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

Judgment reserved on: 18.07.2024

Judgment pronounced on:.19. 11 .2024

\+ **O.M.P. (COMM) 48/2020 & I.A. 1401/2024**

NETAJI SUBHASH INSTITUTE OF TECHNOLOGY .....Petitioner

Through: Ms. Avnish Ahlawat, Standing Counsel with Mr. NK Singh, Ms. Laavanya Kaushik, Ms. Aliza Alam, Mr Amitesh Chadha and Mr. Mohnish Sehrawat, Advs.

versus

M/S SURYA ENGINEERS & ANOTHER .....Respondents

Through: Ms Gunjan Sinha Jain and Mr Animesh Tripathi, Advs.
Mr. Ishaan Mukherjee, Adv.

\+ **OMP (ENF.) (COMM.) 8/2024**

M/S SURYA ENGINEERS .....Decree Holder

Through: Ms Gunjan Sinha Jain and Mr Animesh Tripathi, Advs.
Mr. Ishaan Mukherjee, Adv.

versus

NETAJI SUBHAS UNIVERSITY OF TECHNOLOGY .....Judgement Debtor

Through: Ms. Avnish Ahlawat, Standing Counsel with Mr. NK Singh, Ms. Laavanya Kaushik, Ms. Aliza Alam, Mr Amitesh Chadha and Mr. Mohnish Sehrawat, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, (J)

O.M.P.(COMM) 48/2020

1. This is a petition under section 34 of the Arbitration and Conciliation Act, 1996 seeking setting aside of the impugned Arbitral Award dated 04.08.2007 passed by the respondent no. 2, i.e. the learned Arbitrator.

2. The petitioner has impleaded the learned Arbitrator in the present petition. This is an unusual practice and should be deterred. The Arbitrator is not a party to the proceedings but sits as an adjudicator over the dispute between the parties. He is a creature of the agreement to adjudicate the inter-se disputes arisen between the parties and not personally involved or personally liable in any other way**.** Impleadment of Arbitrators, as parties to the proceedings under section 34 of the Arbitration and Conciliation Act, 1996, have the potential to jeopardize the sanctity of arbitral proceedings, especially since adequate framework for challenging the decision taken by the Arbitrator is in existence. In this view, the impleadment of the Arbitrator need not be done. Respondent No. 2 is deleted from the array of parties.

3. Henceforth, respondent no. 1 is being referred to as 'respondent'.

Facts

4. The brief facts encapsulating the present petition are as under:-

a. The work for "*Construction of NSIT Complex (Phase-III) Part II at Sector 3, Dwarka, New Delhi-110045. SH: Extension of Library Building & Computer Centre at NSIT, Sector-3, Dwarka*" was awarded by the petitioner to the respondent(which was a partnership firm at the time of entering in the contract but is now a sole proprietorship firm) *vide* Agreement dated 29.08.2003.

b. Since the respondent did not adhere to provisions of the contract and the work was not completed within time (including the extended period), the contract was rescinded by the petitioner on 09.05.2005. It is stated that the work got done at the risk and cost of the respondent from M/s. Pt Munshiram & Associates (Pvt.) Ltd..

c. The disputes between the parties were referred to arbitration before learned Sole Arbitrator.

d. The respondent was the claimant before the learned Arbitrator and raised claims of Rs. 1,99,14,072.8/-under the following heads:

Claim No. 1	*Work done but not paid*	*Rs. 18,34,463.73/-*
Claim No. 2	*Escalation payments under clause 10C of the contract for increase in the prices of the materials*	*Rs. 49,90,618/-*
Claim No. 3	*Refund of Security Deposit*	*Rs. 5,00,000/-*
Claim No. 4	*Damages sustained on account of loss of material, tools and Plants, shuttering material etc and for the advances made to suppliers due to unjustified rescission of the contract*	*Rs. 15, 83,475/-*
Claim No. 5	*Damages towards idling of manpower, staff and machinery due to various breaches*	*Rs. 77,52,061.67/-*
Claim No. 6	*Damages due to loss of expected profits of the work that remained to be executed due to illegal rescission of the contract*	*Rs. 32,53,454.40/-*
Claim No. 7	*PRE-SUIT, PENDENTE LITE AND - FUTURE INTEREST*	*@ 18% PER ANNUM*
Claim No. 8	*Litigation Costs*	*Rs. 80,000/-*

e. The petitioner also raised counter claims for Rs. 2,36,27,280/- under the following heads:

