Mr. Surender Kumar Sharma was for doing the acts on behalf of the Defendant No. 1 during the execution of work and not for initiating the Arbitration.

27. It is further explained that the Power of Attorney of Mr. Surender Kumar Sharma already stood cancelled by Defendant No. 1 *vide* its Letter dated 06.11.1995. Instead of giving the Power of Attorney, the Defendant No. 1 got a similar Power of Attorney, as executed in favour of Mr. Surender Kumar Sharma, which was not tenable. *The Plaintiff has claimed that this stand was taken by Defendant No. 1, only to make the Claims time barred.*

28. The Plaintiff has further asserted that as per the NHPC, Final Bill was ready but the Defendant No. 1 did not bother to take any steps in this regard or even inform the Plaintiff. The Plaintiff wrote a Letter dated 17.05.2005 to which Reply dated 25.05.2005, was sent by the Defendant No. 1.

29. The Defendant No. 1 in order to have an excuse for not filing a Reply to the Statement of Claims, took a plea that for the purpose of preparation of the Final Bill by the NHPC, the Plaintiff is also required to depute their representatives. The Defendant No. 1 was directed by the learned Arbitrator, to furnish the copies of the Letters received by them from NHPC. The



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Plaintiff *vide* Letter dated 16.06.2008 informed Defendant No. 1 that Mr. Surender Kumar Sharma has been deputed to assist the Defendant No. 1, in preparation of Final Bill. It was also requested that the Defendant No. 1 may intimate the exact date of visit so that Mr. Surender Kumar Sharma could meet the representative of the Defendant No. 1 at NHPC's Office in Banbasa. The Defendant No. 1, however, failed to respond and took it as an excuse for delaying the filing of Reply, as per its Letter dated 02.07.2008.

30. The Plaintiff has stated that the Objections under Section 30 and 33 of the Arbitration Act, are liable to be rejected as being without any basis or justification and are vague and evasive. It is denied that the Arbitration Award is patently illegal, based on conjectures or surmises or contains conclusions, which are perverse and irrational. It is submitted that the Objections taken are false and incorrect. It is denied that the Arbitrator has materially contradicted himself in the Award at several instances and asserted that such pleas are vague and evasive. In fact, the Defendant No. 1 is attempting to misrepresent the contents of the Award.

31. The Defendant No. 1 is incorrectly alleging that the Work was completed on 30.04.1993, in order to allege that the Claims are barred by limitation.

32. It is denied that the learned Arbitrator committed procedural misconduct by admitting the documents denied by Defendant No. 1. The Defendant No. 1 had denied writing Letters to NHPC, in respect of the work contract and even denied the Judgment of learned Single Judge against which the Appeal was filed before the Division Bench. Because of the such denial with *malafide* intention, the Plaintiff through RTI obtained documents from NHPC and placed them before the learned Arbitrator.



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33. The Defendant No. 1, failed to take further action by executing the Power of Attorney in favour of the representative of the Plaintiff, consequent to which, the Claims against the NHPC could not be raised since there was no subsisting contract between the Plaintiff and NHPC. The payments received by the Plaintiff, were only through Defendant No. 1 and the remedy also was against the Defendant No. 1, in terms of Arbitration *Clause 12* of the Agreement. Clause 12 of Sub-Contract Agreement dated 18.03.1989 is as follows:

“All disputes relating the agreement will be mutually settled and in case of differences, they will be decided by Arbitration in accordance with the provisions of the Arbitration Act, 1940”

34. It is further asserted that it is wrongly contended by the Defendant No. 1 that they were liable to pay to the Plaintiff only after receiving the payments from NHPC. The Defendant No. 1's liability towards the Claims of the Plaintiff, is not extinguished and they cannot be allowed to have benefit of their own wrong. The Claims have been raised correctly by the Plaintiff, for which Defendant No. 1 is liable to make the payment. It is denied that the Defendant No. 1 does not have the liability to make payment of 90% of the awarded amount, to the Plaintiff.

35. The Plaintiff has further asserted that the work was completed on 30.03.1993; the Final Bill could not be prepared unilaterally by NHPC but the Defendant No. 1 failed to co-operate. The NHPC for the first time by its *Letter dated 25.02.2000*, accepted the *Final Bill and Full & Final Settlement* to the release of the payment. It is asserted that from the various Letters that have been placed on record, it is evident that the Defendant No. 1 failed to finalise the Final Bill by not extending due co-operation to NHPC. It is



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denied that no action was taken by the Plaintiff after the completion of the work for submission of the Final Bill.

36. In fact, after giving credit of the amount paid including recoveries, more than Rs. 10 Lakhs has still due and payable, which was accepted by the Hon'ble Court, to conclude that there were disputes that had arisen between the Plaintiff and the Defendant No. 1.

37. In regard to the challenge to the *12 Claims on merits*, it is explained that all these Claims have been awarded for due reasons as recorded in the Award. There is *no patent illegality in the Award* and the Petition under Section 14 of the Arbitration Act, may be allowed.

