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IN THE HIGH COURT OF DELHI AT NEW DELHI*Reserved on: 23.02.2024**Date of decision: 28.02.2024*

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O.M.P. (COMM) 417/2018**UNION OF INDIA THROUGH GENERAL MANAGER****..... Petitioner****Through: Ms.Uma Prasuna Bachu, Adv.****Versus****M/S CHIRAJ STOCK & SECURITY PVT. LTD****..... Respondent****Through: Mr. Ramesh Singh, Sr. Adv. with
Mr.A.T. Patara, Mr. Viveka Nanda, Mr.Karan
Khailau, Mr.Shubham Jindal &Mr.Aditya Ghadge,
Advs.****CORAM:****HON'BLE MS. JUSTICE REKHA PALLI****REKHA PALLI, J**

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) seeks to assail the arbitral award dated 23.05.2018 passed by the learned Arbitrator. Under the impugned award, the learned Arbitrator has allowed claim nos.1 to 3, 5, 7, 9 and 11 to 13 in favour of the respondent along with interest @ 14% w.e.f. 30.01.2014 till the date of final payment.
2. Before dealing with the rival submissions of the parties, the brief factual matrix as emerging from the record may be noted.
3. Upon the petitioner/Union of India inviting tenders for execution of



the work of 'Construction of Road under Bridge by cast in the SITU method near Sarita Vihar on TKJ-TKD Section, the respondent submitted its bid on 22.10.2009. The same was accepted and consequently, a work order was issued in favour of the respondent on 16.12.2009. As per the subsequent agreement entered into between the parties on 28.01.2010, the work was required to be completed within 11 months from the date of the acceptance letter and consequently, the stipulated date of completion of work was fixed as 15.11.2010. It was agreed between the parties that the contract would be governed by Northern Railways General Conditions of Contract, which contained an arbitration clause. The actual work, however, commenced only on 10.05.2010, which as per the respondent's case, was on account of various delays on the part of the petitioner such as the non-availability of workable site, non-finalization of designs and drawings etc. Resultantly, the work under the contract could not be completed within the stipulated period of 11 months and came to be completed only on 13.04.2014, i.e. almost after a delay of three and a half years.

4. Seeking compensation for the extra expenditure incurred on account of the delay in completing the work, the respondent invoked arbitration and on 20.07.2015, approached this Court seeking appointment of an arbitrator. As per the agreement between the parties, a sole arbitrator was appointed by this Court on 26.05.2016 for adjudication of disputes between them. Before the learned Arbitrator, the respondent claimed that since the delay in completion of the work stipulated under the contract was attributable solely to the petitioner, the respondent was entitled to seek compensation with interest from it towards reimbursement of the additional expenses incurred for completion of the project. The petitioner, however, contended that in



accordance with the terms and conditions of the contract, the respondent was estopped from claiming any amount towards compensation on account of any delay on the part of the petitioner including the delay in providing designs and/or drawings. In its statement of claim filed before the learned Arbitrator, while the respondent raised 15 claims, the petitioner in its statement of defense, raised 3 counter claims.

5. In support of their respective stands, both parties led evidence before the learned Arbitrator, who, after considering the pleadings, evidence and submissions of the parties, passed the impugned award. The learned Arbitrator, while allowing claim nos. 1 to 3, 5, 7, 9, 11 to 13 in favour of the respondent by awarding a sum of Rs. 7,96,58,328/- along with interest @14% p.a, has rejected the counter-claims filed by the petitioner.

6. Being aggrieved, the petitioner has approached this Court by way of the present petition.

7. In support of the petition, Ms. Uma Prasad Bachu, learned counsel for the petitioner has made three submissions. The first and foremost being that the impugned award is patently illegal as the learned Arbitrator, while allowing claim nos.1 to 3, 5,7, 12 and 13, has failed to take into account that the said claims fell within the ambit of excepted matters and were, therefore, clearly non-arbitrable. By drawing my attention to clauses 11.3, 7.1, 7.2, 9, 43, 45 and 63, she contends that the said clauses made it abundantly clear that the petitioner would not be liable to compensate the respondent in the event of any delay arising due to the non-approval of drawings, changes, modifications, alterations etc. The said clauses further stipulated that the petitioner would neither be responsible for any loss or damage to the contractor's material, equipment, etc. for any reasons whatsoever nor would



it be liable to compensate the respondent for costs incurred towards price variation or wage escalation except for those agreed between the parties. She submits that the said clauses were covered under the Special Conditions of Contract and were deemed to be excepted matters, thus making it clear that any claims raised under these clauses could not be referred to arbitration. Once the claims under these clauses were non-arbitrable, the learned Arbitrator, while adjudicating these claims, travelled beyond the terms of the contract. In support of her plea, she seeks to place reliance on the decision of the Apex Court in ***General Manager, Northern Railways vs. Sarvesh Chopra (2022) 4 SCC 45***.

8. Ms. Bachu next submits that while allowing claim nos. 11 to 13, the learned Arbitrator has failed to appreciate that as per the terms of the contract, the amount towards these claims was not payable unless the respondent signed the supplementary agreement, which it refused to do. She, therefore, contends that since the learned Arbitrator has allowed these claims by ignoring the specific conditions of the contract, the impugned award is liable to be set aside.

9. The third and final submission of Ms. Bachu is that the learned Arbitrator has failed to appreciate that as the contract did not include any provision for interest on delayed payments, it was evident that the parties had agreed that no interest would be payable. She contends that the learned Arbitrator has exceeded his jurisdiction in awarding interest despite there being no provision for the same in the contract. She, therefore, prays that the impugned award being patently illegal, be set aside.

10. *Per contra*, Mr. Ramesh Singh, learned senior counsel for the respondent begins by contending that there is no infirmity with the



impugned award. He submits that the petitioner's plea that no claim for compensation would be maintainable towards the expenditure incurred/losses suffered by the respondent on account of the delay in execution of the contract despite the reasons for delay being solely attributable to the petitioner, is wholly misconceived. In a case like the present, where it was found that the respondent had to incur extra expenditure on account of the lapses on the part of the petitioner, the learned Arbitrator was justified in allowing the respondent's claims for compensation/reimbursement with interest.

