



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

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Judgement delivered on: 14.11.2025

+ **FAO (COMM) 263/2023**

K P RANA

..... APPELLANT

versus

DELHI DEVELOPMENT AUTHORITY

..... RESPONDENT

Advocates who appeared in this case

For the Appellant : Mr. Rahul Malhotra, Mr. Siddharth Singh,
Mr. Rishabh Singh, Mr. Chirag Goyal,
Advocates.

For the Respondent : Mr. Vaibhav Agnihotri, ASC with Mr. Vidit
Pratap Singh, Mr. Ankit Singh and Mr.
Harshit Kiran, Advocates

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

1. This appeal has been filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (the Act) with the following prayers:-

“a. Pass an order setting aside the impugned order dated 04.11.2023 passed by the Ld. District Judge, Commercial Court, District South East, Saket Courts in OMP (Comm.) No. 21 of 2022 and upholding and reinstating the award dated 14.02.2022 passed in the arbitration matter in K.P. Rana Vs. Delhi Development Authority;



b. Pass an order awarding costs of the present proceedings in favour of the Appellant and against the Respondent; and/or”

2. The facts as noted from the impugned order dated 04.11.2023 are that the appellant, K P Rana is engaged in construction activity of civil works like buildings, underground tanks (specialized work), sump wells, community halls, convenient shopping centers, development & laying of services in government departments i.e. Delhi Development Authority and Delhi Urban Shelter Improvement Board since more than 25 years. To a tender invited by the respondent, for the construction of a Community Hall at Block-G, Sector-11, Rohini, Delhi, at an estimated cost of Rs.1,80,82,008/-, calculated on the basis of DSR-2012, the appellant had tendered an amount of Rs.1,55,35,863/- i.e. 14.08% below the estimated cost. The appellant was declared as the successful bidder and accordingly, a letter of acceptance dated 10.01.2014 was issued by the respondent to the appellant. The agreement was signed between the parties on 15.01.2014. The stipulated date of start of work was 20.01.2014. The stipulated date for completion of the work was 19.01.2015. Due to hindrances, deviations and extra items, the scope of the work increased. The work was finally completed on 22.05.2017, after a delay of 853 days.

3. The appellant had submitted before the learned District Judge that an application for extension of time (EOT) up to the date of completion of work was filed. The case was processed and it was found that justified period as per the hindrance register was 936 days but an extension of 872 days only up to the date of completion was required and accordingly, EOT for 872 days up to the date of completion was granted without levy of compensation.



The approval of EOT was conveyed to the appellant by the respondent vide letter dated 06.09.2017. The finalization of the 9th RA Bill which was also the final bill remained pending on account of sanction of the extra items. The respondent sanctioned the rates vide letter dated 08.04.2019 and finalized the claim of the 9th RA Bill for Rs.2,34,544/-, but later corrected / adjusted the 9th RA bill and finalized that the appellant was to be paid Rs. 2,22,818/- only.

4. The appellant had further submitted that thereafter, *vide* letter dated 02.09.2019, the respondent/DDA informed the appellant that the final bill was ready for payment and the appellant should furnish the guarantee bond for Rs.9 lakhs. The appellant wrote a letter dated 05.09.2019 that due to financial constraints he is not in a position to submit the bond. The respondent, thereafter, wrote another letter dated 21.09.2019, demanding a guarantee bond. The appellant wrote a letter dated 26.09.2019 stating that towards the guarantee bond, a sum of Rs.9 lakhs could be withheld from his claims. On 03.10.2019, the appellant informed the respondent that he had accepted the final bill and measurement subject to further dispute. Thereafter, *vide* a letter dated 08.07.2020 the appellant invoked the arbitration clause and requested the respondent to appoint an arbitrator. By a letter dated 20.10.2020, an Arbitrator was appointed by the respondent to adjudicate the disputes between the parties. It was mentioned in the letter that the disputes were being referred to arbitration subject to their admissibility under Clause 25 of the contract No.35/EE/RPD-6/DDA/2012-13.

5. The appellant filed the statement of claim before the learned



Arbitrator laying 13 claims which are the following:-

Claim no.1: Claim of Final Bill and interest on account of delay in payment of final bill of Rs 25,85,325/- in accordance of clause 9 of agreement. Payment of Final Bill Rs 25,85,325/- plus interest 15% from due date of payment i.e. 21.11.2017@ 15% = as per actual.

Claim no.2: Claim of interest on account of delay in payment of 7th and 8th RA bill of Rs. 5,79,715/- in accordance of clause 9 of agreement. Interest on delayed payment of 7th and 8th RA Bill for Rs 5,79,715 plus interest 15%, from 15.05.2017 to 29.12.2017@ 15% =as per actual.

Claim no.3: Claim for reimbursement of GST (Rs 3,31,673/- + Rs 1,68,850/-) plus interest up to 30.11.2019 i.e. Rs 6,26,906/- plus interest. Claim on account of reimbursement Rs 6,26,906/- plus interest @15% from 01.12.19 till date of payment.

Claim no.4: Claim of escalation payment for labour component as per clause 10 C of the contract for 9th cum Final Bill. Claim amount Rs 3,91,978/- plus interest @15% w.e.f. 30.11.2017 till date of payment.

Claim no.5: Claim of incentive/bonus for completing project before 2.73 months of extended date of completion. Claim of Rs.



7,76,793. /-plus Interest 15% from due date of final payment i.e. 21.11.2017@ 15% = as per actual

Claim no.6: Claim on account of bank charges for extension of performance guarantee beyond stipulated date of completion. Claim amount Rs 1,52,515/- plus interest from 21.01.2015 till date of payment@ 15% = as per actual

Claim no.7: Interest on delay in release of 75% security deposit for Rs 5,82,600/- beyond DLP till date of release. Interest on 75% Security: - Rs 5,82,600X 15/100 X (Jan. 2019 - Feb. 2016= 3.00 year)= Rs 2,62,168/- plus interest@ 15% from Feb,2019 till date of payment.

Claim no.8: Claim on account of non release of 25% security deposit for Rs 1,94,200/- beyond DLP plus interest till date of release security deposit of Rs 1,94,200/- plus interest@ 15% from Feb, 2016 till date of payment.

Claim no.9: Claim of compensation for loss suffered due to prolongation of contract beyond stipulated date of completion till actual date of completion on account of On-Site & Head Office Overhead expenses Claim amount Rs 27,64,412/- plus interest from the date of completion i.e 19:01.2015 till date of payment@ 15% =ss per actual



Claim no.10: Claim of compensation for loss suffered due to prolongation of contract beyond stipulated date of completion till actual date of completion on account of loss of productivity/ under utilization of machinery as per requirement or agreement
Claim amount Rs 32,00,021/- plus interest.

Claim no.11: Claim on account of loss of profit earning capacity due to prolongation of project beyond stipulated date of completion. Claim amount Rs 16,10,798/- plus interest.

Claim no.12: Post award interest@ 15% from date of award up to date of actual payment.

Claim no.13: Claim of costs and interest on costs@ 15% from date of award up to date of actual payment.

6. The respondent filed the statement of defense and the appellant thereafter filed a rejoinder. The arbitration proceedings followed and culminated into an award dated 14.02.2022. A perusal of the award shows that claims no. 1, 2, 4, 8, 9, 11 & 12 were allowed in favour of the appellant. The learned Arbitrator has mentioned the authorities cited by the parties and a summary of the claims allowed by him. The respondent had challenged the decision of the learned Arbitrator on claims no.1, 2, 4, 9, 11 & 12. However, it did not challenge the decision on claim no 8 before the learned District Judge under Section 34 of the Act. The learned District Judge, while deciding the petition under Section 34 of the Act, set aside the claims no. 1,



4, 9, 11 and 12. The learned District Judge partially set aside claim no.2 as far as it relates to interest against RA bill 7. The learned District Judge partially upheld claim no.2 and awarded it to the respondent as cost.

7. The learned District Judge while allowing the appeal under Section 34 of the Act stated in paragraph no.71 as under:-

“The petition is allowed and the impugned award is set aside in respect of the Claims 1, 4, 9, 11, 12. The award is partially set aside in respect of Claim no 2 as far as it relates to the interest against R.A. Bill 7. The award is upheld in respect of grant of interest to the respondent under Claim no 2 against the 8th R.A.Bill. However, the amount payable by the petitioner to the respondent under partly upheld Claim no 2, is awarded to the petitioner as Cost. Consequently, nothing shall be paid by the petitioner to the respondent.”

8. Aggrieved by the same, the appellant has filed this present appeal before us, to set aside the impugned order dated 04.11.2023 passed by the learned District Judge, in OMP (COMM.) No.21 of 2022 and uphold/reinstate the award dated 14.02.2022 passed by the learned Sole Arbitrator.

9. Mr. Rahul Malhotra, learned counsel appearing for the appellant stated that the appellant herein invoked the pre-arbitration mechanism as prescribed in Clause 25 (i) of the GCC forming part of the agreement. Since the claims were not adjudicated in favour of the appellant by the Superintending Engineer and the Chief Engineer, the appellant invoked the arbitration clause of the agreement between the parties *vide* letter dated 08.07.2020. The learned Sole Arbitrator was appointed by the Engineer



Member, DDA vide letter dated 20.10.2020.

10. It is his submission that it was agreed between the parties that there was no requirement of oral evidence and the matter be decided based on documentary evidence.

11. Challenging the setting aside of these claims, Mr Malhotra has made the following submissions with respect to claim no.1.

11.1 Firstly, the bill submitted by the appellant substantially pertained to the work done towards the deviated items and extra items by the appellant. Clause 12 of the GCC dealt with deviated items and extra items. The respondent was under an obligation to pay the market rates towards the said items. He stated that the appellant was under an obligation to prepare and submit the RA bills for the extra/deviated items. However, vide letter dated 01.12.2015, the appellant introduced a software in the system whereby the bills were automatically prepared upon submission of the measurements. The appellant had to take measurements which were approved by the respondent and submit/lodge the same in the designated software. Hence, the appellant was not under an obligation to prepare the bills after the said date. Effectively, the clauses 7, 9 and 12 of GCC which dealt with submission of the bills/rates by the appellant were superseded to the said extent. This practice was not challenged/assailed by the respondent in the objections before the learned District Judge.

11.2 Secondly, it is also the case of the appellant that the respondent was



under an obligation to pay the market rates towards the deviated/extra items in terms of clause no.12 of the GCC, However, while sanctioning the final bill on 08.04.2019, the respondent adopted the rates as provided in DSR-2012 for the deviated items and extra items to be the market rates and thus paid the appellant the lower of the market rate and agreement rate. He stated that the respondent reduced the DSR-2012 rates by 14.08% for the reason that the appellant had quoted tender being 14.08% below the estimated value/cost. This method, he stated, was adopted arbitrarily, to under analyse the rates and accordingly this exercise resulted in retrospective reduction of rates for the deviated/extra items.