38. The ***Defendants in their Rejoinder***, have reaffirmed the assertions as made in their Application under Section 30 and 33 of the Arbitration Act and therefore, the award is liable to be set aside.

39. The ***Defendant No. 1 in its Written Submission*** has placed reliance on *Associated Engineer v. Government of Andhra Pradesh and Anr.* (1991) 4 SCC 93; *Rajasthan State Mines & Minerals Ltd v. Eastern Engineering Enterprises and Anr.* (1999) 9 SCC 283; and *South East Asia Marine Engineering and Constructions Limited (SEAMEC Ltd.) v. Oil India Limited.* (2020) 5 SCC 164 to assert that Arbitrator cannot traverse beyond the scope of the terms of Agreement of the Sub-Contract dated 18.04.1989 and is liable to be set aside.

40. **Submissions heard and the record as well as written submissions perused.**

41. The Suit has been filed under *Section 14 of the Arbitration Act, 1940* for the signing and filing of the Award. Section 30 of the Arbitration Act,



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1940 provides that on receiving a Notice under Section 14 the party may seek setting aside of the Award on the grounds that:

- (i) *that the Arbitrator or Umpire has misconduct himself or the proceedings;*
- (ii) *Award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35; and*
- (iii) *that an Award has been improperly procured or is otherwise invalid.*

42. The defendant No.1, thus filed its Objections to the Award delivered by the Ld. Arbitrator, which are under consideration.

43. It is now fairly settled that the Award can be set aside only on the *grounds* specified in clauses (a), (b) and (c) of Section 30 of the 1940 Act and on no other ground. It is clear from the opening words of Section 30 itself that starts with the words “*An Award shall not be set aside except on one or more of the following grounds*”. A fortiori, a reasoned Award cannot be set aside unless it falls in any of the three clauses specified in Section 30 of the Act. The grounds such as *inadequacy of reasons* in support of an Award, *error committed by the Arbitrator on facts, alternate or more plausible view could be taken than what is taken by the Arbitrator, improper appreciation of evidence done by the Arbitrator in recording any finding, etc.* are not the grounds on which an Award, much less a reasoned award, can be set aside. In other words, none of these grounds can be made the foundation for setting aside the Award because they do not fall within the scope of three sub-clauses of Section 30 of the Act.



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44. The Apex Court in S.D. Shinde Tr. Parnter vs. Govt. of Maharashtra and Others, 2023 SCC OnLine SC 1045 held that the Courts must be conscious that the Arbitrator is the sole Judge of facts and the Award has to be approached with the desire to support it rather than destroy it by calling illegal, since such an Award is “*de praemissis*” as stated by the Apex Court in Santa Sila Devi and Another vs. Dhirendra Nath Sen and Others, AIR 1963 SC 1677.

45. In the case of Harish Chandra and Company vs. State of Uttar Pradesh, (2016) 9 SCC 478 while considering the scope of Section 30 and 33 of the *Arbitration Act, 1940* it was held that the High Court’s enquiry should be confined to whether any legal misconduct is committed by the arbitrator and if so how and in what manner. The High Court cannot act as if Appeal has arisen directly against the Award.

46. In Bharat Coking Coal Ltd vs. L.K.Ahuja, (2004) 5 SCC 109, the Supreme Court further observed that absence of evidence for the purpose of interference with an Award must be apparent on the face of the record.

47. In McDermott International INC. vs. Burn Standard Co. Ltd. and Others, (2006) 11 SCC 181, it was laid down that the method for computation of damages depends on the facts of each case and it is within the discretion of the Arbitrator to apply various formulae application.

48. In Batokristo Roy Co. (Pvt.) Ltd. vs. H. Polesy and Co. (Importers) Pvt. Ltd. and Others, AIR 1975 Cal 467, it was held that there is no scope to assess or re-decide the damages awarded by the Arbitrator in an Application under Section 30 of the 1940 Act.



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49. In light of a synthesized view of these legal principles, the objections taken by Defendant No. 1, may now be considered.

50. The *Preliminary Objection* taken on behalf of the Defendant is that the ground taken was that initially the Petition under Section 20 of the Arbitration Act had been filed by the Plaintiff agitating Claims essentially against NHPC on the basis of the Contract dated 31.03.1989. However, the NHPC got dropped and the Arbitrator got appointed under the Sub-Contract dated 18.04.1989 between the Plaintiff and the Defendant No.1.

51. Admittedly, in FAO(OS) No.159/2005, the Division Bench of this Court accepted the contention of the Defendant that the Contract was with the NHPC and declined to include NHPC as a party, but by observing that in the Sub-Contract dated 18.04.1989 between the Plaintiff and the Defendant, there subsisted a valid Arbitration Agreement and the Order appointing the Arbitrator *inter se* the disputes between them, was upheld.

52. The Division Bench thus, settled the issue that the disputes had arisen out of the Agreement entered into between the parties herein and, therefore are required to be resolved through the process of Arbitration as there is a valid and subsisting Agreement between the parties to the present Suit.