Counter Claim No.1	Compensation under Clause 2 of the Contract	*Rs. 44,83,616/-*
Counter Claim No.2	Damages compensations for the work remaining incomplete/unexecuted by the claimant under clause 3 of the contract	*Rs. 1,82,42,056/-*

Counter Claim No. 3	Ground Rent for the land made available	*Rs. 1,05,273/*
Counter Claim No. 4	Salary/wages of the Supervisory Staff	*Rs. 3,95,335/-*
Counter Claim No. 5	Litigation Expenses	*Rs. 4,00,000/-*
Counter Claim No.6	*Interest*	*@ 18%*

f. The learned Arbitrator *vide* Impugned Award dated 04.08.2007 allowed the claims of the respondent and rejected the counter claims of the petitioner on the ground that the rescission of the contract by the petitioner was unjust and unwarranted and that the work mainly got delayed on account of late issue of the structural drawings by the petitioner. The learned Arbitrator awarded the following amounts in favour of the respondent *vide* Award dated 04.08.2007:-

i. **Claim No. 1 (Work done but not paid):** The learned Arbitrator awarded an amount of Rs. 11,05,447/- in favour of the claimant/respondent.

ii. **Claim No. 2 (Escalation payments under clause 10(c) of the contract for increase in the price of the materials):** The learned Arbitrator awarded an amount of Rs. 40,00,000/- in favour of the claimant/respondent.

iii. **Claim No. 3 (Refund of Security Deposit):** The learned Arbitrator awarded an amount of Rs. 5,00,000/- in favour of the claimant/respondent.

iv. **Claim No. 4 (Damages sustained on account of loss of material, tools and plants, shuttering material etc. and for the advances made to the suppliers due to unjustified rescission of the**

contract.): The learned Arbitrator awarded an amount of Rs. 8,04,827/- in favour of the claimant/respondent.

v. **Claim No.5 (Damages towards idiling of manpower, staff and machinery due to the respondents various breaches of the contract):** The learned Arbitrator awarded an amount of Rs. 43,13,645.67/- in favour of the claimant/respondent.

vi. **Claim No. 6 (Damages due to loss of expected profits on the work that remained to be executed due to illegal rescission of the contract):** The learned Arbitrator awarded an amount of Rs. 4,00,000/- in favour of the claimant/respondent.

vii. **Claim No. 7 (Interest):** The learned Arbitrator awarded (i) Pre-suit Interest on the amounts awarded in claim no. 1 and 3 from 01.09.2005 to 4.12.2006 @ 12% per annum. (ii) Pendente lite Interest from 5.12.2006 up to the date of publication of this award on the amounts awarded against claim nos. 1,2,3,4 and 6 @ 12% per annum. (iii) No future interest was awarded if the award was implemented within three months. If the award was not implemented in this period of 3 months, interest @ 12% per annum on claim nos. 1,2,3,4,6 and 8 from one day after the date of publication till the date the award is actually implemented.

viii. **Claim No. 8 (Litigation Cost):** The learned Arbitrator awarded an amount of Rs. 80,000/- in favour of the claimant/respondent.

5. It is this Award that is under challenge in the present petition.

Finding of the learned Arbitrator regarding delay attributable to the petitioner

Submissions by the petitioner

6. It is submitted by Mrs. Ahlawat, learned counsel for the petitioner that the contract was to be completed within 16 months from the date of the commencement, i.e. from 24.08.2003 to 23.12.2004. The contract was

provisionally extended for another five months, i.e. till 23.05.2005, however since the respondent no.1 did very little work during the said extension, the petitioner rightly rescinded the contract on 09.05.2005. The respondent till the date of rescission had only completed 49% of the work stipulated in the agreement and therefore, the petitioner was within its right to rescind the contract.