11.3 Thirdly, The appellant vide letter dated 09.08.2019 submitted the market rates towards the deviated items and extra items based on the rates provided in DSR-2014 since DSR-2014 rates were the best parameter to determine the market rates. However, the same was not accepted by the respondent.

11.4 He submitted that the learned Arbitrator rightly awarded claim no.1 in favour of the appellant by holding that there was no provision for the appellant to submit the bills after the software was introduced by the respondent. The learned Arbitrator did not agree with the method adopted by the respondent and held that the appellant is entitled to market rates in terms of Clause 12 of GCC. In the absence of any analysis of actual market rates, the learned Arbitrator upheld the analysis of market rates based on rates provided in DSR-2014 for the reason that the work was undertaken in the year of 2014 and



thereafter, the claim of the appellant was allowed.

12. With respect to claim no.2, Mr. Malhotra submitted that the claim of interest on 8th RA bill was upheld but interest on 7th RA bill was set aside by the learned District Judge, on the ground that the same was time barred, having been raised after three years when the same became due and payable. He stated that no such plea of limitation was taken by the respondent in its statement of defense in respect of claim no.2 and rightly so for the reason that RA bills are intermediate/ ad hoc. in nature and all the claims are fructified after the works are completed and final bill is raised. The learned District Judge has erroneously set aside part of claim no.2 for being time barred.

13. It was alleged by the counsel for the appellant before the learned District Judge, that there were delays in release of payment of 7th and 8th RA Bills. It was also alleged by him that the rates sanctioned by the respondent were not in accordance with Clause 12 of the Agreement. The appellant submitted his own 9th Bill on 09.08.2019 in which he calculated the market rates on the basis of DSR 2014. He also wrote a letter dated 11.12.2019 to the respondent in which he stated that in the application for EOT he had been coerced to give the undertaking that he would not claim anything beyond the agreement towards the delay.

14. Insofar as, claim no.4 is concerned, counsel for the appellant stated that Clause 10 C of the GCC provided for payment of escalation of labour component on the basis of indices published by the concerned authority. However, the same provides for freezing of the base index as on the



stipulated date of completion for calculating the escalation for the period beyond the stipulated date of completion.

14.1 He stated that the respondent paid the labour escalation in the 8th RA Bill, taking into account the base index to be 522 which was the labour rate at the relevant point of time beyond the stipulated date of completion. He stated that the said claim of the appellant was premised on the fact that since the delay was caused in completion of works due to reasons attributable to the respondent, the appellant is entitled to escalation of labour component at the prevalent rates at the relevant point of time without freezing the base index on the stipulated date of completion.

14.2 He stated that the appellant had premised the said claim on the fact that the appellant is entitled to escalation in the 9th RA Bill at the same base index i.e. 522 which was sanctioned by the respondent in the 8th RA Bill. It is the case of the appellant that he is entitled to the said claim without freezing the base index as on the stipulated date of completion, under Section 73 of Indian Contract Act, 1872. He stated that in light of the fact that the 8th RA Bill was paid by the respondent by taking into account the base index to be 522, the learned Arbitrator rightly allowed this claim in favour of the appellant and the learned District Judge has erroneously set it aside.

15. With regard to claim nos. 9 and 11, Mr. Malhotra stated that the hindrances which resulted in delay of completion of the works were solely attributable to the respondent. This fact, he stated was also evident from the



extension of time granted in favour of the appellant till the actual date of completion without levy of any liquidated damages/ compensation.

15.1 He submitted that the appellant had claimed compensation towards the onsite and head office expenditure incurred during the period beyond the stipulated date of completion till the actual date of completion. He stated that this claim of the appellant was based on the Hudson Formula which took into account the contract/amounts and period of delay for the purpose of calculating the expenditure towards overheads. He further stated that the appellant had prayed for award of overheads at the rate of 7.5% i.e. the percentage provided in the contract.

15.2 Further, he stated that the appellant had prayed for loss of profit earning capacity @ 7.5% which is the rate of profit prescribed in the agreement, due to delay in completion of the works which was attributable to the respondent. It is his submission that the learned Arbitrator rightly held that the delay was attributable to the respondent and that the appellant could not be blamed/awarded the overheads at the rate of 5% for the prolongation period and the loss of profit at the rate of 2.5%.

15.3 His submission is that the impugned order has disregarded the Hudson Formula used to calculate claim no.9 towards overheads particularly for the reason that the same takes into account the overheads and values as provided in the contract. However, he stated that the learned District Judge wrongly concluded that the Hudson



Formula cannot be applied and the same is contrary to the jurisprudence of engineering contracts.

15.4 He stated that the learned District Judge wrongly relied on the judgment in the case of *Batliboi Environmental Engineers Limited v. Hindustan Petroleum Corporation Limited & Ors, 2023 INSC 850* for the reason that the same was passed keeping in mind the scope of interference in the regime before the 2016 amendment and the same has no application to the facts of the case in hand.

16. Mr. Malhotra submitted that the learned District Judge has passed the impugned order in blatant contravention of the settled principles laid down in respect of limited scope of interference under Section 34 of the A & C Act and the arbitral award was not amenable to interference. The award, he stated was not in conflict with public policy of India or the fundamental policy of Indian law or the basic notions of justice or vitiated by patent illegality appearing on the face of it. He contended that an arbitral award can either be upheld or set aside or remanded back but it cannot be partially modified. He stated the impugned order to be arbitrary, capricious, whimsical and contrary to judicial approach.

17. He further stated that no ground had been made out by the respondent under Section 34 of the Act to upset or set aside the award. He further stated that the impugned order has failed to appreciate that patent illegality should be such which goes to the root of the matter and every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. He stated that the learned District Judge has failed to deal



with the subject in a fair, reasonable and objective manner and ignored the settled law, vital evidence on record, and rendered findings on the basis of non-application of mind and has taken into account things which were irrelevant to the final adjudication.

18. His submission is that the reliance placed by the learned District Judge on the judgement in the case of *Batliboi (supra)* is misplaced as the said judgment was passed taking into account the old regime under the Act as the objections under Section 34 of the Act in the said case were filed in 1999. Hence, the same would not be applicable in the present regime.

19. He stated that the learned District Judge has erred in relying on clause 15 of GCC as the same had no application on the facts of the case. Clause 15 provided for compensation when the works are suspended and resources are lying idle. Further, he stated that clause 12.4 of GCC had no application in the present claims. He also submitted that the impugned order has failed to appreciate that no-claim certificates are of no consequence when the same are taken in advance from the contractor.

20. He also submitted the impugned order has erred in awarding the costs in favour of the respondent herein, equivalent to the award of the claim no. 2 to the extent the same was upheld (interest on delayed payment of 8th RA Bill). The same, as per him, is without any basis or justification and unknown in law. He stated that it goes onto demonstrate that the learned District Judge arbitrarily set aside the entire award in favour of the respondent.

21. He submitted that the award passed by the learned Arbitrator was in



coherence with various Supreme Court orders and correctly interpreted the relevant clauses of the agreement. He stated that a court has to adjudicate the validity of an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration and degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. He further stated it is trite law that the mandate under Section 34 is to respect the finality of the arbitral award and party autonomy to get their dispute adjudicated by an alternative forum as provided under law. He stated that the learned District Judge, while interfering with the award on factual aspects has frustrated the commercial wisdom behind opting for alternative dispute resolution. Reliance has been placed on the judgment in the case of ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., (2020) 5 SCJ 501.***

22. Reliance has been placed by the counsel for the appellant on the following judgments:

- a) UHL Power Company Limited v. State of Himachal Pradesh (2022) 4 SCC 116***
- b) Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd. (2020) 5 SCJ 501***
- c) Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd. reported as (2022) 1 SCC 131***



- d) Narain Das R. Israni v. Delhi Development Authority (2005) 85 DRJ 476***
- e) Ircon International Limited v. GPT- Rahee JV (2022) 290 DLT 59***
- f) State of Maharashtra v. Bharat Constructions in Arbitration Petition No. 245 of 2002 Bombay High Court***
- g) R.L. Kalathia and Co. v. State of Gujarat (2011) 2 SCC 400***
- h) Delhi State Industrial and Infrastructure v. Sukumar Chand Jain (2023) DHC 000339***
- i) Inder Singh Rekhi v. Delhi Development Authority (1988)2 SCC 338***

23. In the present appeal, though oral arguments were advanced by the counsel for the respondent in support of their case, however, no written pleadings were filed.

24. Contesting these submissions, Mr. Vaibhav Agnihotri, learned counsel for the respondent stated that the arbitral award is patently illegal, against public policy and contrary to law and the learned District Judge, while recognising the same, set it aside. According to him, the learned Arbitrator had exceeded its jurisdiction and the award suffered from patent illegality. He stated it is trite law that an Arbitrator has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, then the same amounts to illegality and therefore, the award was liable to be set aside.

25. He submitted that the claims as claimed by the appellant were not admissible as they were not supported by any evidence whatsoever and the appellant himself was responsible for the slow progress of the work. He



reiterated that the appellant had willingly agreed to execute the extra work, being beneficial to both the parties, and raised the claims as an afterthought, which was evident from their conduct.

26. It is also his submission that the appellant is estopped from claiming any amount as he had given an undertaking that he would not claim any amount due to extension of time, if in case it was granted without levy of compensation. He stated that the learned Arbitrator had failed to examine the implication of this expressed representation/undertaking given by the appellant. It was wrongly held by the learned Arbitrator that this undertaking was not given out of free will. He stated that the learned Arbitrator has further erred in holding that it has been held by various courts that an undertaking given by the contractor at the time of extension of time does not extinguish their right to claim anything. He submitted that it is settled law that any allegation of coercion or duress is to be proved and cannot be accepted on the bald plea that it was given under coercion. Reliance has been placed on the judgment in the case of *Delhi Integrated Multi Modal transit System Ltd. v. M/s R S Sharma Contractors Pvt. Ltd., 2018 SCC OnLine Del 9386* and *DDA v. Sukumar Chand Jain, 2012 SCC OnLine Del 3445*. In the present matter, he stated that there is nothing on record other than a bald plea that the undertaking was given under coercion/financial duress.

27. Mr Agnihotri submitted that it was noticed during the execution of work that certain extra work had to be undertaken and since the appellant had already mobilized the site and was executing the work there, it would be mutually beneficial to the parties to have the extra work executed between



them as per the same arrangement. Since this extra work was being executed, it was expected as understood between the parties that the same would result in additional time for completion of work than what was originally contemplated. He submitted that both parties were *ad idem* about the consequences of executing extra items, manner of execution and payment of the same. This, he stated can be evidenced from the fact that the appellant accepted the same without any protest and was paid Rs.2,84,79,927/- compared to the original amount of Rs.1,55,35,863/- as mentioned in the contract.