11. He further submits that the petitioner's reliance on the decision in *Sarvesh Chopra (supra)* is also wholly misplaced as in the said case itself, the Apex Court explained the exception to the applicability of the clauses governing excepted matters. He contends that in cases of extreme delay and exercise of bad faith, the claims raised by a party cannot be simply rejected on the ground of being covered under excepted matters and can in appropriate cases, referred to arbitration. In the present case, the stipulated time for completion of work under the contract was 11 months which was required to be completed on or before 15.11.2010. The said work could, however, be completed only on 30.04.2014, i.e., after a delay of 41 months. This delay, he submits, the learned Arbitrator found attributable solely to the petitioner as despite repeated communications/correspondences by the respondent for expediting the performance of the contract, the petitioner did not provide the requisite designs, drawings on time and rather kept on making frequent modifications in the planning and manner of executing the work under the contract. He, therefore, submits that in a case like the present, where the work under the contract was completed with an extreme



delay of 41 months, the learned Arbitrator was justified in holding that it was a fit case where the respondent's claim could not be rejected as being covered under excepted matters.

12. By referring to the decision of a Co-ordinate Bench in ***MBL Infrastructure Limited vs. Delhi Metro Rail Corporation, OMP (COMM) 311/2021***, he submits that any such clause which restricts the rights of parties in claiming damages is against the spirit of Section 55 and 73 of the Indian Contract Act, which entitles the aggrieved party to claim damages and is, therefore, void. He further submits that even otherwise, the question regarding the interpretation of a clause falls within the exclusive jurisdiction of the learned Arbitrator and the same ought not to be interfered with unless it is found to be patently illegal or in conflict with the public policy of India. He, therefore, contends that once the learned Arbitrator, after appreciation of facts and evidence has arrived to a categoric conclusion that the delay in completion of the work was attributable to the extreme delay on the part of the petitioner, entitling the respondent to seek damages, the view taken by the learned Arbitrator being a plausible one, ought not to be interfered with by this Court. In support of his plea, he seeks to place reliance on a decision of this Court in ***Ircon International Limited vs. GPT-Rahee JV, 2022 SCC Online Del 839*** as also a decision of the Calcutta High Court in ***State of West Bengal vs. Pam Developers Pvt. Ltd. (2017) SCC Online Cal 13272***.

13. Finally he submits that even if these restrictive clauses are read to imply that the petitioner was not obliged to consider the respondent's claims covered by these clauses, the same would not create any embargo on the learned Arbitrator from entertaining such claims. By referring to the decisions of the Apex Court in ***Asian Tech Limited vs. Union of India***,



(2009) 10 SCC 354 and *Assam State Electricity Board and Others vs. Buildworth Private Limited*, (2017) 8 SCC 146, he submits that these restrictive clauses constituted a bar only on the Department from entertaining claims covered by these clauses but did not preclude the learned Arbitrator from adjudicating these claims. He, therefore, prays that the petition be dismissed.

14. Having considered the submissions of learned counsel for the parties and perused the record, what emerges is that the petitioner has raised three grounds to assail the award. The primary contention being that the learned Arbitrator has allowed claim nos. 1 to 3, 5 and 7 which fell within the ambit of excepted matters. The petitioner has next urged that claim nos. 9, 11 to 13 and 17 have been erroneously allowed by the learned Arbitrator by failing to appreciate that the respondent had refused to sign the supplementary agreement prescribed under the contract as a pre-condition for release of the amounts under these claims. The third and final submission of the petitioner is that in the absence of any clause in the contract providing for payment of interest, the learned Arbitrator could not have awarded any interest.

15. Before I begin to deal with these submissions in detail, it would be appropriate to note the contours of the limited jurisdiction which this Court exercises under Section 34 of the Act. In this regard, reference may be made to *Dyna Technologies (P) Ltd. vs. Crompton Greaves Ltd.* (2019) 20 SCC 1, wherein the Apex Court has reiterated that the scope of interference with an arbitral award under section 34 of the Act is extremely narrow. The Court does not act as an appellate authority and, therefore, cannot re-assess or re-appreciate the evidence led before the Arbitral Tribunal. When the Court finds that the conclusions arrived at by the Arbitral Tribunal are based on a



possible view of the matter, no interference is called for. The relevant observations of the Apex Court as contained in para nos. 24 and 25 read as under:

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

16. I may also refer to the decision of this Court in ***Ircon International Limited (Supra)***, wherein this Court has held that the interpretation of a clause of a contract falls within the exclusive domain of the learned



Arbitrator and therefore, if a view taken by the Tribunal is not an implausible one, the Court should not interfere with the same. The relevant extracts of the said decision read as under:

“26. It is well settled that the question as to interpretation of a clause of a contract falls within the jurisdiction of an arbitral tribunal. The decision of the arbitral tribunal cannot be interfered with unless the same is found to be patently illegal or in conflict with the Public Policy of India.

27. In the instance case, the view expressed by the Arbitral Tribunal is a plausible one. It was accepted on behalf of Ircon that Courts have taken divergent views in respect of applicability and interpretation of exclusionary clauses. Clearly, the decision of the Arbitral Tribunal, accepting one view, cannot be construed as implausible or one that no reasonable person can by any stretch of imagination consider to be implausible or one that no reasonable person would hold. Mr. Doval has thus fairly not assailed the impugned award as contrary to the terms of the Contracts.”

17. In the light of these guiding principles for exercise of the limited jurisdiction of this Court under Section 34 of the Act, I may, in the first instance, deal with the submissions of the parties in respect of the claims which the petitioner has vehemently urged fell within the ambit of excepted matters, either because no claim itself was maintainable as per the contract or it was agreed between the parties that the decision of the petitioner/employer in respect of the said claim was final. On the other hand, it is the respondent's case that merely because some of the clauses use restrictive language and provide that no claim would be maintainable under certain heads, the same cannot be construed as curtailing the power of the



learned Arbitrator from adjudicating the claims for reimbursement of expenses incurred due to reasons attributable to the employer. It has, therefore, been further urged by the respondent that in cases of extreme delay, like the present one, the learned Arbitrator was justified in allowing the respondent's prayer for compensation towards the expenses incurred in completing the project on account of this delay.

18. In order to appreciate these pleas of the parties, it would be apposite at this stage to note those claims, along with the relevant clauses of the GCC, which it is urged, fell within the ambit of excepted matters and were therefore not arbitrable:

(I) (i) *CLAIM NO.1*

Whether the claimants are entitled to additional expenses of Rs. 9,93, 193/-incurred and as such losses suffered on engagement of permanent labour deployed at work.

(ii) *CLAIM NO.2*

Whether the Claimants are entitled to a sum of Rs. 1,60,99,892/- on account of additional expenses incurred in the nature of salary of permanent technical, supervision as also watch and war staff during the period from 15th Nov, 2010 to 30th April, 2014?