53. It is submitted that the Claims that were agitated were vis-à-vis, the NHPC and not the Defendant and, therefore, could not have been undertaken by the Arbitrator. *This contention has no merit* for the simple reason that NHPC was also made a party in the Petition for appointment of Arbitrator, but in the Order of Appointment of Arbitrator it was made abundantly clear that there was no privity between the Plaintiff and NHPC, and latter was not added as a party.



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54. It was further observed that in the Sub-Contract dated 18.04.1989 between the Plaintiff and the Defendant, there subsisted a valid Arbitration Agreement. Further, the terms of the original Contract between the Defendant and NHPC were made part of the Contract between the Plaintiff and the Defendant. To say that the Claims did not pertain to the Sub-Contract, was held to be completely erroneous. In the Claims, it had been clearly described how the Defendant was liable for the different amounts that were claimed which were arising out of the Sub-Contract between the Plaintiff and the Defendant. This argument is completely not tenable.

55. It is further pertinent to observe that the Contract between NHPC and the Defendant provided for the Defendant to be represented in the works by its Agent. Consequently, the Defendant had executed a Power of Attorney in favour of Sh. Surrender Sharma, the employee of the Plaintiff, thereby authorising him to represent the Defendant for execution of the Works. Though it was the employee of the Plaintiff executing the terms of the Contract, but that was being done for and on behalf of the Defendant as its Agent. To say that the Plaintiff had directly acted under the terms of the Contract between the NHPC and the Defendant, is absolutely erroneous.

56. It is pertinent to observe that the Deed of Agreement dated 18.04.1989 between the Plaintiff and the Defendant No.1 stated that Principal Contractor (Defendant) had obtained the work of "*Construction of Power Channel Package III from RD 4032 M to 5200 M of Tanakpur Hydroelectric Project, Tanakpur, District Nainital, Uttar Pradesh*", by executing an Agreement with NHPC Limited and the Plaintiff had agreed to work as a *Sub-Contractor* on the terms and conditions mutually agreed in



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the said Agreement. The various terms of the Contract clearly stipulated that the Sub-Contractor shall complete the work according to the terms and conditions of the original Contract by the Principal Contractor (Defendant) with NHPC Limited.

57. The learned Arbitral Tribunal after referring to the various clause of the Sub-Contract, concluded that the main Agreement between NHPC and the Defendant has been made a part of the Sub-Contract between the Plaintiff and the Defendant. To enable the Plaintiff to carry out the works on behalf of the Defendant, a proper Power of Attorney was executed by the Defendant in favour of the employee/person authorised by the Plaintiff. The learned Arbitral Tribunal thus, concluded that for the disputes that had arises in connection with the performance of the Contract by the Defendant No.1 and there were Claims raised against NHPC on behalf of the Defendant, it becomes obligatory on the part of the Principal Contractor (Defendant) to pursue the matter for appointment of Arbitrator and bring the issue to a logical conclusion.

58. The correspondence with NHPC was undertaken on behalf of the Defendant No.1, by the person authorised by the Plaintiff in whose favour the Power of Attorney was executed by the Defendant. The contention of the Defendant that it was under the Sub-Contract liable to make payments to the Plaintiff only on receiving the amount from NHPC and after deducting its 2% commission was *correctly rejected by the learned Arbitrator* who observed that the Claims filed by the Plaintiff against the Defendant were covered by the terms and conditions of the Agreement between them and the Defendant was liable to make payments, if the Claims succeed.



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59. It was obligatory on the Defendant, if it was aggrieved by any act of NHPC, to have independently initiated the Arbitration Clause and sought its relief under the parent Agreement; whether it chose to do so or not, was in its absolute discretion, for which the Claims of the Plaintiff which had arisen under the Sub-Contract of 18.04.1989, cannot be denied on account of inaction on the part of the Defendant, having not fulfilled its obligations under the Contract. Ld. Arbitrator thus, correctly observed that the Defendant is liable to pay the Claims, if decided in favour of the Plaintiff.

60. It is pertinent to observe that while in terms of the Sub-Contract, the Power of Attorney was duly executed by the Defendant in favour of the employee/agent of the Plaintiff, but subsequently when the Arbitration had to be made, an independent Power of Attorney was sought by the Plaintiff from the Defendant to enable it to do so, for and on behalf of the Defendant. However, the Defendant chose not to execute the Power of Attorney in favour of the person authorised by the Plaintiff to pursue the remedy under the main Contract and also chose not to do so for its operations. The liabilities of the parties to the Suit arose under their Sub-Contract with the defendant and the Claims of the Plaintiff cannot be denied.

61. Further, the Defendant has also taken a *Preliminary Objection* that there was *fundamental breach of the Contract on behalf of the Plaintiff* on account of failure to complete the Project within time. The core question which thus, arises was ***whether the prolongation of Contract on account of failure of the employer NHPC to fulfil its obligations, constituted fundamental breach of Contract*** entitling the Defendant to receive payment for damages. Correspondingly, was the Plaintiff entitled to receive such payment from the Defendant based on its Agreement dated 18.04.1989.