28. He stated that though the work was completed after a delay of 853 days, as per the understanding of the parties and after considering the nature of work, the extension of time was granted by the respondent to the appellants, without any levy of compensation as the appellant had agreed to not claim any amount on the said prolongation. He submitted that the respondent had duly considered the extra work carried out by the appellant.

29. He stated that the appellant raised disputes regarding the delay and claimed higher rates of execution and deviated items and since these were beyond the agreement and also the understanding between the parties, the respondent denied the same. He further stated that this followed the appellant invoking arbitration vide letter dated 08.07.2020. Thereafter, Engineer Member of the respondent vide letter dated 20.10.2020 appointed a Sole Arbitrator to adjudicate the dispute. He conceded to the fact that the Sole Arbitrator entered upon reference on 29.10.2020 and fixed a timeline for the submission of documents.



30. It is his submission that no cogent evidence was lead by the appellant in support of its claims, the respondent objected to the same and despite noting this objection by the respondent, no finding on that aspect was given by the Arbitrator. He further stated that the onus to prove that additional expenditure allegedly incurred by the appellant was on the appellant himself and the appellant had failed to prove damages or lead any evidence to prove the same. It was also his submission that the award has been passed without considering the observations in the Site Order Book, wherein the respondent had relied upon several entries to show the slow progress of work, shortage of labour and defective work which had to be rectified time and again. He also submitted that there were multiple defects on part of the appellant.

31. He also submitted that the learned Arbitrator wrongly remarked that the period of idling led to diminishing turn over and loss of expected profit which the appellant could have possibly claimed. This finding, Mr. Agnihotri stated is based on conjectures as the appellant has not placed on record any books of account or any cogent evidence to prove that its turnover had diminished and further that this diminishing turnover was on account of the respondent. Such assumption, according to him, substantiates that the learned Arbitrator had allowed the claims with a prejudicial mind.

32. He also contended with respect to claim no.1 that the learned Arbitrator had mis-conducted the proceedings and the award is contrary to the contract as he had wrongly held the appellant is entitled to be paid for the deviated quantities and extra items as per DSR-2014 despite the fact that the contract stipulated that the DSR-12 shall be applicable. He has also wrongly held that the respondent had calculated market rate but paid only



agreement rate, this is contrary to the contract which stipulated that DSR-12 shall be applicable. Hence, he stated that the learned Arbitrator went beyond the express clauses of the contract and the same being inherently contrary to the record and based on selective consideration of the record.

33. He stated that the learned Arbitrator had failed to consider that the appellant was obligated to submit the bills on time, and not having done so, it could not take advantage of the same. He submitted that the last entry with respect to the 8th RA Bill was on 27.12.2017 and the bill was paid on 29.12.2017. Thus, there was no question of delay.

34. He stated that the learned Arbitrator had further erred in allowing claim No. 9 on account of overheads at 5% without any evidence to the effect being produced by the appellant. He stated that it is settled law that the party claiming damages is bound to produce evidence to prove its claim and damages cannot be awarded in the absence of any evidence to the alleged expense. It is his submission that the law relating to damages in India is well settled that the same is only compensatory in nature and not penal and does not provide for windfall. He submitted it is trite law that even in case there is breach of contract by a party, if the other party has not suffered any loss then they are not entitled to claim anything on account of such breach. Hence, he stated that the Arbitrator wrongly awarded the fabricated claims in favour of the appellant, which the learned District Judge rightly set aside.

35. He submitted that the learned Arbitrator had further misconstrued the principle of mitigation of loss. He stated that it was the duty of the appellant



to prove before the learned Arbitrator that it had made all efforts to mitigate the alleged losses/expenses. Further, it was the duty of the appellant to show that such mitigating losses have been suffered and then after having proved the alleged loss having been suffered, could the learned Arbitrator have awarded anything.

36. Further, he submitted that the learned Arbitrator had failed to note that as per Clause 12.2, it was obligatory on the contractor to submit the rates along with analysis thereof within 15 days of the occurrence and if he failed to do so, the Engineer- In- Charge was required to prepare the rates and thereafter the Contractor would be paid in accordance with the rates so determined. He also stated that as per clause 12.4, once in every three months, the contractor was required to submit to the Engineer - In - Charge an account giving complete details of all payments, he may consider himself entitled to, failing which the “contractor shall be deemed to have waived his right.” Thus, as per the agreement clause where the contractor failed to submit his rates and claim additional payments based thereon, it would be deemed that he has waived any such claims which he may have and the contractor would therefore lose his right to object to the rates at which he is paid by DDA. He stated that the finding that DDA analysed the market rates but gave only agreement rates is contrary to the record and additionally, the unwillingness on the part of the appellant to submit any oral evidence in support of its stand ought to have been considered by the learned arbitrator which it failed to do so.

37. He also stated that the learned Arbitrator failed to consider that the respondent, being a public body, is imparting public functions and the



money involved on the said account, being public money, the said funds would have been utilised for development. He also stated that all the organisations have been affected by the Covid Pandemic and in view of the same the rate that was awarded by the learned Arbitrator was exorbitant.

38. He submitted that the learned Arbitrator had failed to consider that no evidence in support of claim no. 11 was filed by the appellant. Despite being called upon to strictly prove that the appellant had failed to obtain/ secure another project, the learned Arbitrator failed to consider that no evidence was given with respect to the same. Indeed, it is the submission that the appellant had admitted that he was, in fact, working on another project simultaneously. In light of the submission, the onus on the appellant intensified to show how he could not generate profit from the present project or secure any new project. He submitted that the appellant had already been paid more than what was originally contemplated in the contract and hence, the question of earning more from another project did not arise at all.

39. He also stated that the learned arbitrator has wrongly awarded future interest @ 10% interest to the appellant, the same is exorbitant and no reasons for the same have been provided and the appellant is not entitled to receive any amount on account of interest.

40. He also stated with respect to Claim No. 4, for escalation of labour rates, the learned Arbitrator has not considered that the contractor was bound to issue a notice whenever it become aware of a change in the wages of labour which admittedly the contractor had failed to do. Secondly, it was explained that mere prolongation itself would not entitle a person to increase



in wages, it was the responsibility of the contractor to provide relevant details and documents to prove that the rates had actually been increased and paid. Thirdly, the details by the contractor were wrong and baseless as the basis for the final bill was the approval of rates for deviated/extra items. He stated that the award is based only on a formula simpliciter and not on any evidence.

41. He also submitted that the impugned award is flawed and was rightly set aside because it permits the appellant's claims that contradict the signed contractual terms and violate clear contract clauses. By ignoring this legal principle, the award conflicts with Indian law, exceeds the arbitrator's jurisdiction, and thus should be overturned to the extent challenged.

42. Concluding his submissions, he stated that the award passed by the Arbitrator was indeed patently illegal, perverse, and suffered from non application of mind. It was contrary to the public policy of India, contrary to the agreement between the parties, ignoring material terms of the contract and substituted the contract with his own views. In light of these views, the learned District Judge rightly modified the award.

REASONS AND CONCLUSION

43. Having heard the learned counsel for the parties and perused the record, the scope of this appeal is primarily related to the conclusions drawn by the learned District Judge in setting aside the award dated 14.02.2022 to the extent of claims as awarded by the learned Arbitrator being claims no.1,4,9, 11, & 12 and partially setting aside the claim no.2 which relates to interest against the 7th and 8th RA Bills. He has also directed, the claim no.2



as partially upheld to be treated as cost in favour of the respondent.

44. Insofar as the challenge to the claim no.1 is concerned, the same relates to payment of an amount of Rs.25,85,325/-, against the final bill which has been granted by the learned Arbitrator, without, pre-reference interest. The same was set aside by the learned District Judge on the ground that the appellant was equally responsible for not submitting the revision of rates with analysis as per clause 12.2 of the GCC.

45. The findings of the learned Arbitrator on claim no.1 can be seen from pages 142-143 of the paperbook. The same is in the following manner:-

“i. As per clause 12.2 of the agreement , in case of contract items which exceed the deviation limits laid down in the contract, Schedule 'F', the contractor may within 15 days of receipt of order of occurrence of excess , claim revision of rates supported by the analysis of rates, provided that rate so claimed is more than the agreement rate. The Engineer - in - Charge is required to determine the market rates considering the analysis of rates submitted by the contractor, on the basis of market rates.

ii. In the instant case, the analysis of rates was not submitted by the Claimant. The analyses of rates for extra items were prepared by the Respondent only which were required to be prepared and submitted by the Claimant. Even all RA Bills & Final Bill were prepared by the Respondent which was also required to be submitted by the Claimant as per clause 7 & 9 of the agreement. Likewise, in line with the prevailing practice, the analysis of rates for Dis is also could have prepared by the Respondent in order to determine market rates for the deviated quantities, which were not determined. The Respondent has paid only agreement rates for the deviated quantities. It is seen from the approval of extra items (C-47), the Respondent has worked out market rates but approved only agreement rates.



The contract of the subject work was awarded to the Claimant on 10.01.2014 with competitive rates 14.08% below the Estimated Cost put to tender. The work was scheduled to be completed in 12 months with scheduled date of completion as 19.01.2015. However, due to various hindrances like non availability of drawings, non-availability of site etc and drastic increase of scope of the work, the work was delayed for 872 days and was finally completed on 22.05.2017. Under the circumstances, the Claimant was not expected to execute the deviated quantities without any limit at his low quoted rates and that too at much belated stage. As per the aforesaid provisions of the agreement, the Claimant was entitled to be paid marked rates for the quantities of the items deviated beyond the deviation limits. It is a matter of record that the Claimant had represented and submitted his Final Bill prepared with deviation items rates at market rates.(C-49). The Claimant has based his rates on DSR -2014. The entire work was executed after 2014. Therefore, in the absence of any analysis of rates submitted by the Claimant or prepared by the Respondent, it would be very fair and reasonable to allow the DSR- 2014 rates. INR 25, 85,325/- claimed by the Claimant against Final Bill is therefore justified.

iii. Second part of the claim is delay in payment of Final bill. From the various submissions made and arguments made, it is clear that main reason of delay was Approval of EOT which was received on 06.09.2017, sanction of deviation items No 2 received on 27.03.2019. Respondent had asked the Claimant on 21.09.2019 to submit Guarantee Bond of INR 9.00 Lacs (C-53) for which the Claimant had replied on 26.09.2019 with a request that final bill may be released withholding INR 9.0 Lacs (C-53). Now since defect liability period is over, withholding of INR 9.0 lacs is no longer required.

iv. As per the reasons explained and details given hereinabove, an amount of INR 25,85,325/- is hereby awarded against this claim. Award of interest on this amount is included in claim 13 infra. No pre suit interest is



awarded as the Claimant is considered equally responsible for not submitting revision of rates along with analysis as per Claus 12.2 of the contract agreement.”