7. The petitioner submits that the site was handed over on 21.08.2003 and the demolition for extension of the project site started on 24.08.2003. All the major drawings for all floors (including doors, windows, sections, plumbing and structural details) were made available in between 26.08.2003 to 28.08.2003 and not on 24.11.2003, as held by the learned Arbitrator. In addition, the petitioner submits that about 46 drawings were issued between 26.08.2003 to 17.11.2003 (*i.e. 33 number of drawings on 28.08.2003, 7 number of drawings on 07.10.2003, 05 drawings on 14.11.2003 and 1 number of drawing on 17.11.2003*) and any clarification sought, was duly attended to by the Engineer-in-charge present at the site.

8. The petitioner submits that the learned Arbitrator failed to appreciate that drawings were made available before laying of RCC slabs, however it was the respondent who did not execute the work. The minor clarifications were recorded in the revised drawings, however there was no hindrance in the work because of non-issue of revised drawings. The petitioner has given details of revisions in drawings and clarifications for different floors.

9. Further, it submitted by the petitioner that the learned Arbitrator has wrongly observed that the extension of five months given by the Engineer-in-charge was not based on any analysis done to ascertain the reasonable time required but was purely on guess work and Ad-Hoc basis. It is stated that the contractor/respondent did not seek any extension and the extension granted was also not disputed. The respondent was supposed to complete RCC work for four floors within five months, however the contractor took 3 and a half months for

completing RCC work for just one floor showing inadequate manpower available with the respondent.

10. With respect to the finding by the learned Arbitrator that the delay was attributable due to non-approval of the source of the machine-moulded bricks, the petitioner submits that the same is patently incorrect and against the express provisions contained in Clause 1.2 of the Special Conditions of Contract (SCC), which reads as under:-

> *"1.2 The good quality machine moulded bricks are not available in Delhi and shall have to be arranged from Chandigarh or nearby area. Nothing extra shall be paid for royalty, carriage, sales tax, octroi etc."*

11. The petitioner submits in terms of clause 1.6.4.2 of the SCC the RCC work could have started only after getting M-20 and M-25 approved by an approved laboratory. It is stated that the respondent delayed the submission of the sample of concrete mix with the Engineer-in-charge and therefore the delay is attributable to the respondent. Clause 1.6.4.2 of SCC reads as under:-

> *"1.6.4.2. The source and quality of all ingredients of a concrete mix shall be got approved from the Engineer-in-Charge before designing the mixes and their testing and the same shall be maintained during the execution of the work as well."*

12. In view of the above clause, the petitioner submits that no approval or decision was required to be given by the petitioner and it is the respondent who has failed to execute the exposed brick work in term of the express provisions of contract.

Submissions by the respondent

13. The respondent submits that the petitioner is intending to conduct a fishing and roving enquiry, which does not fall under the purview of 'patent *illegality,'* as envisaged under the Arbitration and Conciliation Act, 1996.

14. The respondent submits that the petitioner has failed to show any illegality in terms of any contravention of any substantial law or terms of the

contract but the objections raised are primarily on the ground that the learned Arbitrator failed to consider the factum and evidence on record regarding the delay attributable to the respondent.

15. The respondent submits that the learned Arbitrator was a technical person, who was the retired Engineer-in-charge of CPWD. The Arbitrator has gone through the evidence and the same can also be seen by a perusal of para 2.3 the Impugned Award. Para 2.3 of the Award reads as under:-

> *"2.3 I have studied carefully the voluminous documentary evidence filed by the parties in support of their contentions and have also carefully considered the pleadings, oral and written, as made by the parties. The claimants' main stress for not being able to complete the work in the stipulated contract period was on the delayed issue of the structural drawings which were not made available to them in the beginning of the work itself and it was because of this that the work could not be properly planned and executed with the required pace. ....."*

16. The respondent submits that the drawing register of the petitioner clearly shows that multiple revisions of drawings on various crucial aspects were made from time and time. Additionally, there is nothing on record to show that only minor clarifications were required and the same were cleared by the Engineer-in-charge, present on the site, verbally and in real time.