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62. The learned Arbitrator in detail referred to the extension of time was applied by the Defendant for the first time on 15.03.1991 for 20 months upto to 31.12.1991 which was granted by NHPC. Extension of time was applied for the second time by the Defendant on 28.09.1991 for extension upto 30.06.1992. Final extension was applied upto 30.04.1993, by Letter dated 11.02.1993. These Applications contained the same details of *hindrances* as in the first Application, ***which was non-availability of clear site – 23.5 months.***

63. The learned Arbitrator rightly observed that considering the reason for seeking extension clearly established *a fundamental breach of Contract committed by the Defendant entitling the Plaintiff to damages* and compensation on account of excess expenditure incurred by it ***due to prolongation of Contract.*** The cogent reasons had been given by the learned Arbitrator for holding the prolongation of Contract to be in fundamental breach of the Agreement between the Plaintiff and the Defendant. No justiciable ground has been made out by the Defendant No. 1 to upset the finding of the learned Arbitrator.

64. In *Eastern and North East Frontier Railway Co-operative Bank Ltd vs. B.Guha and Co.*, AIR 1986 Cal 146, it was reiterated that in case the Arbitrator allowed the Claim without indicating the basis or disclosing any proposition of law, it is to be proved to the satisfaction of the Court that there was no evidence before the learned Arbitrator.

65. Herein, cogent reasons have been granted by the Ld. Arbitrator and the findings on the prolongation of the Contract for factors attributable to the defendant, does not merit any interference.



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66. **The Defendant No. 1 has taken a challenge to Claim No. 2 on account of enhancement of rates of work done beyond stipulated period.**

67. The *main grounds of challenge* are that the Plaintiff never alleged in its Statement of Claims that the Defendant was liable for prolongation of work, there is no evidence available in allowing the Claim and it is violative of the Contract and law. Practically, the Arbitrator has worked out a new Contract for the Plaintiff to award this Claim. There is non-deduction of an amount of Rs. 14,07,066.00/-, being the escalation which had already been received by the Plaintiff whereby the double payment and undue enrichment permitted to the Plaintiff. Moreover, 2% has been wrongly awarded and directed that 98% of the amount against NHPC should be borne by the Defendant.

68. The *learned Arbitrator* after referring to the detailed documents and evidence observed that the computations of Part-I for the increase of labour wages and rates agreed for transportation as included in the Contract, were subject to same escalation provisions in the Contract in regard to the three Escalation Bills prepared by NHPC and paid to the Contractor and the items of extra leads were included. Likewise, in Part-III, the bulk of the work of Rs. 71,59,833.64/- has been shown to be done from April to June, 1993 which reflected that the Plaintiff had assumed that practically their entire Claim amount not paid by NHPC is payable in April-June 1993 and that the work also is deemed to have been done in the said period. The facts of actual progress were entirely to the contrary and the work was substantially completed by 30.04.1992 which is reflected from the fact that NHPC took over the constructed canal on 16.02.1992 and led water into it for power generation.



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69. The detailed reference was made to the various documents and made an assessment of the amount of escalation for increase of minimum wages of labour taking into account the computation submitted in Part-II and III of the Annexure-B and accepted the computation of Part-I for the labour components. The escalation cost was calculated as Rs. 32,00,000/- payable by the Defendant to the Plaintiff which was held to be justifiable. However, the adjustment of the amount of Rs. 14,07,066.00/- already paid by NHPC through three Escalation Bills was denied, since this amount had already been adjusted in the Final Bill.

70. In Food Corporation of India v. A.M. Ahmed & Co., (2006) 13 SCC 779, the Supreme Court had observed that Escalation was a normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type.

71. The Apex Court in K.N. Sathyapalan (Dead) By Lrs vs State Of Kerala & Anr (2007) 13 SCC 43 wherein the Supreme Court considered the question of grant of claim on account of escalation of cost in the absence of a price escalation clause. It was observed that "Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations." This principle was reiterated by the Apex Court in the Case of T.P. George v. State of Kerala (2001) 2 SCC 758.

72. In Hindustan Tea Co. Vs. K.Sashikant Co and Anr, AIR 1986 (Supp) SCC 506 it was observed that the Award cannot be set aside on the ground



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that the Arbitrator had reached a *wrong conclusion or had failed to appreciate the facts* since the Arbitrator is the final Arbiter of the disputes between the parties.

73. Therefore, no challenge on facts is tenable in these proceedings. Even otherwise, the learned Arbitral Tribunal has rightly appreciated the evidence and the documents filed by the parties to arrive at its conclusions. Even otherwise, as noted above,

74. No ground has been shown for disturbing the finding on this Claim.

75. The Defendant No. 1 has challenged Claim No. 3 on account of extra leads as per actual distance covered.

76. The *main grounds of challenge* is that the Plaintiff had agreed in writing that no claim for extra lead will be made and therefore the claim was in clear violation of the Agreement. Further, the Defendant has challenged the Award under Claim No. 3 on common grounds that no such claim was ever notified to the defendants; the award is based on no evidence and is in violation of the contract and law ; the Ld. Arbitrator has made out a new contract; the claim is barred by Limitation and that the Arbitrator had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the award amount should be borne by the Defendant.