46. The learned District Judge while setting aside the conclusion drawn by the learned Arbitrator on claim no.1 has stated the following:-

“(17). Claim No. 1:

Under this claim, the respondent claimed ₹25,85,325/- towards payment of the final bill. As per clause 9 of the agreement, the payment was to be made within 6 months. The work was completed on 22.05.2017. According to the respondent, the payment became due from 22.11.2017. In addition to the amount mentioned above, he also prayed for interest at the rate of 15% per annum w.e.f. 21.11.2017.

(18). Ld. Arbitrator dealt with claim no. 1 & 2 in para 10 of the award. Under the claim no. 1, Ld. Arbitrator allowed the claim for ₹25,85,325/-. However, pre-reference interest was not awarded on the ground that the claimant was equally responsible for not submitting the revision of rates along with the analysis as per clause 12.2.

(19). It would be pertinent to mention the ground taken by the respondent to make the claim no. 1. Justification is provided by him in para 6(a) of the statement of claim. The respondent stated that the rates of the extra/substituted/deviated items had not been calculated as per the provisions of clause 12 of the agreement. The sanctioned rate of all extra/substitute/deviated items has been drawn without any systematic procedure. Basically all items should be analyzed based on market rate circulated by the office of Chief Engineer (South Zone) vide letter no. F.8(9)/EE(P)-II/ SE(P)-1/SZ/09/DDA/316 dated 16.12.2014 for justification and applicable with effect from 01.11.2014 or adopt rate as per DSR-2016. It was further stated that the main work in question was executed after 01.11.2014, hence the claimant has considered the market rates of deviation/extra items as per DSR-2014.

(20). It is also stated in para 5(b) of the statement of claim



filed before the Ld. Arbitrator that vide letter dated 21.04.2015 C-19, the respondent had informed the Executive Engineer, RPD-6 that for the work executed beyond 19.01.2015, he would charge the market rates.

(21). There is no dispute on the point that the rates for the deviation and extra items were to be determined under clause 12 of the agreement. It is also an admitted fact that the respondent had not submitted his own analysis of rates regarding the deviation and the extra items. Deviation items are those agreement items which exceed the limit provided under Schedule-F. Since the deviation items are the agreement items, there is are agreement rates in respect of those items. Extra items are completely new items and there cannot be any agreement rate for the same.

(22). For the extra items it is provided under clause 12.2 that the contractor may within 15 days of receipt of order or occurrence of the item(s) supported by proper analysis, for the work and the Engineer in-Charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of market rates and the contractor shall be paid in accordance with the rates so determined.

(23). Ld. Counsel for the petitioner submitted that the contractor is not to be paid the market rates but at the rates determined by the Engineer in-Charge which he determines taking into consideration the market rates and the analysis, if any, submitted by the contractor. The interpretation of Ld. Counsel for the petitioner is supported by the wording of clause 12.2. It is also to be noted that for the work with stipulated date of commencement as 20.01.2014, the respondent had not claimed DSR rates of 2012 with the applicable cost index. The tender submitted by him was 14.08% below the estimated cost. This also shows that the DSR rates are not essentially the market rates.

(24). Regarding the deviation items it is provided under Clause 12.2 of the agreement that in case the quantities exceed the limits laid down in Schedule-F, the contractor may within 15 days of the receipt of order or occurrence of



excess, claim revision of rates, supported by proper analysis, for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates specified in the Schedule of quantities, the Engineer-in-Charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

(25). The provision of clause 12.2 mentioned above shows that in case of deviation items also the contractor is to be paid according to the rates determined by the Engineer-in-Charge. The respondent did not submit his own analysis of rates. Vide letter dated 24.01.2015, he had informed the Executive Engineer RPD- 6 that for the work executed beyond 19.01.2015, he would charge market rates. However, he wrote letter dated 05.12.2015 C-25 stating that he was ready to execute the additional work under deviation as per agreement. By writing this letter he changed his stand that for the work executed beyond 19.01.2015 he would be charging market rates. The letter dated 05.12.2015 written by the respondent was followed by the letter dated 07.04.2016 written by S.E. (P), Rohini to the Superintending Engineer, DDA, Civil Circle 14, Rohini. Copy of the letter was sent to E.E./RPD-6 for compliance and a copy of the letter was also supplied to the respondent. The said letter was filed by him before the Ld. Arbitral Tribunal as C-28. By this letter the petitioner communicated the principal approval of deviations. It was mentioned in the letter that for the deviations the contractor would be paid on agreement rates or market rates (as applicable) whichever is lower. For the extra/substitute items it was to be ensured that the rates were reasonable and no undue benefit was given to the contractor.

(26). The respondent knew that for the deviation items he was to be given the agreement rates or the market rates whichever was lower. He was also aware that he would get reasonable rates for the extra/substituted items. He was



paid up to 8th RA Bill. The 9th Bill which is the final bill is a consolidation and adjustment of the running accounts bill. On being asked as to how the payment for the extra/deviation/substituted items was being made in the RA Bills, Ld. Counsel for the petitioner submitted that payments were being made on part rates. Ld. Counsel for the respondent was asked whether the respondent had lodged any protest about the part rates. Ld. Counsel for the respondent submitted that the rates being given in the RA bills were acceptable to the respondent and therefore he did not lodge any protest. It is to be noted that in the statement of claim filed before the Ld. Arbitral Tribunal, the respondent did not say that he should be given the rates which were already given to him under the R.A. Bills and acceptable to him. He made a new claim based on DSR 2014.

(27). Now let us see how the rates for deviation and extra items were granted by the petitioner. The deviation statement no. 2 was filed before Ld. Arbitrator as C-46 and this document is at page 386 of the compilation filed before this court. The document shows that the petitioner calculated the market rates and the justified rates. For the quantities up to 30% above the agreed quantities, the agreement rates were given. For the excess quantities beyond 30%, the market rate or the agreement rate whichever was lower, was given.

(28). The extra item statement no. 2 and deviation statement no. 1 and 2 dated 08.04.2019 was filed before Ld. Arbitrator as C-47 and this document starts from page no. 414 of the compilation filed before this court. For the deviated quantities within 30% as well as above 30%, the agreement rate or the market rate whichever was lower, was given.

(29). The manner of determination for the extra items was explained before the Ld. Arbitral Tribunal by the petitioner in a chart which is at page 649 of the compilation. DDA adopted DSR 2012. Cost index of 14% was applied. Thereafter deduction of 14.08% was made and the rate so arrived was given. Ld. Counsel for the respondent submitted that adoption of DSR 2012 was not correct and there was



no rational for deduction of 14.08% on the ground that the tender submitted by the respondent for the original work was 14.08% below the estimated cost. Ld. Counsel for the respondent further submitted that the situation at the time of execution of extra work was not same as at the time of submitting the tender for the original work. Be that as it may, it is evident that rates were determined by the petitioner for the deviation items as well as for the extra items.

(30). Now let us see how the Ld. Arbitrator dealt with the claim. In para (ii) at page 46 of the award, Ld. Arbitrator observed that "likewise, in line with the prevailing practice the analysis of rates for Dis is also could have prepared by the respondent in order to determine market rates for the deviated quantities, which were not determined. The respondent has paid only agreement rates for the deviated quantities. It is seen from the approval of extra items (C-47), the respondent has worked out market rates but approved only agreement rates". The observation made by the Ld. Arbitrator is against the record. The petitioner had determined the rates for the deviation items and also for the extra items. Payment for the deviation items was made as mentioned above. There could not be agreement rates for extra items and therefore the observation of Ld. Arbitrator that agreement rates were given for extra items is also incorrect.

(31). The respondent had not explained the illegality in the rates determined by the petitioner. He simply stated that major work was done after 2014 and therefore DSR 2014 should be applied. It has been seen above that the DSR rates are not the market rates. It was the duty of the respondent to point out the illegality and it was the duty of the Ld. Arbitral Tribunal to decide whether the rates determined by the petitioner were not proper. No such effort was made. Ld. Arbitral Tribunal did not consider the effect of the letters dated 05.12.2015 and 07.04.2016. To allow the claim, he observed that "the contract of the subject work was awarded to the claimant on 10.01,2014 with the competitive rates 14.08% below the Estimated cost put to tender. However,



due to various hindrances like non-availability of drawings, non availability of site etc. and drastic increase of scope of the work, the work was delayed for 872 days. and was finally completed on 22.05.17. Under the circumstances, the claimant was not expected to execute the deviated quantities without any limit at his low quoted rates and that too at much belated stage. As per the aforesaid provisions of the agreement, the claimant was entitled to be paid market rates for the quantities of the items deviated beyond the deviation limits. It is a matter of record that the claimant had represented and submitted his Final Bill prepared with deviation item rates (C-49). The claimant has based his rates on DSR-2014. The entire work was executed after 2014. Therefore, in the absence of any analysis of rates submitted by the claimant or prepared by the respondent, it would be very fair and reasonable to allow DSR-2014 rates. INR 25,85,3251- claimed by the claimant against final bill is therefore justified". At the cost of repetition, it may be pointed out that the finding of Ld. Arbitrator that no analysis of rates had been prepared by the petitioner is against the record. He could not have allowed the claim because the claim of the respondent appeared to be just. There was provision Clause 10 C of the agreement to take care of the increase in the labour /material cost even during the period of delay. There was also clause 15 to compensate the contractor for extra expenses incurred on account of suspension of work. Beside these he could also claim damages under Sec 73 of The Contract Act. The respondent was getting certain rates under the RA Bills which were acceptable to him. He did not submit his own analysis of rates. It has been seen above that he was not to be paid according to the market rates and that DSR rates are not the market rates. The respondent could not start asking for payment on "rates based on DSR 2014" and it could not have been allowed because the Ld Arbitrator felt that it was just. He could not have decided the claim on equity unless the parties had agreed to get the claim decided on equity. The Ld Arbitrator went beyond the contract and the material before him. This is patently illegal.



(32). Ld. Counsel for the respondent drew the attention of the court to para 41 of the judgment in Batliboi (Supra) wherein Hon'ble Supreme Court has mentioned the observations in Associate Builders case that at times, decisions are taken acting on equity: Such decisions can be just and fair and they should not be over turned under Section 34 of the A&C Act on the ground that the Arbitrator's approach was arbitrary or capricious. These observations have to be applied along with the other observations made by the Hon'ble Supreme Court in the same judgment. An award which is based on no evidence and rendered by ignoring vital evidence is patently illegal It has also been observed by Hon'ble Supreme Court in para 41 of the judgment that fidelity to judicial approach entails that the court or authority should not act in an arbitrary, capricious or whimsical manner.