17. Even in terms of the machine moulded bricks, the respondent submits that the petitioner has only raised factual grounds, predicated upon re-appreciation of evidence, which is impermissible, in a petition under section 34 of the Arbitration and Conciliation Act, 1996. The respondent states that the petitioner never earlier contended in its Statement of Defence that its approval/permission is not required for procuring the machine-made bricks from areas other than Chandigarh or nearby areas, rather as per the contract prior permission was required for even bricks used for construction of hut for labourers (Clause 19H of GCC). The respondent relies on clause 1.2.12 of SCC to show the

requirement of prior permission for sample of materials, including bricks, which reads as under:-

> *"1.2.12 SAMPLE OF MATERIALS:*
> *The contactor shall submit to the Engineer-in-Charge samples of all materials/work to be performed for approval before bringing bulk supplies and before commencing the work. These approved samples shall be preserved and retained in the custody of the Engineer-in-charge as standards of materials and workmanship till the completiton of the work. The cost of such samples shall be borne by the Contractor and nothing shall be payable on this account. Testing charges, shall be borne by the Institute.*
> *In case sample of materials fails in the Laboratory, the testing charges shall be recovered from the contractor's account."*

18. The respondent submits that under clause 5 of the contract, the Superintending Engineer was required to take a decision on extension of time considering the reasons for delay. A bare perusal of the termination letter shows that there is a total non-consideration of the reply of the respondent to the show-cause notice and there is total non-consideration of the petitioner's own lapses which caused delay in completion of the project.

19. ***Claim No. 1:*** **Work done but not paid:**

Submissions by the petitioner

20. The petitioner submits that all the running bills, except the last running bill for an amount of Rs 3.73 lakhs, were duly paid for, and there was no bill amounting to Rs. 90 lakhs, therefore the learned Arbitrator should have held that there is no delay in payment of bills, instead of holding there was no appreciable delay.

21. The petitioner states that the amount of Rs. 7,29,088/- was awarded on account of shutter finish of RCC surface against item 3.5 of BOQ (Bill of Quantity), however since the objective of shutter finish was not achieved, the extra payment could not have been made. The petitioner relies on the entries in

the Site Order Book dated 29.10.2004 and 19.01.2005 which clearly shows that shutter finish was not done.

Submissions by the Respondent

22. The respondent submits that the petitioner has relied on photographs and entries in the Site Order book to state that RCC work was defective, however the same was rejected by the learned Arbitrator. The learned Arbitrator observed that there was no submission that the shutter finish work was not meeting technical specifications since there was no complaint. Other than a few columns, the petitioner never asked the respondent to redo any work

23. The respondent further submits that the technical view of the Arbitrator cannot be substituted/reviewed by the court under the limited jurisdiction under section 34 of the Arbitration and Conciliation Act, 1996 on the basis of some photographs and entries in the Site Order book, which too had been duly considered by the learned Arbitrator.

Claim No. 2: Escalation payments under clause 10(c) of the contract for increase in the price of the materials:

Submissions by the petitioner

24. The petitioner submits that the claim and awarded amount for escalation in steel price is contrary to clause 10C of the GCC and the same is only permissible if the increase is a direct result of any fresh law, statutory rule or order (but not due to any change in sales tax) and such increase exceeds 10% of the price and or wage prevalent at the time of last stipulated date of receipt of tender including the extension. Clause 10C reads as under:-

> *"**CLAUSE 10 C***
> *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 works (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) and such increase exceeds ten per cent of the price and/or wages prevailing at the time of the last stipulated date for receipt of the tenders including extensions if any for the work, and the contractor thereupon necessarily and properly pays in respect of that material (incorporated in the works) such increased price and/or in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied, provided always that any increase so payable is not, in the opinion of the Superintending Engineer (whose decision shall be final and binding on the contractor) attributable to any delay in the execution of the contract within the control of the contractor.