77. The Ld. Arbitrator after examining the claim and the objections of the Defendant observed that it was the NHPC who had itself accepted the 10 Km extra lead in the bills paid. Further, the letter dated 15.03.1991 by which extension of time is sought by the Respondent mentioned that the haul road was operative from 24.09.1989. However, in the Claims raised by the Respondent *vide* Letter dated 13.06.1991(Ex. C-256), it was stated that Haul



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road was made available to it by NHPC in the end of October, and the Claim was raised for extra 3 km lead for the quantities of Fill materials measured and paid upto third RA Bill.

78. LD. Arbitrator examined Letter dated 30.10.1989 (Ex. C-49) by which Project Manager of the Respondent/Defendant No.1 had informed about the completion of the Haul road to NHPC and Letter dated 18.11.1989 (Ex. 55) which was written immediately after the payment of the 3rd RA Bill *vide* which it was communicated that all materials were carried through the PWD road of Tanakpur-Khatima and payment of less lead was protested and *concluded that the objections of the Respondent/Defendant was untenable as, if at all, the carriage was done after 24.09.1989 and upto middle of November.*

79. Further, the Claimant/Plaintiff vehemently denied that it had agreed not to claim extra for the lead by stating that Shri Neeraj Kamal who wrote this letter was not authorised to write on behalf of the Claimant.

80. The Id. Arbitrator observed that the Letter was of no significance as it was in the nature of a proposal requesting the Respondent/Defendant No. 1 to write to NHPC for their Approval and in his view, it was apparent from the correspondences that the proposal was not acceptable to the Respondent/Defendant No. 1.

81. Therefore, the learned Sole Arbitrator has rightly awarded the Claim on the basis of appreciation of evidence and the documents filed by the parties. No ground has been shown for disturbing the finding on this Claim.

82. The Ld. Arbitrator while addressing the unchallenged Claim No. 1 has address the general issues common to all claims and has reiterated the reasons in subsequent Claims. It is apposite to refer to the same to



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address the common objection on Limitation taken by the Defendants herein. The Ld. Arbitrator while dealing with the *plea of limitation* observed that NHPC wrote to the Respondents for the first time on 25.02.2000 to accept the Final Bill in Full and Final Settlement to release payment. It was during the progress of the arbitration that this Letter and subsequent communications were brought on record *vide* Letter dated 31.05.2008. The Ld. Arbitrator rightly observed that the claims can correctly be known only after the Final Bill is prepared. Additionally, the measurements referred by the Defendant as the '*final measurements*' were strongly disputed by the Claimant/Plaintiff. Consequently, the Ld Arbitrator rightly concluded that the Claims raised before the Hon'ble High Court by the Claimant/Plaintiff in Suit No. 1068/1996 which were subsequently referred to arbitration by the Court, were not barred by limitation.

83. The Award under Claim No. 5 on account of '*forming extra embankment and subsequent lip cutting*' has been challenged by Defendant No. 1 on account of common grounds that no such claim was ever notified to the defendants; the award is based on no evidence and is in violation of the contract and law; the Ld. Arbitrator has made out a new contract; and that the claim is barred by Limitation and that the Arbitrator had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the award amount should be borne by the Defendant.

84. The Ld. Arbitrator after reiterating the rationale for his decision on preliminary issues and general issues as dealt in Claim No. 1, observed that the reasons given by the Claimant for 1.0m extra width formation on both sides were justified for which reference was made to Letter dated



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21.09.1990 that showed that the same was in accordance with the site instructions of the employer.

85. Further, the Sole Arbitrator after giving due consideration to the fact that the work involved formation of extra width embankment and lip cutting of the same extra width observed that the Rate claimed by the Claimant/Plaintiff was reasonable. Therefore, the Ld. Arbitrator awarded amount of Rs. 12,25,000/- to the claimant for extra work done.

86. Therefore, the Ld. Sole Tribunal has rightly awarded the Claim on the basis of appreciation of evidence and the documents filed by the parties. There is no infirmity in the finding of the Sole Arbitrator on this Claim.

87. **The award under Claim No. 6 on account of ‘idleness losses against Machinery and labour’ has been challenged on the grounds that** Plaintiff never alleged in its Statement of Claims that the Defendant was liable for prolongation of work, there is no evidence available in allowing the Claim and it is violative of the Contract and law. Practically, the Arbitrator has worked out a new Contract for the Plaintiff to award this Claim; and 2% has been wrongly awarded and directed that 98% of the amount against NHPC should be borne by the Defendant.