(iii) *CLAIM NO.3*

Whether the. Claimants are entitled to a sum of Rs. 10,55,017/- on account of additional expenses incurred in relation to site overhead expenses during the period from 15th Nov, 2010 to 30th April, 2014?

CLAUSE 11.3 (PERTAINING TO CLAIM NOS. 1 TO 3)



11.3 No claim whatsoever will be entertained by the Railway on account of any delay or hold up of the work/s arising out of delay in approval of drawings, changes, modifications, alteration, additions, omission and the site layout plans or details, drawings and designs and/or late supply of such material as are required to be arranged by Railway or due to any other factor on railway accounts.

II. CLAIM NO.5

Whether the claimants are entitled to extra cost due to re-handling of barricades due to allotment of work site in phased manner: Rs.6,00,000/- 1150 meter (Area of Barricade) x 4 times x Rs.1,000/- meter- Rs.6,00,000/- as per details given in Annexure-E with the Claim petition.

CLAUSE 9 (PERTAINING TO CLAIM NO.5)

9.0 RATES FOR PAYMENT

9.1 The rates given in the attached schedule of rates tendered by the contractor and as accepted by the Railways will form the basis of payment for such items under this contract.

9.2 No material price variation or wages escalation on any account whatsoever the compensation for Force majeure etc. shall be payable under the contract except payable as per price escalation clause if any provided separately in the tender documents.

9.3 The rates for any item work not included in the (Schedule of times, Rates and quantities) and which the contractor may be called upon to do by Railway Administration shall be fixed by the supplementary written the contractor and the Railway before the particular item or items of work is/are executed in the event of such agreement not being entered into and executed the Railway may execute these works by making alterative arrangements. Railway will not be responsible for any loss or damages on this



account.

Non Scheduled Items-

Providing temporary Steel barricading 2.0 m high and making arrangements for traffic diversion such as traffic plant during construction period at site for day and night as per requirement and as per DMRC type drawing. This item will be payable only once during the entire construction period. Till the completion of work, the arrangement of barricading and traffic diversion has to be kept continuously. This shall include repositioning or repainting of barricading and provision of suitable reflectors and red lamps in night. The dimensions of barricades as given in the drawing, with all labour and material as a complete job. Nothing extra shall be paid for fixing and any other arrangements. (The release barricades will be the property of the contractor)

III. CLAIM NO.7

Whether the claimants are entitled to payment on account of damage to tools and plant (Pumps, Welding Machine, Jack Hammer & Vibrators, etc.] and removal of slush/muck accumulated due to flooding of boxes on dated 20.07.2013 Rs.2,76,254/- as per details given in Annexure G with the Claim Petition.

CLAUSE 7.1, 7.2 & 43 (PERTAINING TO CLAIM NO.7)

7.1 The drawings for the works can be seen in the office of the Chief Administrative Officer/ Construction, Northern Railway, Kashmere Gate, Delhi and in the office of Dy. Chief Engineer/Const. II, Northern Railway, Shivaji Bridge, New Delhi. It should be noted by tenderer/ s that these drawings are meant for general guidance only and the railway may suitably modify them during the execution of the work according to the circumstances without making



the Railway liable for any claims on account of such changes

7.2 The tenderer/s is/are advised to visit the site of work and investigate actual conditions regarding nature and conditions of soil, difficulties involved due to inadequate stacking space, due to build up area around the site, availability of materials, water and labour, probable sites for labour camps, stores, godowns etc. They should also satisfy themselves as to the sources of supply and adequacy for their respective purpose of different materials referred in the specifications and indicated in the drawings. The extent of lead and lift involved in the execution of work and any difficulties involved in the execution of work should also be examined before formulating the rates for complete items of works described in the schedule.

43.0 MISCELLANEOUS:

The Railway shall not be responsible for any loss or damage to contractor/s men, material, equipments, tools and plants etc, from any cause whatsoever. No claim for idle labour, idle machinery/plant etc on any account will be entertained. Similarly, no claim shall be entertained for business loss or any such loss.

IV. (i) CLAIM NO. 12

Unpaid PVC bill for want of final bill clearance: Rs.53,07,050/-.

(ii) CLAIM NO. 13

Final bill pending for want of final Addendum &Corrigendum: Rs.10,00,000/-

CLAUSE 45 AND 63 (PERTAINING TO CLAIM NOS. 12&13)

45. It shall be open to contractor to take objection to any recorded of measurements on any ground within



7 days of the date of such measurements. Any recorded measurement taken by the Engineer in the presence of the Contractor or in his absence after due notice has been given to him in consequence of objection made by the Contractor shall be final and binding on the Contractor and no claim whatsoever shall thereafter be entertained regarding the accuracy and classification of the measurements.

63. All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor's representation, make and notify decisions on all matters referred by the contractor in writing, provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55 A(5) 57, 57A, 61(1), 61(2), and 62(1) to (xiii)(J3) of Standard. General Conditions of Contract or in any clause of the Special Conditions of the contract shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway Authority, thereon shall be final and binding on the Contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause.

19. From the aforesaid, what clearly emerges is that these seven claims, raised by the respondent are in the nature of seeking reimbursement of the extra expenditure incurred by it, on account of the prolongation of the project due to reasons attributable solely to the petitioner. From the submissions made at the bar, I find that the petitioner has not seriously disputed the respondent's claim that these additional expenses were incurred



but have only contended that as per the terms of the contract, no amount under these heads was payable as the petitioner's decision in this regard was final and consequently, these claims were not at all maintainable. In support of this plea, the petitioner has relied solely on the decision in ***Sarvesh Chopra (supra)***. The respondent, on the other hand, has besides urging that ***Sarvesh Chopra (supra)*** itself provides for exceptions where excepted matters can also be considered by the learned Arbitrator, also relied on ***Asian Tech (supra)*** and ***Buildworth Limited (supra)***, Since both sides have relied on the decision in ***Sarvesh Chopra (supra)***, it may be useful at this stage, to refer to this decision, wherein the Apex Court has summarized the principles governing excepted matters. Para nos. 14 and 15 thereof read as under:

“14. In Hudson's Building and Engineering Contracts (11th Edn., pp. 1098-99) there is reference to “no-damage” clauses, an American expression, used for describing a type of clause which classically grants extensions of time for completion, for variously defined “delays” including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the contractor and, whether expressly or by implication, these damages or compensation are not to be recoverable therefor. These “no-damage” clauses appear to have been primarily designed to protect the owner from late start or coordination claims due to other contractor delays, which would otherwise arise. Such clauses originated in the federal government contracts but are now adopted by private owners and expanded to cover wider categories of breaches of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American



*jurisprudence developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely, (i) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (ii) where the delay amounts to abandonment, (iii) where the delay is a result of positive acts of interference by the owner, and (iv) bad faith. The first of the said four exceptions has received considerable support from judicial pronouncements in England and the Commonwealth. Not dissimilar principles have enabled some Commonwealth courts to avoid the effect of “no-damage” clauses. (See Hudson, *ibid.*).*

15. In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is “of the essence” of an obligation, Chitty on Contracts (28th Edn., 1999, at p. 1106, para 22-015) states:

“a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract (‘a breach going to the root of the contract’) depriving the innocent party of the benefit of the contract (‘damages for loss of the whole transaction’)”.