(33). The discussion above shows that the Ld. Arbitral Tribunal did not examine the record properly and made observations contrary to the record. He misconstrued Clause 12.2 and wrongly accepted that the respondent was to be paid at the market rate/ DSR 2014. He did not examine the effect of the letters exchanged by the parties regarding the rates to be paid for the deviation and the extra items. He did not decide as to how the rates determined the petitioner were not correct and went on to allow the claim on the ground that it was fair to do so. The decision of the Ld. Arbitral Tribunal on claim no.1 is patently illegal and it cannot be sustained."

47. The submissions of the learned counsel for the appellant as noted in paragraph no.12 above, are primarily the following:-

- i. That clause 12 of the GCC dealt with the payments to be made with regard to the deviated items and extra items;
- ii. The respondent was under an obligation to pay the market rates towards the said items;
- iii. The respondent introduced a software system whereby the bills



were automatically prepared upon submission of the measurements;

vi. Hence, the appellant was not under the obligation to prepare the bills after the said date;

v. While sanctioning the Final bill dated 08.04.2019, the respondent adopted the rates as provided in DSR-2012 for the deviated items and extra items and thus, paid the appellant lower than the market rates and agreement rates; and

vi. The respondent reduced the DSR-2012 rates by 14.08% because the appellant had quoted tender being 14.08% below the estimated value.

vii The appellant vide letter dated 09.08.2019 submitted the market rates towards the deviated items and extra items based on the rates provided under DSR-2014 since the DSR-2014 rates were *pari materia* to determine the market rates, which was not accepted by the respondent.

viii The learned Arbitrator rightly awarded the claim no.1 in favour of the appellant by holding there was no provision for the appellant to submit the bills after the software was introduced by the respondent.

ix The learned Arbitrator did not agree with the method adopted by the respondent and held that the appellant is entitled to market rates in terms of clause no.12 of the GCC. In the absence of the analysis of actual rates, the learned Arbitrator upheld the analysis of market rates based on the rates provided in DSR-2014 for the reason that the work was being undertaken in the year 2014.

48. On perusal of the conclusion drawn by the learned District Judge, more specifically in paragraph no.27, we find that he has reproduced



observation of the learned Arbitrator that analysis of the rates of deviated items could have been prepared by the respondent; in order to determine the market rates for the deviated quantities, which were not determined. The respondent has paid only agreement rates for the deviated quantities. It is seen from the approval of extra items, the respondent has worked out market rates but approved only agreement rates are against the record. According to the learned District Judge, the appellant had not undertaken any such analysis as is required in clause 12 of the agreement, which we reproduce as under:

“ **CLAUSE 12**

Deviations/Variations Extent and Pricing

xxx

xxx

xxx

12.2

Deviation, Extra Items and Pricing

In the case of extra item(s) (items that are completely new and are in addition to the items contained in the contract), the contractor may within fifteen days of receipt of order of occurrence of the item(s) supported by proper analysis, for the work and the Engineer-in-Charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

In the case of substituted items (items that are taken up with partial substitution or in lieu of items of work in the contract), the rate for the agreement item (to be substituted) and substituted item shall also be determined in the manner as mentioned in the following Para.



Deviation, Substituted Items, Pricing

- a) *If the market rate for the substituted item so determined is more than the market rate of the agreement item (to be substituted) the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so increased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).*
- b) *If the market rate for the substituted item so determined is less than the market rate of the agreement item (to be substituted) the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so decreased to the extent of the difference between the market rates of substituted items and the agreement item (to be substituted).*

Deviation, Deviated Quantities, Pricing

In the case of contract items, substituted items, contract cum substituted items, which exceed the limits laid down in schedule F, the contractor may within fifteen days of receipt of order or occurrence of the excess, claim revision of the rates, supported by proper analysis, for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates specified in the schedule of quantities the Engineer-in-Charge shall within one month of receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

12.3 The provisions of the preceding paragraph shall also apply to the decrease in the rates of items for the work in excess of the limits laid down in Schedule F, and the Engineer-in-Charge shall after giving notice to the contractor within one month of occurrence of the excess and after taking into consideration and reply received from him within fifteen days of the receipt of the notice, revise the rates for the work in



question within one months of the expiry of the said period of fifteen days having regard to the market rates.

12.4 The contractor shall send to the Engineer-in-Charge once every three months an up to date account giving complete details of all claims for additional payments to which the contractor may consider himself entitled and of all additional work ordered by the Engineer-in-Charge which he has executed during the preceding quarter failing which the contractor shall be deemed to have waived his right. However, the Engineer in Charge may authorize consideration of such claims on merits.

xxx xxx xxx”

49. We find that the basis for the learned Arbitrator to award the claim no.1 in favour of the appellant is primarily that as the major work was done after the year 2014, therefore, the DSR-2014 should be applied. This, according to the learned District Judge, is erroneous for the simple reason that the DSR-2014 rates are not the market rates. In any case, it was the duty of the appellant to point out the illegality in the rates determined by the respondent. No such effort was made by the appellant. At least nothing has been pointed to us in that regard. The learned District Judge held that the learned Arbitrator did not consider the effect of the letters dated 05.12.2015 and 07.04.2016 regarding the rates to be paid for the deviation and extra items by the respondent. In effect, the finding of the learned District Judge is that no analysis of the rates had been made by the appellant, is correct. This we say so because it is not the plea of the appellant that it has made such analysis. Even otherwise the basis for the learned Arbitrator to award the claim no.1 on the basis of DSR-2014 rates and not on the basis of the analysis made by the respondent, which is the requirement under clause no.12 of the GCC. The findings of the learned District Judge in this regard



cannot be contested. The learned District Judge has rightly set aside the award on claim no.1.

50. Insofar as claim no.2 is concerned, the same is primarily for grant of the interest towards the delay in payment of the 7th and 8th RA bills. Insofar as the 7th RA Bill is concerned, the stand of the appellant was that there was a delay of 137 days in making the payment. Similarly there was a delay of 229 days in making the payment of 8th RA Bill against which the claims of Rs.2,54,616/- (towards 7th RA Bill) and Rs.3,25,099/- (towards 8th RA Bill) were made.

51. The Arbitrator had granted interest @ 8% per annum for 137 days delay against the 7th RA Bill but for 219 days against the 8th RA Bill, no interest was granted. The findings of the learned Arbitrator on claim no.2 can be seen from pages 144-145 of the paperbook are in the following manner:-

“iii. The Claimant submitted measurement on March 2016 for 7th RA Bill (Exhibit C-88) whereas the payment was released in 09.08.2016. Similarly the claimant submitted the measurement for 8th RA Bill on dated 10 & 11.05.2017 but payment was not released. The matter was also taken up with RESPONDENT vide letter dated 21.11.2017 (Exhibit C-38). The payment was finally released by RESPONDENT on dated 29.12.2017 (Exhibit C-39) after more than seven month for which measurements already submitted in May 2017 i.e. about more than 6 months ago.

iv. It can be seen from the important dates at i. above, the main reason of delay in release of RA Bill was delay in approval of AA&ES due to non-availability of funds. It was only on receipt of approval of AA&ES, the abstract was generated and bills got signed from the contractor.



v. The Claimant claimed INR 5, 79,715/- plus interest 15% from 30.11.2019 till payment= as per actual as per details given below.

Details of Interest on delayed payment

SNo	RA Bill	Amount of bill INR	Date of withhold	Date of release	Period of delay (days)	Interest @15% up to date of release INR	Period of delay up to 30.11.19 (days)	Total interest up to 30.11.19 INR	Total amount up to 30.11.19 INR
1	7 th	3,013,813	26.03.16	09.08.16	137	169,682	1218	84,934	254,616
2	8 th	2,681,021	15.05.17	29.12.17	229	252,310	702	72,790	325,099

Total : 579,715

It was the responsibility of the Respondent to arrange funds and make timely payments. The Claimant has financially suffered due to delay in payment on part of Respondent, is entitled to be compensated under section 73 of Indian Contract Act, 1872.

In view of the reasons explained and details given hereinabove, an amount of INR2,12,580.00 is awarded herewith against this claim as per the calculations given below:

SN o	RA Bill	Amount of bill INR	Date of withhold	Date of release	Period of delay (days)	Period of delay minus 10 days	Interest @ 8% up to date of release INR
1	7 th	3,013,813	26.03.16	09.08.16	137	127	83,891.00
2	8 th	2,681,021	15.05.17	29.12.17	229	219	1,28,689.00
						Total	2,12,580.00

No interest is awarded on this claim."

52. In this regard, the learned District Judge has stated as under:-



"(35). Ld. Arbitral Tribunal granted interest@ 8% per annum for 127 days against the 7th RA Bills and for 219 days against the 8th RA Bill. No future interest was granted. Interest has been granted by the Ld. Arbitral Tribunal under Section 73 of the Contract Act. The petitioner had given consolidated reply to claim no. 1 and 2. Clause 7, 9, 12 & 25 of the conditions of contract were cited to oppose the claim. Clause 9 is not relevant as it deals' with the final bill. Clause 7 provides that in case the Engineer-in-Charge gets the bill prepared on failure of the contractor to submit the bill, no interest would be paid. The Ld. Arbitral Tribunal noted that it was the practice that the contractor would upload the measurements on the software. The petitioner/DDA had the password and the control to generate the extract. After generation of the extract, it was got signed from the contractor. It is also held by the Ld. Arbitral Tribunal that the delay in payment of the 7th and the 8th RA Bill was due to delay in approval of AA&ES and non-availability of funds. These are findings of fact which cannot be said to be perverse.

(36). During the arguments before this court, Ld. Counsel for the petitioner submitted that the respondent admitted the amount and the measurement on the bills. No dispute was raised as required under clause 12.4 of the agreement and no demand for appointment of Arbitrator was made under clause 25 regarding the interest part when the bills were paid. Ld. Counsel further submitted that arbitration clause could have been invoked even in respect of individual claims such as the claim for interest on alleged delayed payment of RA Bills. It is also stated in the petition under Section 34 A & C Act filed by the petitioner that the Ld. Arbitrator did not appreciate that the last entry in respect of 8th RA Bill was made by the contractor/respondent on 27.12.2017 and the bill was promptly paid on 29.12.2017.