88. Further, the Claim has been challenged on the **ground** that the Arbitrator after holding that the Plaintiff failed to prove its losses and mitigate them has awarded the same to the Claimant/Plaintiff making it patently illegal.

89. **Another ground** on which this claim is challenged is that the Ld. Arbitrator despite holding that *market rate of rent claimed by the Plaintiff* is not correct and that the *hire charge rate* submitted by the Defendant Exhibit RS-5 is correct, chose to rely on the market rate of hire charge submitted by



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Plaintiff for deriving 10% idleness/underutilization of machinery making the award patently illegal and liable to be set aside.

90. The Ld. Sole Arbitrator at the outset reiterated that the delay in work was caused due to the fundamental breach of contract by NHPC and after duly referring to the documents, pleadings and Annexure G-i wherein details of computation of Claimant's losses due to idle machinery are enlisted observed that the Claimant had not cited any document which showed that the machinery actually remained at the site. Admittedly, the Claimant accepted that many of these machineries and equipment were deployed in two other works during the extended period which are not deducted in the computation submitted before the arbitrator. Ld Arbitrator also found merit in the argument furnished by Respondent/Defendant No. 1 that work left to be done after February 1992 was not substantial which required use of heavy equipment, thus, the Ld. Arbitrator concluded that the method of calculation of loss adopted by the Claimant was not admissible and rejected the Computations of the Claimant in Annexure G-i. On account of compensation of idleness loss, the Ld. Arbitrator observed that the Claimant/Plaintiff is entitled to loss due to *depreciation of his machinery* deployed in the work and not on account of loss of hire charges. However, the Arbitrator only rejected the computations of the Claimant in Annexure G-i.

91. In conclusion, the Ld. Arbitrator concluded that the Claimant had suffered Loss on account of at least four excavators, one dozer, 36 Carriers, one water tanker and four concrete mixers which were deployed for work and which was established from the correspondence between the parties. The Ld. Sole Arbitrator also observed that, admittedly, the heavy machinery



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stood deployed till February 1992 which is established from the Bills and the extension granted by NHPC was without levy of compensation making it apparent that the Claimant/Plaintiff was not responsible for the delay and entitled to compensation for losses suffered.

92. With due consideration to the record, evidence and the calculations presented by the parties, the Ld. Sole Arbitrator while partially allowing the claim concluded that out of all the machinery one excavator, one dozer, 12 tippers and a water tanker remained idle/underutilized for 18 Months till 28.02.1992 and consequently, idleness rate was assessed at a conservative 10% of the market monthly hire charges on account of losses to the Claimant/Plaintiff.

93. Therefore, the learned Sole Arbitrator has rightly awarded the Claim partially on the basis of appreciation of evidence and the documents filed by the parties. In fact, the Ld. Sole Arbitrator while allowing the Claim has given nuanced reasoning as to the computation of losses incurred by the Claimant on account of idling charges.

94. It is re-emphasized that as per the Apex Court ruling in McDermott International INC (Supra) the method for computation of damages is within the discretion of the Arbitrator. No ground has been shown for disturbing the finding on this Claim.

95. The Defendant No. 1 has challenged Claim No. 8 on account of loss of overheads during the prolonged period for no fault on the part of the Claimant.

96. The *main grounds of challenge* are that the Ld. Arbitrator has held that the Plaintiff could not produce evidence to establish the claim.



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However, despite this determinative finding, the Ld. Arbitrator proceeded inexplicably to award the Claim in favor of the Plaintiff.

97. Further, the claim is challenged on the above-mentioned *common grounds* that the Plaintiff never alleged in its Statement of Claims that the Defendant was liable for prolongation of work, there is no evidence available in allowing the Claim and it is violative of the Contract and law. Practically, the Arbitrator has worked out a new Contract for the Plaintiff to award this Claim; and that the Ld. Arbitrator has made out a new contract; the claim is barred by Limitation and that the Arbitrator had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the award amount should be borne by the Defendant.

98. **The Ld. Arbitrator while assessing the impugned Claim,** considered the record and details of revised Annexure 'I' submitted on 30.09.2012 and observed that while the claimant has suffered loss on account of additional overhead expenses, entitling them to compensation, due to fundamental breach of contract by NHPC but the Claimant has failed to furnish documents to establish 'Actual' overheads expenditure incurred by it during 49 months till the completion of the contract.

99. Thereafter, the Ld. Arbitrator while self-admittedly assessing the claims in a conservative held that the method of calculation adopted by the Claimant in the revised Annexure 'I' were justified. The Ld. Arbitrator observed that the contract provided 25% of Market rates as contractors' profit and overhead which were also adopted by the Respondents. On these basis, The Claimants worked out overheads per month as Rs. 3,02,625.65/- and claimed 75% of this amount considering the principle of mitigation of losses.