If, instead of avoiding the contract, the contractor



accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, “unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so”. 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.”

20. In the light of the aforesaid, it is clear that the general rule is that once the contractor has agreed that no claim would be entertainable in respect of certain heads, he will be precluded from raising any claim qua the same. This general rule is, however, subject to exceptions, which have been explained in a number of decisions, both by the American Courts as well as the Indian Courts. In fact, I find that in **Sarvesh Chopra (supra)** itself, which has been heavily relied upon by the petitioner, the Apex Court has taken note of these exceptions to this general rule that no claim would be entertainable in cases of excepted matters. I am, therefore, of the view that



the learned senior counsel for the respondent is correct in urging that merely because some of the claims fell within the ambit of excepted matters, the same could not preclude the contractor from raising a justifiable claim in respect thereof. However, the exceptional circumstances, where such claims would be entertainable, have to be decided on a case to case basis and cannot be put in a straight jacket formula. These exceptional circumstances may include a situation where the contractor had made his position clear regarding the additional claim during the performance of the contract itself as also a situation where there is an extreme delay, for which the employer is solely responsible.

21. I have also considered the decisions in ***Asian Tech (supra) and MBL Infrastructure (supra)***, wherein it has been held that this bar on raising claims *qua* excepted matters of this nature where the claimant is seeking compensation for the expenses incurred, does not take away the power of the learned Arbitrator to allow such claims. In ***Asian Tech (supra)***, the Apex Court held as under:

“Apart from the above, it has been held by this Court in Board of Trustees, Port of Calcutta vs. Engineers-De-Space-Age (1996) 1 SCC 516, that a clause like clause 11 only prohibits the department from entertaining the claim, but it did not prohibit the arbitrator from entertaining it. This view has been followed by another Bench of this Court in Bharat Drilling & Treatment Pvt. Ltd. vs. State of Jharkhand & others in Civil Appeal No. 10216 of 2003 decided on 20th August, 2009.

For the reasons given above we are not in agreement with the view taken by the High Court that the award of the arbitrator was without jurisdiction. In the facts and circumstances of the case, we allow these appeals and set aside the impugned order of the High Court



and restore the award of the arbitrator. No costs.”

22. Similarly, in ***MBL Infrastructure (supra)***, a Co-ordinate Bench, while dealing with a similar clause, held as under:

“41. Upon perusal of the abovesaid paras pertaining to the award of Claim no. 1, it is crystal clear that the learned Tribunal has held that the delay in completion of the project is attributable to the respondent. It has further categorically held that as per notice dated 2nd August 2013, under clause 13.2 of the GCC regarding failure to meet contractor’s obligations as per the contract has been given wrongly. Since as per the material on record the tribunal held that the delays were beyond the control of the petitioner and the same cannot be construed as its fault.

42. Furthermore, the Tribunal highlighted the fact that there were surplus workers deployed in the key categories of Carpenter and fitters as per the data provided by the respondent. Therefore, the Tribunal held that the termination of the contract and forfeiture of performance security by the respondent is not in accordance with the contract.

43. This Court is of the opinion that the clauses which restricts the right of the party in claiming damages is a restrictive clause. Such a clause will defeat the purpose of the Indian Contract Act, 1872. Under section 55 and 73 of the said Act, the aggrieved party is entitled to claim damages, and there cannot be any restriction or prohibition exercised by the other party. It is the right of the aggrieved party to claim such damages.

44. Under section 23 of the Indian Contract Act, 1872, states that such clause is opposed to public policy since it aims at



restraining the aggrieved party from claiming its rightful dues.

45. Such kind of clauses are also not in public interest since they hinder the smooth operation of the commercial transaction. Furthermore, they create an environment which is not conducive for the purpose of business transactions. Moreover, the said clauses cannot restrain the Tribunal from awarding damages, which are otherwise payable by the employer on account of its breach of contract.”

23. From the aforesaid decisions of the Apex Court and of this Court, it is evident that the Courts have consistently held that such prohibitory clauses which totally restrict the right of the claimant to seek rightful compensation under Sections 55 and 73 of the Indian Contract Act are against public policy and are, therefore, hit by Section 23 of the Contract Act. This view has also been followed by a Co-ordinate Bench in its recent decision in ***Delhi Metro Rail Cooperation (Supra)*** by holding as under:

“30. The next question to be examined is whether the Arbitral Tribunal's decision to award sum of Rs. 7,68,46,375/- as compensation on account of idling/underutilization of resources deployed at Ashram station during the initial period of twenty nine months due to delay in finalizing the revised layout of the station and the delay in handing over of the land, is patently illegal.

31. The Arbitral Tribunal evaluated the evidence led by the parties and found that there was an inordinate delay on the part of DMRC in handing over the land at Ashram Station. The said land was required to be handed over by August, 2012. The works were to commence on 16.07.2012 and the stipulated period for



completion of the Contract was agreed at three years six months. Admittedly, there was a delay of more than twenty eight months in handing over the site. Further, the length of the station was also reduced. The delay was largely for various reasons including certain litigation in respect of “Marble House” area. Admittedly, the Architectural Designs Drawings had to be revised to restrict the length of the station within the available area and to add another floor for creating additional space. DMRC opposed the claim by referring to the contractual provisions. It relied on Clause 2.2 of GCC and Clause 8.3 of GCC, which are set out below:

“2.2. The Employer shall grant the Contractor right of access to, and/or possession of, the Site progressively for the completion of Works. Such right and possession may not be exclusive to the Contractor. The Contractor will draw/modify the schedule for completion of Works according to progressive possession/light of such sites. If the Contractor suffers delay from failure on the part of the Employer to grant right of access to, or possession of the Site, the Contractor shall give notice to the Engineer in a period of 28 days of such occurrence. After receipt of such notice the Engineer shall proceed to determine any extension of time to which the Contractor is entitled and shall notify the Contractor accordingly. For any such delay in handing over of site, Contractors will be entitled to only reasonable extension of time and no monetary claims whatsoever shall be paid.