(37). It appears that the argument regarding clause 12.4 and 25 was not specifically pressed before the Ld. Arbitral Tribunal in respect of claim No. 2. Vide letter dated 21.11.2017 C-3 8 at page 361 of the compilation, the respondent had informed the petitioner that he would



charge interest for the delay in payment of the 8th RA Bill. In the said letter, the date of uploading the measurements with respect to the 8th RA Bill is mentioned as July, 2017. Ld. Counsel for the respondent submitted that there is typographical error in the letter regarding the date of uploading the measurements. The date of uploading of the measurements is a question of fact and the finding of the Ld. Arbitrator is to be accepted. However, it is also to be noted that as per Section 28 (1) (a) A & C Act, 1996 the Arbitral Tribunal has to decide the dispute in accordance with the substantive law in force in India. Section 43 (1) of the Act provides that Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in court. Section 3 (1) of the Limitation Act provides that the question of limitation has to be considered even if it has not been set up as a defense. Therefore, it was the duty of the Ld. Arbitrator to consider the limitation before allowing the claim.

(38). As mentioned at page 47 of the award the 7th RA Bill was paid on 09.08.2016 and the 8th RA Bill was paid on 29.12.2017. Article 25 of the Limitation Act provides that in respect of claim for money payable for interest upon money due from the defendant to the plaintiff, the limitation would be three years from the date when the interest becomes due. In respect of the 7th RA Bill the interest had become due on 09.08.2016 when the bill was paid. The claim for interest against the 7th RA bill had to be made on or before 09.08.19. In respect of the 8th RA Bill the interest became due on 29.12.2017 when the 8th RA' Bill was paid. The claim for interest against the 8th RA bill had to be made on or before 29.12.2020.

(39). Section 43 (2) of A & C Act, 1996 provides that for the purposes of Section 43 and the Limitation Act, an arbitration shall be deemed to have commenced on the date referred in Section 21. Section 21 provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to Arbitration is received by the respondent.

(40). In the present case, the respondent invoked the



arbitration clause vide letter dt. 08.07.2020 C-58 at page 215 of the compilation. Therefore, we have to see whether the claim for interest in respect of 7th RA and 8th RA Bill was within limitation as on 08.07.2020. The limitation for the claim for interest in respect of 7th RA Bill started on 09.08.2016 and it expired on 09.08.2019. The limitation for the claim of interest in respect of 8th RA Bill started from 29.12.2017 and it expired on 29.12.2020. This shows that the claim for interest in respect of 7th RA Bill had become time barred when the arbitration clause was invoked by the respondent. The Ld. Arbitral Tribunal could not have allowed the claim for interest in respect of the 7th RA Bill as it was barred by limitation. The objection of the petitioner has to be upheld in respect of the grant of interest against the 7th RA Bill. It is held that the respondent is entitled only for the sum of ₹1,28,689/- granted to him by the Ld. Arbitral Tribunal towards interest against the 8th RA Bill.”

53. From the reading of the conclusion drawn by the learned District Judge it is clear that he has held that the claim of interest in respect of 7th RA Bill had become time barred when the arbitration clause was invoked by the respondent. Insofar as the 8th RA Bill is concerned, the amount of Rs.1,28,689/- granted, has been upheld. So in that sense, the claim no.2 was partially set aside.

54. The submission of Mr Malhotra is primarily that no such plea of limitation was taken by the respondent in its statement of defence in respect of claim no.2, for the reason that the RA bills are intermediary *ad hoc* in nature and all claims are fructified after the work is completed and the final bill is raised.

55. We are not in agreement with this contention. It may be true that RA



bills are *ad hoc* / intermediary, but that would not preclude the respondent from raising a dispute / claim for the appellant's entitlement for interest on the ground of delayed payment. If no such dispute was raised in three years of payment of the amount under the 7th RA Bill, surely the claim becomes time barred. It is well settled that once the limitation starts running, it continues to run, making the claim stale and beyond consideration. Hence, we uphold the conclusion drawn by the learned District Judge.

56. Insofar as claim no.4 is concerned, the same is in respect of a sum of Rs.3,91,978/- towards the escalation for labour component under clause no.10C of the GCC. The learned Arbitrator has granted the amount to the appellant by stating as under:-

“Arbitral Tribunal's findings and Award.

Clause 10 C of the contract provides that If after submission of the tender, the price of any material incorporated in the work not being from Engineer-in-Charge's store and /or wages of labour increases as a direct result of the coming into force of any fresh law, or statutory rule or order{but not due to any change in sales tax/Vat) beyond the prices/wages prevailing at the time of last stipulated date of receipt of tenders including extension, if any, for the work during contract period including justified period extended under provision of clause 5 of the contract without any action under clause 2, then the amount of contract shall accordingly be varied ,further for this purpose, the labour component of the work executed during the period under consideration shall be the percentage as specified in Schedule 'F' of the value of the work during that period. in the present case, this percentage of labour specified under Schedule 'F' is 25%of the value of the work.

The Respondent has paid escalation amount under 10C up to 8th RA Bill. As such rejecting the claim by the Respondent due to non-information of increase in labor rate



is not justified since the claim is for escalation for 9th cum last final Bill, based on the same formulae as adopted by respondent before.

Respondent didn't raise any comments on the amount and working of the claim amount. An amount of INR 3,91,978.00 is thus awarded against this claim. Award of interest on this amount is included under claim no 13 infra."

57. As against this claim, the learned District Judge in paragraphs no.41-48 has stated as under:-

“(41). Claim No.4: Claim no. 4 was for ₹3,91,978/- under clause 10 C towards escalation for labour component. The respondent also prayed for interest @ 15% per annum w.e.f. 30.11.2017 till the date of payment. It was stated that DDA had allowed the escalation for labour component upto 8th RA Bill. The escalation bill captioned as the first R.A. Bill under clause 10 C for labour escalation was submitted on 15.01.2018 vide letter Ex C-40 at page 368 of the compilation. The letter was accompanied by the chart at page 369 in which the respondent provided the calculation towards labour escalation under Clause 10 C for the RA Bills 1 to 8. It is stated in para 5(h) of the statement of claim that the payment was made on 31.03.18. The respondent claimed that due to non-release of Escalation for Labour component of 9th cum Final Bill he had suffered the financial loss of the amount claimed. To justify the claim he mentioned Clause 10C as well as section 73 of the Contract Act. He relied upon judgments by Hon'ble Supreme Court in PM. Paul Vs. Union of India, AIR 1989 SC 1034 and KN.Sathyapalan (Dead) by LRs Vs. State of Kerala & Anr. (2007) 13 SSC 43.

(42). The petitioner opposed the claim by stating that allowing the claim would amount to unjust enrichment to the respondent. Ld Counsel for the petitioner also submitted that the judgments cited by the respondent before the Ld. Arbitral Tribunal were not applicable. In the rejoinder the respondent/claimant submitted that the amount had been



claimed using the same formula which had been adopted by DDA to calculate the escalation upto the 8th RA Bill.

(43). The Ld. Arbitral Tribunal observed that in Schedule-F, the labour component was 25%. DDA had given escalation up to the 8th RA Bill and therefore the escalation should also be given in the fmal bill. Ld Arbitrator also observed that working of the amount had not been challenged by the respondent. Ld. Arbitrator allowed the claim. Regarding the interest, Ld. Arbitrator held that the claim for interest was included in claim no. 13.

(44). Ld Counsel for the petitioner argued before this court that under clause 10 C the contractor has to submit the claim within reasonable time of his becoming aware of any alteration in the price of any material and/or wages of labour. The Engineer-in-Charge may call books of account and the other relevant documents from the contractor. The escalation has to be limited to the price/wages prevailing at the stipulated date of completion or as prevailing for the period under consideration, whichever is earlier. Learned Counsel further submitted that the labour rate of ₹ 522 adopted by the contractor cannot be allowed as it is for a period beyond the stipulated date of completion. Learned counsel for DDA also submitted that to rely upon section 73 of the Contract Act, the contractor has to prove the actual loss and he also needs to prove the steps taken to mitigate the losses.

(45). This court asked Learned counsel for the respondent to explain how the claim had been made. Learned counsel submitted that some work had been done after submission of the 8th RA Bill and therefore the escalation under clause 10C had to be paid by DDA in the 9th Bill towards escalation in the labour wages in respect of such work. Learned counsel also submitted that by substantially reducing the rates for the deviation and the extra items in the 9th Bill, DDA also reduced the labour component which was payable to the respondent. Learned Counsel also submitted that the argument of Learned Counsel for the petitioner about the rate does not hold as DDA had itself paid the escalation under the 8th RA Bill taking the labour



rate as ₹522.

(46). During the arguments on earlier dates, Learned Counsel for the respondent had submitted that no work was done under the 8th RA Bill and under the 9th RA Bill. The argument that some work had been done even after submission of the 8th RA Bill is beyond the pleading and it is also contrary to the earlier argument. The submission that reduction in the rates in the final bill led to reduction of the labour component in the 9th Bill and therefore the claim was justified, is also beyond pleading. The respondent did not advance these arguments and did not make these pleadings before the Learned Arbitral Tribunal to justify the claim:

(47). To claim the escalation up to the 8th RA Bill, the respondent had submitted the Bill dated 15.01.2018 with the calculation. The calculation shows that the gross value of work done since the previous RA Bill was used to calculate the labour component. Thereafter, the labour component was divided by the base price/old labour rate in the tender. The result was multiplied with the difference in the labour rate to calculate the escalation under each R.A. Bill. If the claimant wanted escalation towards Labour Cost under Clause 10 C for the 9th Bill, he had to show the gross value of work done after the 8th RA Bill. This was not done. It is not disclosed as to why the Bill was not submitted by him if he had the claim against the 9th Bill. The claimant got the Labour escalation upto the 8th RA Bill. He submitted the RA Bill for escalation on 15.01.18. The work was completed on 22.05.2017. There is no explanation as to why the claim for labour escalation towards the 9th Bill was not included in the Bill dated 15.01.2018 if he had such claim. The argument of his Ld. Counsel that the decision of the deviation and extra item rates in the 9th Bill led to reduction of the labour component also appears to be untenable for the reason that the escalation is a separately calculated. The claimant had already received the payment on 31.03.2018 and it is not his case the amount claimed under claim no 4 was recovered from him in the 9th Bill.

(48). It is true that the petitioner did not question the



working of the amount and it generally denied the claim by stating that it would amount to undue benefit to the claimant. However, any fair minded person would ask the claimant to explain how the amount was calculated and why the notice under clause 10C had not been given to DDA to claim the escalation. No such endeavour was made by the Learned Arbitrator. Learned arbitrator also did not decide whether the claim was being allowed under clause 10 C or under section 73 of the Contract Act. The decision of the Learned Arbitral Tribunal suffers with absence of reasoning and it is patently illegal.”