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100. Thus, Ld. Arbitrator, with due consideration of the totality of the record and circumstances considered 50% of the amount as more appropriate making the monthly loss Rs. 1,51,312.82/-. Further, the Ld. Sole Arbitrator observed that in the assessment of loss of overhead during this period there was no indication in Annexure 'I' that the Claimant accounted for diversion of overhead in the extra works on R.C.C. bridge and left afflux bund. Thus, the Ld. Sole Arbitrator concluded *firstly*, that the period of delay of 20 months may be considered instead of 29 and *Secondly*, assessing the loss of overhead as 20% of the losses of the period upto 30.11.1990 computing the monthly loss of Rs. 30,262.56/- and loss for prolonged period of 20 months to Rs. 6,05,250/-.

101. Therefore, the learned Sole Arbitrator has rightly awarded the Claim on the basis of appreciation of evidence and the documents filed by the parties. No ground has been shown for disturbing the finding on this Claim.

102. **Claim No. 10, 11 and 12 have been challenged by Defendant No. 1** on the *common grounds* that no such claim was ever notified to the defendants; the award is based on no evidence and is in violation of the contract and law ; the Ld. Arbitrator has made out a new contract; and that the Arbitrator had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the award amount should be borne by the Defendant. These common objections have been addressed at length while dealing with preliminary objections and Claim No. 1 by the Ld. Arbitrator.

103. While assessing *Claim No. 10* the Ld. Arbitrator after examining the record and Annexure 'K' of SF observed that this Claim stood approved already by NHPC which is apparent from the final bill entries and the



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dispute only pertained to Quantum. On the aspect of Quantum, the Ld. Arbitrator observed the rates adopted by the Claimant excavation in drains, backfilling with excavated earth and backfilling with borrowed Earth was on the higher side and consequently made his own assessment and awarded Rs. 85,000/-.

104. While assessing *Claim No. 11* the Ld. Sole Arbitrator referred to Annexure 'L' and observed that the Para 1.3.2. referred by the Respondent squarely applied to excavation portion of the work and held that the portion of the Claim for extra excavation as per Annexure 'L' was contrary to the specific agreement and therefore not admissible. However, the same was not applicable to the refilling component of the claim. Further, it was observed that as per Annexure 'L' the area for compaction was also not restricted which showed the width of foundation trench to be filled and compacted was more than 5m beyond the structure making it easy to compact by mechanical means and use of manual labour for restricted area was not involved to justify extra rate of compaction. On the basis of this analysis, the Arbitrator concluded that the rate of Rs. 4.50 of item No. 2.1. was applicable on the backfilling involved in the present case and awarded the Claimant/Plaintiff the refilling of 2464.14 cum of earth at the rate of Rs. 4.50 per.cum.

105. The Ld. Arbitrator, while assessing *Claim No. 12* examined the MBs available in Document Vol. 17B and observed that measurements of item 2.2 pertaining to filling in embankment with earth from borrow pits and compaction were recorded between RD 4720 and RD 4860 and then again from RD 4940 to RD 5200 of the right Embankment, thus, concluded that there was no evidence whatsoever that the embankment in filling was built



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by the Claimant at RD 4870 m where the retaining wall came up. In September 1991, the payment demand for these items was sent to NHPC however, in this claim no payment was claimed for originally constructing the embankment in filing and so the claim amount was a much lower figure of Rs. 67,513/-.

106. In light of the same the Ld. Arbitrator rejected the first part of the Claim of Claimant/ Plaintiff based on Annexure 'M' while holding that the second part of backfilling after construction in the sum of Rs. 6,702.89/- was payable as per Annexure 'M'. Lastly, reference was made to the final bill of NHPC where an amount of Rs. 9842/- was unpaid and consequently, the claim was awarded.

107. The learned Sole Arbitrator has rightly awarded the Claim No. 10, 11 and 12 on the basis of appreciation of evidence and the documents filed by the parties. In fact, the Ld. Arbitrator has partly allowed and partly denied certain parts of the claim with reasons in writing. No ground has been shown for disturbing the finding on this Claim.

108. The award under Claim No. 16 on account of 'sprinkling of water in MES area has been challenged' by Defendant No. 1.

109. The *main ground of challenge* is that there is a non-deduction of an amount of Rs. 14,07,066 from this claim being the escalation already received by the Plaintiff, which amounts to the Plaintiff receiving a double payment.

110. The Claim is also challenged on Common grounds that no such claim was ever notified to the defendants; the award is based on no evidence and is in violation of the contract and law ; and the Ld. Arbitrator has made out a new contract; and that the Arbitrator had no jurisdiction to award 2%



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to the Defendant from an Award made against NHPC or direct that 98% of the award amount should be borne by the Defendant.

111. **The Ld. Arbitrator while awarding Claim No. 16** assessed the quantum and the amount receivable by the Claimant on the basis of evidence and held that the claim for this work done beyond 30.04.1990 was valid in lieu of failure of NHPC to fulfil its contractual obligations. Further, the Ld. Arbitrator after referring to the Contract and the MBs held that the Claimant was entitled to receive reimbursement of expenditure on the extra work for the period of 24 months from 01.05.1990 to 30.03.1992. Further, the Claimant's plea for compensation for full 8 hours of deployment of tanker was rejected, utilisation of water tanker for this particular work was assessed at 40% and separate pumping charges for the tanker were also rejected. Consequently, the Claim was partially awarded in favour of the claimant due to the reasons mentioned above.