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8.3. In case of delay on the part of the Contractor, the Contractor shall be liable to pay liquidated damages and any other compensation for the



damages suffered by the Employer as per clause 8.5. This is without prejudice to the right of the Employer to rescind the Contract. Failure or delay by the Employer or the Engineer, to hand over to the Contractor the Site necessary for execution of Works or any part of the Works, or to give necessary notice to commence the Works For to provide necessary Drawings or instructions or classifications or to supply any material, plant or machinery, which under the Contract the responsibility of the Employer, shall in no way affect or vitiate the Contract or alter the character thereof; or entitle the Contractor to damages or compensation thereof but in any such casa, the Engineer shall extent the time period for the completion of the Contract, as in his opinion is/are reasonable.”

32. The Arbitral Tribunal examined the said clauses and found that the same were violative of Section 23 of the Contract Act. The Arbitral Tribunal had also relied upon the following passage from the decision dated 23.02.2010 of this Court in *Simplex Concrete Piles v. Union of India*, (2010) 115 DRJ 616:

“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.”



33. The Arbitral Tribunal found that DMRC was in breach of its obligation. It had the option to order suspension of work as per the Contract clause at Ashram Station, however, it had failed to do so. In the circumstances, DMRC was required to compensate CRTG for its breaches. In the circumstances, the Arbitral Tribunal held that Clauses 2.2 and 8.3 of GCC would not absolve DMRC of its liability to pay compensation.

34. The Arbitral Tribunal has jurisdiction to decide the question of fact as well as of law. Clearly, the decision of the Arbitral Tribunal that by virtue of Section 23 of the Contract Act, Clauses 2.2 and 8.3 of GCC which proscribe CRTG from claiming compensation due under Sections 55 and 73 of the Contract Act are unenforceable, is a plausible view [See : *Simplex Concrete Piles v. Union of India (Supra)*]

24. From the aforesaid, what emerges is that such restrictive clauses as Clause 11.3, 7.1, 7.2, 9 and 43 cannot curtail the power of an arbitrator to entertain *bonafide* claims of a contractor, even though they may, as per the contract, fall within excepted matters. It may, therefore, be apposite to now examine herein below, the manner in which the learned Tribunal has dealt with claims 1 to 3 in para nos. 9-12 and 43 to 46 of the impugned award.

“9. In support of their contentions, Ld. Counsel for the Respondents has referred to a judgment of the Hon'ble Supreme Court of India cited as *General Manager, Northern Railway vis Sarvesh Chopra [2002 AIR 1272 (SC)]*. In this decision, it was held that reference of excepted matters to an Arbitrator is not maintainable and is rather without jurisdiction.

10. Ld. Counsel for the Claimants referring to this very judgment has urged that there is no absolute bar for the Contractor to claim extra expenditure made or damages suffered in respect even of excepted items.



Para 14 of the Judgment, in its relevant portion, is appended on the next page:

"such clauses originated In Federal Government contracts but are now adopted by private owners and expanded to cover wider categories or breach of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American jurisprudence developed so as to avoid the effect of such clauses and permitted the contractor to claim in four situations, namely:-

- (i) Whether the delay is of a different kind from that contemplated by the clauses, including extreme delay,*
- (ii) Where the delay amounts to abandonment, (iii) Where the delay is a result of positive acts of interference by the owner and*
- (iv) Bad faith.*

The first of the said four exceptions has received considerable support from judicial pronouncements in England and Commonwealth. No dissimilar principles have enabled some commonwealth courts to avoid the effect of 'no damage' clause.

11. From this part of the judgment of Hon'ble Supreme Court of India, it is evident that the rule that excepted items are non-arbitrable is not an absolute one.

12. When we examine oral evidence in the shape of affidavit of Sh. Rakesh Saxena PW, who is one of the Directors of the Claimant-company, in association with the documentary evidence produced by the Claimant, it becomes clear that the extreme delay caused in completion of the allotted work was of a kind different from that contemplated and excepted by relevant clauses of the agreement. It is also evident, as will be discussed in detail shortly, that the delay is a result of positive acts of commission and of culpable omissions and were in the nature of interference by the Respondent Railway and in addition it was also an act of bad faith on the part of the Respondent.



(emphasis supplied)

43. *When the entire gamut is seen through, it emerges that the Claimants had continuously been in touch with the Railways and in fact had consistently been communicating and bringing out the circumstances preventing carrying out of the work allotted to them with a view to seek redressal at their end. Reasons clearly attributable to the delays and defaults to the Railways have regularly been explained and that too constantly and consistently by the claimants to the Railways without losing time and that too even by consistently insisting as also repeatedly seeking availability of clear site for execution of the allotted work.*

44. *Communications addressed from time to time for seeking extensions for completion of work, are briefly given hereunder: As the date of completion expired on 16.11.2010, Letter was written by the Claimants on 08.12.2010 (C-21) requesting for extension till 15.11.2011 with Price Variation Clause PVC) without penalty. Reference was made to letters dated 17.02.2010 (C-10), 21.05.2010 (C-14), 05.07.2010 (C-16) and 27.09.2010 as the design for the first phase had been only given by the Respondent on 24.10.2010. It was also mentioned that the balance portion will be available for construction only after completion of box pushing work. The Respondents had provided the extension till 15.08.2011 as mentioned in letter dated 18.03.2011 (RW-1/5); Respondents vide letter dated 05.08.2011 (RW-1- 6) requested the Claimants to apply for further extension, as the work was not complete even after the extended period. In response, the Claimants vide letter dated 18.08.2011 (C-27) again applied for extension dt.30.04.2012 is giving various reasons of delay but the same was granted only till 31.03.2012;*



On 19.03.2012 (C-29), Claimants wrote a letter explaining reasons for delay and requested for further extension till 31.03.2013;

iv. It is revealed to letter dated 12.10.2012 (C-31) that Claimants again requested for extension till 31.08.2013 as some portion of the space of the site was to be available till December, 2012. Therefore they demanded some extra time to complete the site;