Provided, however, no reimbursement shall be made if the increase is not more than 10% of the said prices/wages, and if so, the reimbursement shall be made only on the excess over 10% and provided further that any such increase shall not be payable if such increase has become operative after the contract or extended date of completion of the work in question.

If after submission of the tender, the price of any material incorporated in the works (not being a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 thereof) and/or wages of labour is decreased as a direct result of the coming into force of any fresh law or statutory rules or order (but not due to any changes in sales tax) and such decrease exceeds ten per cent of the prices and/or wages prevailing at the time of receipt of the tender for the work. Government shall in respect of materials incorporated in the works (not being materials supplied from the Engineer-in-Charge's stores in accordance with Clause-10 hereof) and/or labour engaged on the execution of the work after the date of coming into force of such law statuary rule or order be entitled to deduct from the dues of the contractor such amount as shall be equivalent to the difference between the prices of the materials and/or wages as prevailed at the time of the last stipulated date for receipt of tenders including extensions if any for the work minus ten per cent thereof and the prices of materials and/or wages of labour on the coming into force of such law, statutory rule or order.

The contractor shall, for the purpose of this condition, keep such books of account and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorised representative of the Government, and further shall, at the request of the Engineer-in-Charge may require any documents so kept and such other information as the Engineer- in-Charge may require.

The contractor shall, within a reasonable time of his becoming aware of any alteration in the price of any such material and/or wages of labour, give notice thereof to the Engineer- in-Charge stating that the same is given pursuant to this condition together with all information relating thereto which he may be in position to supply."

25. The petitioner submits that there is no ambiguity in the phrase of "Statutory Rule or Order" in clause 10Csince the same is made applicable to all government contracts by all the government agencies. Therefore, giving a different interpretation and applying the *Contra Proferentum* Rule by the learned Arbitrator gave undue benefit to the respondent/contractor, which is against public policy. It is submitted that a wholesale price index issued by the Ministry of Commerce is only an indication of the escalation of the price and not any rule/order contemplated under clause 10 C.

Submissions by the respondent

26. The respondent submits that the petitioner has failed to make out a case of implausible interpretation. It is submitted that the learned Arbitrator has rightly interpreted the term 'order' under the clause 10C. Reliance is placed on the judgment of the Supreme Court in ***Consolidated Coffee Limited v Coffee Board (1980) 3 SCC 358,*** *the operative portion of which reads as under**:-***

*"**14.** In the first place the concerned phrase speaks of two things in disjunctive: "agreement" or "order". The word "order" which appears in a statute dealing with sales tax must be understood in a commercial sense, that is, in the sense in which traders and commercial men will understand it. In commercial sense an order means a firm request for supply of definite goods emanating from a buyer, an indent placed by a*

purchaser and, therefore, an order for or in relation to export would mean an indent from a foreign buyer. It is not possible to accept the contention urged by counsel for the petitioners that the word "order" in this phrase can mean or refer to an order, direction, mandate, command or authorisation to export that may be issued by a statutory body like the Coffee Board for two reasons; first, occurring in a sales tax statute the word must be given its commercial meaning and, secondly, while enacting the provision Parliament could not be said to have only statutory bodies like Coffee Board or STC in mind. If, therefore an order for export in the concerned phrase means an indent from a foreign buyer, the preceding word "agreement" in the phrase would take colour from the word "order" and would on the principle of noscitur a sociis mean an agreement with a foreign buyer. In Maxwell on the Interpretation of Statutes (at p. 289, 12th Edn.) the rule of noscitur a sociis is explained thus:

> *"Where two or more words, which are susceptible of analogous meaning, are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."*