58. The submission of Mr Malhotra can be summed up in the following manner:-

- i. The respondent paid the labour escalation in 8th RA Bill taking into account the base index to be Rs.522/-, which was the labour rate at the relevant point of time beyond the stipulated date of completion;
- ii. The said claim of the appellant was premised on the fact that the delay in completion of the work was attributable to the respondent;
- iii. The appellant is entitled to escalation of the labour component at the prevalent rate at the relevant point of time without freezing the base index on the stipulated date of completion; and
- iv. The appellant has premised its claim of escalation in the 9th RA Bill at the same base index of Rs.522/- as was sanctioned in 8th RA Bill.

59. A perusal of the paragraph no.47 of the order passed by the learned District Judge, which we have reproduced above, reveal that unlike the 8th



RA Bill dated 15.01.2018, wherein the appellant had shown the calculations depicting the gross value of the work done since the previous RA bill (that is 8th RA bill) to calculate the labour component, it was not done in the 9th RA Bill. That apart, we note, the work having been completed on 22.05.2017, the 8th RA bill was submitted/prepared on 15.01.2018, even the escalation for labour component for the period beyond the period of 8th RA bill should have been included in that Bill. It has not been so included.

60. That apart, the learned District Judge concluded that no notice under clause 10C had been given to the DDA to claim escalation, that is the appellant had not put the respondent to notice for claiming escalation towards labour charges. We also note, the learned District Judge has also stated that the learned Arbitrator did not state as to whether the claim was allowed under Clause 10C or under Section 73 of the Indian Contract Act, 1872, as, such a conclusion becomes relevant as the claim has been premised by the appellant by relying upon clause no.10C of the GCC. The clause no.10C of the GCC reads as under:-

“CLAUSE 10C

Payment on account of increase in prices/wages due to statutory order(s) If after submission of the tender, the price of any material incorporated in the work (excluding the materials covered under Clause 10CA and not being a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 thereof) and/or wages of labour increases as a direct result of the coming into force of any fresh law, or statutory rule or order (but not due to any changes in sales tax/VAT) beyond the prices/wages prevailing at the time of the last stipulated date of receipt of tenders including extensions, if any, for the work during contract period including the justified period extended



under the provisions of clause 5 of the contract without any action under Clause 2, then the amount of the contract shall accordingly be varied and provided further that any such increase shall be limited to the price/wages prevailing at the time of stipulated date of completion or as prevailing for the period under consideration, whichever is less.

If after submission of the tender, the price of any material incorporated in the work not being from Engineer-in-Charge's store and /or wages of labour increases as a direct result of the coming into force of any fresh law, or statutory rule or order (but not due to any change in sales tax/Vat) beyond the prices/wages prevailing at the time of last stipulated date of receipt of tenders including extension if any, for the work during contract period including justified period extended under provision of clause 5 of the contract without any action under clause 2, then the amount of contract shall accordingly be varied ..”

61. From the above, it is seen that the escalation in respect of the labour component, was admittedly not satisfied as no such details have been given in the RA Bill. Surely, without any evidence showing the work done after the submission of 8th RA Bill, the said claim could not have been allowed by the learned Arbitrator. The learned District Judge was justified in setting aside the same.

62. Claim no.9 is for the compensation for loss suffered due to prolongation of the contract. The claim amount was Rs. 27,64,412/- plus interest from the date of completion i.e., 19.01.2025 till the date of payment at the rate of 15%.

63. The learned Arbitrator held that there are well accepted international formulas for calculating losses of overhead and profits due to delay in project completion.



64. The learned Arbitrator at page 182 has given the following finding on this claim. The learned Arbitrator has allowed the overhead charges by using the Hudson Formula @ 5% of the contract value which has been quantified as Rs.12,38,612/-. No interest has been awarded on this claim.

“v. Claim No 9: Claim of Compensation for loss suffered due to prolongation of contract beyond stipulated date of completion till actual date of completion on account of On-Site & Head Office Overhead expenses.

While awarding the work, the Claimant was directed to start the work immediately. At the beginning itself and during the progress of the work, the work could not progress and had to be stopped due to various hindrances. EOT Initiated by the Respondent for shows that there was a delay of 582 days due to various hindrances. It was primary obligation of the Respondent under the contract to make available drawings, site and timely decisions to the Claimant to enable him to execute the work. Failure to do so amounts to fundamental breach on the part of the Respondent for which the Claimant is entitled to be compensated for damages as per section 73 of Indian Contract Act 1872. To defend the claim, the Respondent has averred that the Claimant could have taken measures to mitigate the loss .Respondent submitted the time period for execution became prolonged due to necessity for extra work which willingly accepted by the Claimant to be paid in terms of the Agreement. Furthermore, the work was prolonged due to the slow rate of work of the Claimant. Respondent stated that even before the submission of bid, Claimant was well aware of the Site position. All these averments are illogical as the no contractor can foresee hindrances at the time of bidding. Further delay due to extra work was only 290 days as against total delay of 872 days.

vi. The claimant has claimed for the expenditure to maintain staff in Head Office as well as at site, extra expenditure for elongation on account of electricity, cost on account of



preliminary setup like labor hutment, water requirement, setting up of testing lab at site, keeping all required machinery and tools, preparation of cement godown, store, reinforcement platform, storage space of pre-fabricated material etc. Over & above, site overhead various other expenses Claimant stated that following expenditure was incurred by the Claimant on account of Head/Site office over head in the nature of following.

“Site office staff, Director Salary, bank charges, Interest charges on borrowed capital, legal & advocate fee, stationary charges, Cost incurred for various compliance like safes tax, Income Tax, Service tax, ROC charges, ESI, EPF etc., Periodicals, books & stationary, Tender fee, expenditure for office maintenance, office furniture, electricity, water, Travel, conference, employee benefits in terms of bonuses, Insurances, furniture, vehicle t:naintenance & repair etc”

During the hearings held, the Claimant admitted that it is not possible to bifurcate the cost impact on each & every project separately, the quantum of damage is, therefore assessed based on widely accepted Hudson Formula as under:

"Contract head office overhead and profit percentage X Contract sum /Contract period x Period of delay"

In the Hudson Formula, the overhead percentage is taken from the contract. The Hudson Formula has received judicial support in many cases. Considering Claimant's responsibility for mitigation of his losses and all other facts of the case as explained by both the parties during submissions, the overhead expenses are hereby allowed @ 5 %(on average basis for the total period of delay except delay due to additional scope of work.)



Formula used	Overhead percentage allowed (a)	Contract sum / contract period (15535863/365 days) (b)	Idling period in days (c)	Amount of damages= a x b x c	Remarks Overhead %age as per contract
Hudson	5%	12,94,655.00 42,564.00	582	1238612.00	Percentage on cost of material and labour to cover all overheads and profit -15% Schedule - F (2)(x) From this OH can be taken as 7.5%

The Respondent's contention to deny the claim due to undertaking given by the Claimant 'not to claim anything extra on account of the delay' while submitting EOT is not found to be acceptable. There is no condition in the contract in the prescribed EOT format to furnish such undertaking by the contractor and no contractor will give such undertakings out of its free will. It is a common practice in the departments to obtain such undertakings before sanctioning of the EOT or finalization of their contract bills. As held by various courts, such undertakings given by the contractors at the time of EOT or payment of bills cannot extinguish their right to the claims which otherwise are found to be justified.

Since the claim is based on site overhead and credible method based on various judgments and established formulae, the same is admissible and INR 1238612.00 are awarded against this claim. No interest is awarded on this claim for the damages.

vi. Claim no 10- Claim of Compensation for loss suffered due to prolongation of contract beyond stipulated date of completion till actual date of completion on account of loss of productivity/ underutilization of machinery as per requirement or agreement.

vii Due to various hindrances as explained in Claim No 9 , the Claimant was kept engaged for a period of 582 without productive work . As against contract period of 365 days allowed for the completion of work the Claimant was kept



waiting In uncertainty for this long period of 582 days (Net delay 872 days- 290 days for extra work)

viii. The claimant has submitted a claim of damages/ compensation for loss suffered due to prolongation of contract beyond stipulated date of completion till actual date of completion on account of loss of productivity of various machinery and plant etc. such as Concrete Hopper Mixer, Steel Shuttering, Scaffolding, Vibrators, Bar Bending/Cutting Machine, Floor Grinding Machine, DG Set, Stone Cutting Machine, Tractor & Trucks, Chain Pulley and Lift Machine etc. The -Claimant submitted that these Machineries and shuttering etre generally brought on hire charges or contractor own cost, the rental value, depreciation and operation and maintenance cost can be claimed as damages. In the current claim the rental value is claimed as damages (Annexure-3} amounting to INR 32, 00,021.00.

ix. The claim for damages has been submitted on ad-hoc basis without any details/ evidence either for deployment or idling of any P&M during the idling period. Therefore no damages can be awarded against this. In view of the reasons explained nil amounts is awarded against this claim.”

65. In so far as, claim no.9 is concerned, the leaned District Judge has set aside the award by stating in paragraph 49 to 60 by stating as under:

“(49). Claim No.9:

Claim no. 9 was for compensation for loss suffered due to prolongation of the contract beyond stipulated date of completion till actual date of completion on account of on-site and head office overhead expenses. The respondent claimed a sum of ₹27,64,412/- under this head and also claimed interest @ 15% per annum w.e.f. 19.01.2015 till the date of payment. It was stated that the respondent incurred expenses on "site office staff director salary, bank charges, interest charges on borrowed capital, legal and advocate fee, stationary charge, cost incurred for various compliances like sales tax, income tax, service tax, ROC charges, ESI, EPF etc, periodical, books



and stationary, tender fee, expenditure for office maintenance, office furniture, electricity, water, travel, conference, employee benefits in terms of bonuses, insurances, furniture, vehicle maintenance and repair etc". It was also stated by the respondent that it was not possible to bifurcate the cost impact on each and every project separately. The respondent calculated the compensation under this head on the basis of Hudson formula.

(50). The petitioner contested the claim. It was stated in the statement of defense that the respondent was responsible for delay on many counts as detailed in the statement of defense.

(51). Ld. Arbitrator observed that the claimant admitted that it is not possible to bifurcate the cost impact on each and every project separately. Ld. Counsel for the petitioner submitted that the Ld. Arbitrator could not have used the admission of the claimant to justify his claim. The observation of the Learned Arbitral Tribunal appears to be incongruent. However, we can leave this aspect and see whether the decision of Ld. Arbitrator on this claim can be sustained or it is against the public policy/patently illegal.