On 09.04.2013 (C-32) more letter was written by the Claimants to the Respondents explaining that due to various types of constraints like availability of fronts/designs, etc. the work will not be finished earlier to December, 2013 and urged to grant extension till 31.12.2013; vi. The Respondents vide letter dated 09.10.2013 (RW-1/9) should that the Claimants vide letter dated 28.09.2013 had sought further extension upon 31.03.2014. It was also mentioned that they had already granted their earlier extension till 31.12.2013 and had denied further extension of 31.03.2014. They also requested to submit DOC up to 31.12.2013 along with Bar Chart Programme showing completion activities involved in commissioning of RUB and manifold resources; vii. The Claimants explained the Respondents in their letter dated 10.10.2013 (C-43) That the last extension was granted till September 2013 considering that all the thrust bed area will be made available for construction, but since start of work on thrust bed portion itself multiple hindrances were faced and by then only 1/3rd portion had been made available and balance portion was still occupied by the pushing agency. It was further requested by the Claimants to provide the entire balance area that is free from Malba/Muck by 31st Oct. 2013, so that the work will be started, and request for extension till Feb. 14; viii. The Claimants with reference to the above mentioned letters wrote, another letter dated 15.10.2013 (C-44) wherein they had again demanded extension till 28.02.2014 with PVC without Penalty as the pushing work was under progress by the thrust bed



portion and due to site constraints, only a part of the portion had been made available for construction; ix. As the extension was not granted by the Respondents, Claimants vide letter dated 25.10.2013 (C-45) provided day-wise schedule for completion of balance work and requested for extension upto 28.02.2014 with PVC without penalty; and, x. On 28.02.2014 (C-46) a letter was written by the Claimants to the Respondents in which they had explained that the last day of extension had expired but the completion could not be possible as thrust bed was still occupied by the pushing agency. It was further requested by the Claimants to provide extension of date of completion till 30.04.2014 with price variation and without penalty.

45. When reasons for the delay in completion of the work have clearly been explained by the Claimants regularly flagging, such issues to the Respondents, to the contrary the Respondents have claimed that the fault squarely lies with the Claimants for delayed completion of the work.

46. When the entire matter and the attending circumstances as also correspondence exchanged between the parties is gauzed through it is clear that multiple difficulties faced by the claimants were real and substantial, whereas the respondents were only rhetorical in their approach and lacked management inputs and will to provide commensurate congenial atmosphere and conditions for timely completion of the work. Consequent upon the discussion as elaborately made herein before, all the issues are decided in favour of the Claimants and against the Respondents."

25. Now I may turn to para 76 of the impugned award, whereunder the learned Arbitrator has allowed claim no.5, which as per the petitioner, was non-arbitrable. The same reads as under:



“76. Considering the contention of both the parties and the evidence as also material on record, it is clear that the Claimants had made extra barricading because the workable site instead of being given at one go, was divided into 3 phases which is not part of the tender conditions and this position is nowhere denied by and rather has been accepted by the Respondents as well. Since the Respondents have not provided any strong evidence and proof in repudiation of the plea of the Claimants, the Tribunal cannot deny the extra cost and efforts put by Claimants in additional and repeat barricading done during the extra period. The Claimants are thus entitled to the claim of Rs.6,00,000/- from the Respondents. Consequently, Issue No.5 is decided in the favour of Claimants and against the Respondents.”

26. I may now also refer hereinbelow para nos. 89 to 91 vide which, the learned Arbitrator has allowed claim no. 7, which also as per the petitioner fell within excepted matters:

“89. After considering the connections of both the parties, it is to be pointed out that the damage took place on 20.07.2013 and it occurred only because of the negligence on the part of the Respondents. It is also important to note the date of the accident is after the completion of 11 months. If the project was complete on time, then the same could not have happened.

90. Referring to Clauses 7.1 & 7.2 of Special Tender Condition, hitherto mentioned in earlier part of the Award, it is to be noted that the mentioned Clauses of the Special Tender Condition only talk about the investigation of the site and checking of the actual conditions regarding nature and conditions of soil, difficulties involved due to inadequate stacking space, due to build up area around the site, availability of materials such as water and labour, probable sites for labour camps, stores, godowns, etc.



91. The referred clauses of the Tender Conditions are not supportive of the submissions of the Respondents, as the damage occurred due to negligence from the side of the Respondents. Respondents also failed to provide appropriate remedial support. Considering all the facts and circumstances and also the clauses of the Special Tender Conditions, the Claimants are held entitled and are awarded the claim of Rs.2,76,254/- against the Respondents.

Issue No.7 is decided in favour of the Claimants and against the Respondents.”

27. Finally, I may refer to the findings qua claim nos. 12 and 13, which again as per the petitioner, fell within the ambit of excepted matters:

“147. Respondents vide letter dated 03.08.2017 admit that the amount of Rs.53,07,050/- is pending with the respondents and is liable to be paid to the claimants.

148. But on the other hands, the Respondents in their reply to the Statement of Claim had denied the said claim and had submitted that due to pending final bill, final PVC bill was not prepared and delay was on the part of Claimants.

149. Respondents further argued that the Claimants themselves did not come forward to sign the necessary documents as per the contract for release of the payment as claimed even having been repeatedly requested from time to time.

150. Stand of the Respondents that these payments reflected in Issues No.12 and 13 could not be made to the Claimants because they even came forward to execute the necessary documents, rather exposes the Respondents sufficiently. What documents were required to be signed by the Claimant are referred to by the Respondents Railways in the evidence affidavit of Sh. Shiv Om Dwivedi, Dy. Chief Engineer (Construction). The Claimants were asked to sign No Claim Certificate as also final bill/addendum &



corrigendum.

151. Even during the arbitration proceedings, an effort was made for release of the admitted amount by the Railways but the Railways had been playing truant. Record of the proceedings reveal that the Railway authorities wanted those documents to be signed by the Claimants as a condition precedent for release of even the admitted amount.

154. Considering the contentions of both the parties, it is to be concluded that Respondents are liable to pay the PVC Bill amounting to Rs.53,07,050/- to the Claimants without insisting the Claimants to sign the necessary documents including No Claim, Final Corrigendum and Addendum as provided in Clause 9.8 of the tender conditions and the reported case mentioned earlier.

155. So far as Issue No.12 in particular is concerned the Claimants have submitted that till date addendum and corrigendum has not been passed and the final bill has not been processed by the Respondents. It has been urged that even as per records and the measurement books of the Respondents, the payment amount would come to about Rs.1 0,00,000/-.

156. The Claimants also submitted that final bill as per details as entered in the measurement books of the Respondents, has never been intimated to the Claimants.