Applying this rule of construction it becomes clear that "the agreement" occurring in the phrase must mean the agreement with a foreign buyer and not the agreement with a local party containing a covenant to export. Secondly, and more importantly, the user of the definite article "the" before the word "agreement" is, in our view, very significant. Parliament has not said "an agreement" or "any agreement" for or in relation to such export and in the context the expression "the agreement" would refer to that agreement which is implicit in the sale occasioning the export. Between the two sales (the penultimate and the final) spoken of in the earlier part of the sub-section ordinarily it is the final sale that would be connected with the export, and, therefore, the expression "the agreement" for export must refer to that agreement which is implicit in the sale that occasions the export. The user of the definite article "the", therefore, clearly suggests that the agreement spoken of must be the agreement with a foreign buyer. As a matter of pure construction it appears to us clear, therefore, that by necessary implication the expression "the agreement" occurring in the relevant

phrase means or refers to the agreement with a foreign buyer and not an agreement or any agreement with a local party containing the covenant to export."

27. The respondent submits that interpretation of terms of contract falls within the domain of the learned Arbitrator and the principle of *contra proferentum* is applicable to interpret such term against the drafter of the Agreement, if the contractual term were ambiguous. Further, the respondent states that Penta Test for applying the principle of business efficacy would be applicable and the judgment of *Nabha Power Limited v Punjab State Power Corporation Limited &Anr*, (2018) 11 SCC 508) in this regard reads as under:-

"49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. The development of law saw the "five condition test" for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious Bystander Test". This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society and Attorney General of Belize v. Belize Telecom Ltd. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

28. Further, the respondent relies on the judgment of this court in ***Prem Chand Sharma & Co v DDA & Anr,*** **2005(85) DRJ 305**, to state that clause 10C would cover the increase in prices of steel by the selected vendors and CPWD price index. The operative portion reads as under:-

> *"**4.** Claim no 4 arises from the price escalation clause 10-C. It is not in dispute that the amount under this clause would be payable on account of statutory increase if during the progress of the work the price of any material incorporated in the work and of wages of labour increase more than ten per cent. The grievance of the respondent is that the arbitrator has erroneously relied upon the CPWD cost index which does not amount to a statutory increase. It is thus contended that the cost escalation made on the basis of the CPWD cost index could not form the basis of awarding an amount under clause 10-C of the conditions of the contract.*
>
> ***5.** A reading of the award shows that these CPWD tabulations were contested on the ground that they were not binding on the respondent-authority and further the CPWD rates of escalation do not reveal the basis on which the escalation has been worked out. The arbitrator found that the building cost index circulated by the CPWD is rightly recognized method of working out the cost escalation and the respondent had given no convincing reason why this methodology should not be adopted for purposes of objection under clause 10-C. I find no infirmity in the approach of the arbitrator. The CPWD rates are not private rates but are rates of escalation of statutory authorities which have been relied upon for purposes of arriving at the escalation figure. It is not as if the respondent has produced some other material to come to the conclusion that a different figure of escalation should have been awarded under clause 10-C. I thus find no merit in the objections."*

Claim No. 3: Refund of Security Deposit:

Submissions by the petitioner

29. The petitioner submits that the contract had been rescinded in accordance with clause 3 of GCC. Clause 3 of GCC reads as under**:-**

> "***Clause 3***
>
> ……

a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contract under the hand of the Engineer-in-Charge shall be conclusive evidence). Upon such determination or recession the full security deposit recoverable under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the Government. If any portion of the Security Deposit has snot been paid or received it would be called for and forfeited.

……

Provided further that if any of the recoveries to be made while taking action as per (b) and/or (c) above are in excess of the security deposit forfeited, these shall be limited to the amount by which the excess cost incurred by the Department exceeds the security deposit so forfeited."

30. The respondent had delayed work and only completed 44.36% of the work till by stipulated date of completion, i.e. 23.12.2004 and could complete 5% of the work during the extended period. Since work came to a standstill, the petitioner was compelled to rescind the contract as the respondent is not ready and willing to complete the contract.