(52). Ld. Arbitrator observed that delay of 290 days was due to enlargement of the scope of the work. Ld. Arbitrator reduced his period from the total EOT of 872 days and held that the respondent was entitled for the compensation for 582 days. Ld. Arbitrator also observed that the percentage on cost of material and labour to cover all over heads and profit was 15% in Schedule-F. Therefore, the overhead percentage could be taken as 7.5%. Ld. Arbitrator allowed the overhead expenses by taking 5% as the reasonable percentage. Applying the Hudson formula, Ld. Arbitrator granted a sum of ~12,38,612.00/- to the respondent.

(53). It has been held by Hon'ble Supreme Court in para 16 of Batliboi (Supra) that the computation of damages should not be whimsical and absurd resulting in a windfall and bounty for one party at the expense of the other. In the same judgment, Hon'ble Supreme Court mentioned the shortcomings of Hudson



formula. It was also observed that application of Hudson formula presupposes three assumptions mentioned in para 22 of the judgment. In the present case, the Ld. Arbitrator did not examine whether those assumptions could be made.

(54). Question also arises whether the agreement does not provide any mode for calculation of compensation in case of prolongation of the contract. Clause 15 of the agreement deals with the issue of suspension of work and grant of compensation to the contractor. The clause provides that the contractor may be given reasonable compensation to cover the salaries and/or wages paid by him to his employees and labour at site, remaining idle in consequence and adding to the total thereof 2% to cover indirect expenses of the contractor. The contractor has to submit the claims supported by details within the time prescribed under the clause. Though, work suspension orders were not issued by the petitioner, the mechanism under clause 15 provides guidance for computation of the compensation. 2% extra is given to cover the expenses which cannot be calculated separately. Clause 12.4 also requires the contractor to submit the additional claims every three months. It is to be noted that if the contractor prefers the claim during the currency of the contract, he has to support the claim with documents. It is convenient for the contractor to raise the claims after long period of the completion of the work and to say that the amount cannot be separately calculated.

(55). The agreement contains various clauses requiring the contractor to maintain the records regarding the expenses, labour/technical staff deployed at the site etc. and to make such record available to the Engineer-in-Charge for inspection. Question arises whether the contractor is absolved from leading evidence to claim overhead expenses on the ground that it is difficult to calculate the expenses separately for each project. In this regard, we may profitably refer to the observation made by Hon'ble Division Bench, M.P. High Court in M/s Saluja Construction Company v. State (2001) ILR 1394. (56). In Saluja Construction Company (Supra), it was held thus:



"as we have already mentioned above, claim for loss of profit may arise in different eventualities such as where there is a partial or total prevention of contract due to breach on the part of the department and the third contingency is where the contractor is allowed to complete the work but during an extended period for delay solely occasioned due to the breach on the part of the department. The quantum of loss of profit in all three eventualities cannot be the same. It would differ from case to case depending upon the nature of the contractor, progress of work of the contractor and other factors relevant in work contract. What we find from the decision of Dwarka Das (Supra) is that where the claim is made on loss of profit there can naturally be no insistent on proof of 'actual loss suffered' by the contractor. The nature of claim is such that no contractor can prove actual loss of profit suffered by him. The contractor, however, can and should place material and evidence to base his claim for anticipate loss towards profit We do not find that the case of Dwarka Das (Supra) of the Supreme Court is an authority to accept the contention on behalf of the contractor that the contractor is totally absolved from his burden of leading any evidence to substantiate his claim towards loss of profit. We had occasion to deal with a similar argument concerning a claim of similar nature in the case of another works contract in State of M.P. and Ors Vs. Smt. Gyan Kaur (1). We have in detail discussed the nature of claim towards overhead expenses and loss of profit. So far as overhead expenses are concerned, they have been described to mean 'of site' or 'head office expenses' such as for establishing an office, supervisory staff, power bills, stationary, journeys performed, telephone bills and several other similar expenses required to fulfill the contract. So far as the overhead expenses are concerned, the contractor can certainly lead evidence oral and documentary to prove the actual expenditure towards overheads."

(57). In the light of the clauses of the contract and the observations made by Hon 'ble Division Bench, M.P. High Court in M/s Saluja Construction Company (Supra), the claim could not have been allowed without evidence by simply relying



upon Hudson formula. In a recent judgment Unibros vs All India Radio 2023 SCC Online SC 1366, Hon'ble Supreme Court has held that Hudson Formula cannot be applied without evidence.

(58). The respondent had pleaded before the Ld. Arbitrator that while grant of EOT, he had given the undertaking that he will not claim anything extra beyond the agreement for the delay. The undertaking is at page 355 of the compilation and it is part of C35. Ld. Arbitrator held that the undertaking was not acceptable. There was no format for giving such undertaking by the contractor for EOT and no contractor would give such undertaking with free will. Ld. Arbitrator further observed that it is a common practice for the department to obtain such undertaking before granting EOT. Ld. Arbitrator also observed that it has been held by various courts that such undertakings given by the contractors at the time of BOT or payment of bills cannot extinguish their right to the claims which otherwise are found justified.

(59). The observation of Ld. Arbitrator regarding decision of the courts in respect of such undertakings is a general observation without reference to any particular judgment and without reference to the facts of this case. In DDA vs. Sukumar Jain which is relied upon by the petitioner, it has been held that without evidence it cannot be held that the undertaking was given under duress. In the present case, the undertaking was given on 28.08.2017 and it was withdrawn vide letter 11.12.2019 C56 at page 466 of the compilation. The Ld. Arbitrator did not consider that the undertaking was withdrawn after more than two years and he did not mention any compelling reason for the respondent to remain silent on this issue for such long period.

(60). In view of the above discussion, it is held that the decision of claim no. 9 has been made without evidence and against the law laid down by Hon'ble Supreme Court and by the Hon'ble High Courts. The decision has resulted into windfall and bounty to the respondent. The decision shocks the conscience of



the court. Accordingly it is held that the decision of Ld. Arbitrator on claim no. 9 also cannot be sustained.”

66. Mr. Malhotra submitted the delay in completion of work was solely attributable to the respondent. According to him, this is evident from the extension of time granted in favour of the appellant till the actual date of completion without levy of any liquidated damages/compensation.

67. We note, the learned District Judge was of the view that the computation of damages should not have been whimsical and absurd resulting in a windfall and bounty for one party at the expense of the other. Reliance was placed on Clause 15 for the grant of compensation to the contractor.

68. According to the learned District Judge, the clause provides that the contractor may be given reasonable compensation to cover the salaries/wages paid by him to his employees and labour at site, remaining idle and adding to the total thereof @ 2% to cover indirect expenses of the contractor. He also held that the contractor has to submit the claims supported by details within the time prescribed under the clause.

69. There is a finding that the contractor should have supported its claims through evidence. Reference has been made to the judgment in the case of **Unibros v. All India Radio, 2023 INSC 931** wherein, it was held that the Hudson Formula cannot be applied without evidence.

70. Mr. Malhotra has not placed before the Court any evidence or any document to show that the appellant has in fact suffered the losses on account of overheads because of the delay in completing the work. Surely,



in the absence of any evidence, the learned Arbitrator could not have determined the overheads as 5% of the total contractual value.

71. We are unable to understand when there was no evidence on record, how the invocation of the Hudson Formula would be tenable. In any case the finding of the learned District Judge reversing the finding of the learned Arbitrator is a plausible view based on the judgment referred to by the learned District Judge and it cannot be held to be an erroneous finding.

72. Similarly, insofar as claim no.11 is concerned, the same is on account of loss of profit and earning capacity due to prolongation of the project. The claim of the appellant was for Rs.16,10,798/-. The learned Arbitrator has granted an amount of Rs.5,36,933/- without any interest. The finding of the learned District Judge on this claim is similar to the one as was given by him to claim no.9.

73. In this case, the learned Arbitrator took the percentage of profit as 7.5%. However, the loss of profit was held at the rate of 2.5% which was considered to be reasonable by the learned Arbitrator. In fact, the learned Arbitrator by relying upon the judgment of the Madhya Pradesh High Court in *M/s Saluja Construction Company v. State, (2001) ILR 1394* has held that the claim for loss of profit cannot be granted without evidence. It has also relied upon the judgment of this Court in *Delhi Integrated Multi Modal Transit System Ltd. v. R S Sharma, (supra)*. Suffice to state, in paragraph 23 of *Batliboi (supra)*, the Supreme Court has observed that to claim loss of profit the builder/contractor has to prove that there was other work available that he would have secured but for the delay, by producing invitations to



tender which were declined due to insufficient capacity to undertake other work. The same could have been proved from books of accounts to demonstrate drop in the turnover by establishing that this has resulted from the delay rather than from extraneous causes. The conclusion drawn is that a decision without any evidence is patently illegal.

74. Though the learned Arbitrator has maintained the loss of profit at 2.5% which quantifies as Rs.5,36,933/-, in the given facts, the award was rightly set aside as there was no evidence to show that the appellant had actually suffered loss of profit because of the prolongation of the contract which is attributable to the respondent herein.

75. At least, nothing has been pointed to us by Mr. Malhotra to show that there was enough evidence produced from the books of accounts to highlight loss of profits. Having said that, one issue that requires consideration is that the learned Arbitrator has granted the amount payable by the respondent to the appellant under claim no.2 and directed that the same be treated as cost to the respondent. In this petition under Section 37 of the Act, we are of the view that the appellant having succeeded before the learned Arbitrator, wherein, the learned Arbitrator had granted the amount as interest against the 8th R A bill to state that the said amount shall be treated as cost to the respondent, is clearly untenable.

76. A claim which was validly awarded by the learned Arbitrator to the appellant cannot be directed to be paid to the opposite party i.e. the respondent herein, as cost. It is not known whether such a plea was raised by the respondent before the learned Arbitrator. It must be stated that the claim



no.2 which has been partially allowed shall enure to the benefit of the appellant and the conclusion drawn by the learned District Judge to hold the amount be treated as cost to the respondent is liable to be set aside. We order accordingly.

77. In so far as claim no.12 is concerned, the learned Arbitrator has awarded interest at the rate of 8.5% per annum on the awarded amount to be paid within 90 days from the date of the publication of the award, but failure to pay within 90 days, shall result in payment of interest at the rate of 10% per annum.

78. Suffice to state, the amount of Rs.1,28,689/- shall be paid to the appellant with interest at the rate of 8.5% per annum.

79. Insofar as the judgments relied upon by Mr. Malhotra, which we have referred to in paragraph 22 of this order are concerned, they primarily are relatable to the scope of judicial review of proceedings under Section 34 of the Act.

80. Having seen those judgments, we are of the view that in view of our findings above, the judgments are clearly distinguishable on facts and as such are not applicable.

81. We accordingly dispose of the present appeal.

V. KAMESWAR RAO, J

VINOD KUMAR, J

NOVEMBER 14, 2025

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