157. Respondents vide letter dated 03.08.2017 addressed to the this Tribunal have admitted that an amount of Rs.10,00,000/- (approx.) IS pending with the Respondents and is liable to be refunded to the claimants.

158. As per judgment of Pragati Construction v/s Ministry of Railways (ARB.P.155/20 16) (Delhi High Court), the Respondents cannot force the Claimant to sign the supplementary agreements and other documents. Vide letter dated 03.08.2017 the Respondents have admitted pending dues of Rs.10,00,000/- (approx.). Hence the claim of



Rs.10,00,0001 - (approx.) is to be examined by the Respondents and the exact amount due to the claimants is to be paid to them.

Issue Nos. 12, 13 &17 are accordingly decided in favour of the Claimants and against the Respondents”

28. From the aforesaid it is evident that the learned Arbitrator has, after examining in detail the factual matrix as also the relevant clauses of the GCC, arrived at a categoric conclusion that the delay in completing the project was attributable to the petitioner, due to which the respondent had to incur extra expenditure at every stage. The learned Arbitrator has observed that the claimants had brought to the notice of the petitioner the circumstances preventing the timely completion of the project, but the petitioner failed to address/resolve the same, thereby delaying the completion of the same. Furthermore, it was found that the petitioner failed to provide to the claimants the workable site at one go and instead provided the same in phases, as a consequence whereof the claimants had to incur costs towards extra barricading and were, therefore, liable to be compensated for the actual expenditure. The learned Arbitrator has also awarded damages caused to plant and machinery, which, in its view, was caused due to the negligence of the respondents.

29. From the aforesaid findings qua claim nos. 12 and 13, it transpires that after examining the factual matrix, the learned Arbitrator has specifically rejected the petitioner's plea that on account of clause 45, no further claim for price variation was maintainable as he was of the opinion that the petitioner's insistence on the respondent signing a 'No-Claim certificate', to seek release of the admitted amount, was wholly illegal. The learned Arbitrator was, therefore, of the considered view that the petitioner



could not be permitted to take a plea that unless the respondent agreed to sign a supplementary certificate, undertaking therein that there was no dispute regarding the due amount or the measurements, even the admitted amount towards price variation would not be released.

30. From the aforesaid findings under the impugned award, it is clear that the learned Arbitrator has, after interpreting the relevant clauses of the contract, taken a view that this extreme delay in completing the project was a different kind of delay than the one envisaged by the parties while entering into contract and therefore, a claim for reimbursement of these expenses could not fall within the ambit of excepted matters as contemplated by the parties. This view, in my considered opinion, is a reasonable view and can, by no stretch of imagination, be said to be an implausible view so as to warrant interference by this Court under Section 34 of the Act. It is trite law that interpretation of a clause of a contract falls within the exclusive domain of the learned Arbitrator and a view taken by them in this regard should not, in the normal course, be interfered with unless the same is patently illegal or against the public policy of India. I am, therefore, of the considered opinion that there is no ground made out to interfere with the aforesaid detailed findings of the learned Arbitrator

31. I may now deal with the petitioner's plea regarding claim nos. 9 and 11, having been erroneously allowed by the learned Arbitrator despite the respondent not having executed the necessary documents prescribed under the contract. It may, therefore, be apposite to note hereinbelow, these claims along with the relevant clauses:

“V. CLAIM NO. 9

*Whether the claimant is entitled to release of Security
Bank Guarantee: Rs.1, 12,33,060/-*



CLAUSE 9.8(PERTAINING TO CLAIM NO. 9)

After the works completed and taken over by the Railway as per terms and conditions of the contract agreement or otherwise concluded by the parties with mutual consent and full and final payment is made by the Railway to the contractor for work done under the contract, the parties shall execute the Supplementary agreement annexed hereto as Annexure B.

VI. CLAIM NO.11

Security Bank Guarantee extension charges: From 30.10.2014 till the date of release.

32. I may now note the relevant findings of the learned Arbitrator in respect of these two claims, which were interconnected.

"108. It is also a matter of record that during arbitral proceedings, the Respondents repeated the prayed for the Claimants to sign the No claim and Supplementary agreement but the Claimants declined.

109. The Claimants with reference to their submissions have referred the case of Pragati Construction v/ s Ministry of Railways (ARB.P.155/2016) (Delhi High Court) in which the Hon'ble Delhi High Court observed that:

"It is matter of concern, that as a matter of practice, the respondent is insisting on signing of a supplementary agreement before the release of even the admitted dues. The plain language of clause 9.8 of the tender conditions indicate that supplementary agreement is to be signed after the full and final payment is made to the contractor and not as a condition precedent for making such payments (Para 14).

"It may also be mentioned that it is not the first case where such conduct has been brought to light and there are several cases where the parties



have approached this Court alleging that it is a matter of practice that the respondent does not release the payment until the supplementary agreement are signed. This is clearly pernicious practice and contrary to the tender condition (para 16)."

110. In the above case the Hon'ble High Court retreated that the practice of insisting to signed the supplementary agreement before the release of dues, is contrary to the tender conditions. In the present case also clause No.9.8 of the social tender conditions which is mentioned in the earlier part of the award provides that the supplementary agreement shell be executed after the full and final payment IS made by the respondents to the claimant and not to as a condition precedent to release of the security bank guarantee.

111. Considering the above mentioned conditions of both the parties, it is concluded that the respondents should have release the security bank guarantee of the claimant without insisting the claimants to signed the supplementary agreement other documents as provided in the clause 9.8 of the tender conditions and the case mentioned earlier.

Consequently, issue No.9 decided In favour of the claimants and against the respondents.

After considering the submissions of both the parties, one thing is prominently clear that the Claimants had paid extra cost of Rs.7,51,348/- with reference to Annexure I-I for extending the Security Bank Guarantee from 30.04.2014 till the date of release. Prima facie there is a loss to the claimant. On the other side, the Respondents had mentioned some letters in which they invited the Claimants in their office for signing of the addendum and corrigendum but they failed to submit any proof of such letters. Rather, the



Claimants have enclosed one letter as Annexure (C54) in which Respondents had called the Claimants for signature but it didn't happen because of certain restrictive conditions imposed by the Respondents.

133. Since the Respondents failed to justify their delay and hence the Claim of the Claimants cannot be rejected. It is thus ordered that the Respondents would release the undisputed amount of extension charges of Rs.7,51,348/- and Rs.85,000/- on each extension till release of the Bank Guarantee Bond. Consequently, Issue No.11 is decided In favour of the Claimants & against the Respondents.