112. Therefore, the learned Sole Arbitrator has rightly awarded the Claim on the basis of appreciation of evidence and the documents filed by the parties. No ground has been shown for disturbing the finding on this Claim.

113. **The Defendant No. 1 has challenged Claim No. 17 on account of extra ramps for embankments** on the *common grounds* that no such claim was ever notified to the defendants; the award is based on no evidence and is in violation of the contract and law ; the Ld. Arbitrator has made out a new contract; and that the Arbitrator had no jurisdiction to award 2% to the Defendant from an Award made against NHPC or direct that 98% of the award amount should be borne by the Defendant and the award is based on surmises and conjectures.



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114. The learned Arbitrator while examining this Claim, has held that the claimant was entitled to the payment for extra ramp constructed because of the many failures of NHPC. Reference was made to the 26th and the Final Bill as well as previous bills up to 20th RA Bill to examine this claim. The Ld. Arbitrator observed that he was unable to find an exact amount after examining the measurement contained in Vol. 17A to 17E also Vol. IX to assess the quantity of earthwork in ramps already paid however, concluded that the total of such measurement will be 50% to 60% of the quantity assessed by the Claimant in Annexure 'R'. Further, the Ld. Arbitrator observed that during the hearing, the claimant agreed that only the labour rate as in Item 2.1 would apply. Consequently, the Ld. Arbitrator awarded Rs. 35280 to the Claimant against the respondent after allowing for 2% commission of Respondent.

115. Therefore, the learned Sole Arbitrator has rightly awarded the Claim on the basis of appreciation of evidence, documents and submissions made by parties before the Ld. Sole Arbitrator. No ground has been shown for interfering with the finding on this Claim.

116. **The Defendant No. 1 has challenged Claim No. 19 i.e. Final Bill** on various above-mentioned common grounds that don't warrant repetition. However, the *additional ground of challenge* is that the Plaintiff prayed before the Ld. Arbitrator under *Claim No. 16* that even though it was entitled to a high amount, the award should be limited to the amount referred by this court for arbitration and the prayer of the Plaintiff was accepted by the Ld. Arbitrator. Under Claim No. 19, the amount referred for arbitration by the High Court was admittedly only Rs. 10 Lakhs. Therefore, the awarding of an



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amount above Rs. 10 Lakhs is even otherwise illegal and the resultant award is liable to set aside.

117. At the outset, this ground seems misconceived as from the perusal of Claim no. 16 nowhere it is stated that the Award should be limited to the Rs. 10 Lacs. Further, it is apparent from the record that the Plaintiff in its petition under Section 20 of the Arbitration Act, has consistently agitated payment for claims of more than an amount of Rs. 10,00,000/-. Therefore this ground is not made out.

118. **The Defendant No. 1 has challenged Claim No. 20 pertaining to ‘Interest on Amount due’ primarily on Two grounds; *firstly***, that the Award is liable to be set aside as all the claims are liable to be set aside and *Secondly*, the reason mentioned for determining the starting date of award of interest in para 93 of the award is also patently incorrect as the Plaintiff raised claims against the Defendant in the petition dated 21.05.1996 filed before this Hon'ble Court which were against the NHPC. Therefore, on this ground interest could not have been awarded from the date of filing of the petition.

119. Firstly, none of the claim-specific grounds taken by Defendant No. 1 are tenable. Secondly, at the cost of repetition, this objection has been duly satisfied with cogent reasons by the Ld. Arbitrator by dealing with the same in preliminary objections.

120. Further, the Ld. Arbitrator observed that the Claimants raised claims against the Respondent for the first time in Suit No. 1068/1996 on 21.05.1996 before this Hon'ble Court and were entitled to interest from the same date. Consequently, the Ld. Arbitrator awarded 10 % S.I. pre-Suit interest and 10% s.i. Pendente lite interest.



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121. In the end , reference be made to the case of *NTPC Limited vs. Deconar Services Private Limited*, (2021) 19 SCC 694 wherein the Apex Court observed that if a possible view has been taken by the Arbitrator upon an interpretation of the contract to allow the escalation cost beyond the contractual period, it cannot be questioned by the Court.

122. In the present case, the challenge to all the Claims is essentially on merits, which is beyond the scope of consideration.

Conclusion:

123. All the Claims awarded in favour of the Plaintiff are supported with cogent reasons. The learned Arbitrator thoroughly scrutinised the Claims together with the break-ups given in the same and calculations as have been detailed therein.

124. There is *no merit in the Objections filed on behalf of the Defendant*, which are hereby dismissed.

125. The Plaint is allowed and the Arbitral Award is made into the Order of the Court.

**(NEENA BANSAL KRISHNA)
JUDGE**

DECEMBER 3, 2024/RS/rk