33. From the aforesaid, it becomes evident that these two claims are interconnected. The first claim, i.e., Claim No.9 pertains to return of the bank guarantee submitted by the respondent at the time of entering into the contract and the second, i.e., Claim No.11, pertains to the respondent's claim for reimbursement of bank charges levied on account of the requirement to repeatedly extend the bank guarantee as a result of the prolongation of the contract beyond the agreed period. It may be noted that in so far as the respondent's claim for return of the bank guarantee is concerned, the petitioner did not dispute either before the learned Arbitrator or before this Court that this bank guarantee was to be returned after the completion of the contract. The petitioner's case, however, is that unless the respondent came forward to sign the supplementary agreement, which included a No-Claim Certificate, the bank guarantee could not be released. It is as per this condition that the respondent was being compelled to sign such a certificate, which was found to be illegal by the learned Arbitrator and in my view, rightly so. Once, as per the terms of the contract, the respondent became



entitled to return of the bank guarantee, the petitioner could not insist that the respondent must agree in writing that there were no pending claims. The respondent, who was seeking to press its various claims including claims for reimbursement of the extra expenditure incurred on account of prolongation of the contract, was justified in refusing to sign such a supplementary agreement. The learned Arbitrator, therefore, held that this Bank Guarantee ought to be returned to the respondent without compelling the respondent to sign any additional documents.

34. Similarly, the learned Arbitrator was also justified in holding that on account of the inordinate delay in completion of the project for reasons attributable to the petitioner, the respondent was entitled to reimbursement of the expenses incurred to keep the Bank Guarantee alive, during this extended period of contract. In my view, once the learned Arbitrator found that the petitioner was solely responsible for the delay in completion of the project, during which period, the Bank guarantee had to be kept alive, he was justified in directing that the respondent be reimbursed the expenses incurred towards the extension of the Bank Guarantee. I, therefore, find no reason to interfere with these well-reasoned findings of the learned Arbitrator, which are based on appreciation of Clause 9.8 as also the factual matrix of the case.

35. I may now refer to the petitioner's last plea that in the absence of any clause in the contract stipulating grant of interest, the learned Arbitrator could not have awarded any interest. In this regard, it needs to be noted that the respondent has not denied that there was no specific provision in the contract providing for payment of interest, but has urged that in the absence of any prohibitory clause, interest was payable as per Section 31(7) of the



Act itself. Thus, what emerges is that both parties are *ad idem* that in the contract, there was neither any provision dealing with award of interest nor any provision specifically barring the grant of interest. As it has been urged by the respondent that despite there being no provision for interest in the agreement, the learned Arbitrator was still free to award interest under Section 31(7), it would be apposite to refer to Section 31(7) of the Act, which reads as under:

“31. Form and contents of arbitral award-

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.”

36. From the aforesaid, it is evident that unlike the position under the Arbitration Act, 1940, Section 31(7) of the 1996 Act incorporates a specific provision empowering an arbitrator to grant interest on the awarded amount. This power includes the discretion to award interest for pre-award, *pendente lite* and post-award period at such a rate and for such a period as is deemed reasonable in the facts of the case. Award of interest would, therefore, depend on the peculiar facts of each case including the nature of claims, the nature of disputes referred to arbitration, the items on which interest would be payable as also the period for which interest should be granted. The



interest should, however, be reasonable and not punitive or unconscionable. This clause, which vests the Arbitrator with the discretion to award interest is, however, subject to party autonomy and therefore in case the parties have agreed at a particular rate of interest or have agreed that no interest at all would be payable, the learned Arbitrator would be bound by such a clause.

37. Having noted the statutory provision dealing with the award of interest, I may now note the relevant findings of the learned Arbitrator in this regard. The same read as under:

“159. The above mentioned claim is as to whether the Claimants are entitled to interest @ 16% p.a. from 30.10.2014 till final release of the payment.

160. With regard to above Claim, the Claimants have submitted that they took loan from the State Bank of Bikaner & Jaipur and HDB Financial Services Ltd. and paid interest to them at different rates at different points of time for execution of the contractual work. It was claimed that the Claimants had paid interest ranging from 13.5% to 18% p.a. from 2009 till date.

161. The Claimants to justify payment of interest on their pending bills have attached copy of the ledger account of the interest paid to the different banks in this regard which is enclosed as Annexure K and K-L.

164. Contrary to the Claimants, the Respondents submitted that there is no such clause incorporated in the agreement and hence there is no liability of the Respondents to pay any kind of interest on pending payments to the Claimants.

166. With reference to the above mentioned submissions, it is to be decided as to whether the



Respondents are liable to pay the interest to the Claimants. Since they have paid interest to the Banks which varies from 13.5 % to 18%, therefore the Claimants are held entitled to interest @ 14% per annum, calculations for which when made, come to Rs.36,51,866/-. The interest is only allowed against the issues which are in the favour of Claimants. The amount so arrived at thus would be payable to the Claimants by the Respondents. It is also made clear that interest @ 14% per annum would continue to be payable by the Respondents till the date of payment.

Issue No.14 accordingly is decided in favour of the Claimants and against the Respondents.”

38. In the present case, once there was no clause which either prohibited grant of interest or specified the rate of interest, the learned Arbitrator was undoubtedly justified in awarding interest. The learned Arbitrator, having found that the petitioner was responsible for the delay in execution of the contract, was correct in holding that the respondent was entitled to be compensated for the delay in payment of the amount spent to execute the contract. I may also note that the respondent is a private limited company registered under the Micro, Small and Medium Enterprises Act (MSME Act), which in order to complete the project, had to make huge borrowings from various financial institutions by paying interest. Infact, I find that the petitioner has not seriously disputed that in order to complete the contractual work, the respondent had availed of loans from various financial institutions, which amount was required to be returned with interest.

39. From the aforesaid findings of the learned Arbitrator, it is also clear that while awarding interest @ 14% p.a., the learned Arbitrator has taken into account the rate of interest at which the respondent had availed credit



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facilities to generate the funds required for completion of the contractual work. Even though under Section 16 of the MSME Act, which is applicable to the respondent being an MSME, it was entitled to claim interest at three times the bank rate of interest. The respondent has, however, been awarded interest only @ 14% p.a., which in the facts of the present case, cannot be said to be excessive. I, therefore, find no infirmity with the grant of interest @ 14% p.a., by the learned Arbitrator.

40. For the aforesaid reasons, I find no merit in the petition, which is accordingly, dismissed with no orders as to costs.

(REKHA PALLI)
JUDGE

FEBRUARY 28, 2024
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