Submissions by the respondent

31. The respondent submits that since the contract was unjustly and illegally terminated, the respondent is liable to refund of its forfeited security amount on the principle of restitution.

Claim No. 4: Damages sustained on account of loss of material, tools and plants, shuttering material etc. and for the advances made to the suppliers due to unjustified rescission of the contract.

Submissions by the petitioner

32. The petitioner submits that the finding of the learned arbitrator that the rescission was unjust is incorrect. The site was at complete stalemate due to the inaction and delay of the contractor/respondent and therefore clause 14 of GCC which permitted petitioner to recover expenditure incurred by the petitioner from monies due to respondent/contractor was invoked. The Clause 14 of GCC reads as under:-

"***CLAUSE 14-***

Cancellation of contract in full or part

If contractor:

i) at any time makes default in proceeding with the works or any part of the work with the due diligence and continues to do so after a notice in writing of 7 days from the Engineer-in-Charge;

ii) or commits default to complying with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-Charge; or

iii) fails to complete the works or items of work with individual dates of completion, on or before the date(s) of completion, and does not complete them within the period specified in a notice given in writing in that behalf by the Engineer-in-Charge; or

iv) shall offer or give or agree to give to any person in Government service or to any other person on his behalf any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any action relation to the obtaining or execution of this or any other contract for Government; or

v) shall enter into a contract with Government in connection with which commission has been paid or agreed to be paid by him or to his knowledge, unless the particulars of any such commission and the terms of payment thereof have been previously disclosed in writing to the Accepting Authority/Engineer-in-Charge; or

vi) shall obtain a contract with Government as a result of wrong tendering or other non-bonafide methods of competitive tendering; or

vii) being an individual, or if a firm, any partner thereof shall at any time be adjudged insolvent or have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition (other than a voluntary liquidation for the purpose of amalgamation or reconstruction) under any Insolvency Act for the time being in force or make any conveyance or assignment of his effects or composition or arrangement for the benefit of his creditors or purport so to do, or if any application be made under any Insolvency Act for the time being in force for the sequestration of his estate or if a trust deed be executed by him for benefit of his creditors; or

viii) being a company, shall pass a resolution or the Court shall make an order for the winding up of the company, or a receiver or manager on behalf of the debenture holders or otherwise shall be appointed or circumstances shall arise which entitle the Court or debenture holders to appoint a receiver or manager; or

ix) shall suffer an execution being levied on his goods and allow it to be continued for a period of 21 days; or

x) assigns, transfers, sublets (engagement of labour on a piece-work basis or of labour with materials not to be incorporated in the work, shall not be deemed to be subletting) or otherwise parts with or attempts to assign, transfer sublet or otherwise parts with the entire works or any portion thereof without the prior written approval of the Accepting Authority;

The Accepting Authority may, without prejudice to any other right or remedy which shall have accrued or shall accrue hereafter to Government, by a notice in writing to cancel the contract as a whole or only such items of work in default from the Contract.

The Engineer-in-Charge shall on such cancellation by the Accepting Authority have powers to:

(a) take possession of the site and any materials, constructional plant, implements, stores, etc., thereon; and/or

(b) carry out the incomplete work by any means at the risk and cost of the contractor.

On cancellation of the contract in full or in part, the Engineer-in-Charge shall determine what amount, if any, is recoverable from the contractor for completion of the works or part of the works or in case the works or part of the works is not to be completed, the loss of damage suffered by Government. In determining the amount, credit shall be given to the contractor for the value of the work executed by him up to the time of cancellation, the value of contractor's materials taken over and incorporated in the work and use of plant and machinery belonging to the contractor.

Any excess expenditure incurred or to be incurred by Government in completing the works or part of the works or the excess loss or damages suffered or may be suffered by Government as aforesaid after allowing such credit shall without prejudice to any other right or remedy available to Government in law be recovered from any moneys due to

the contractor on any account, and if such moneys are not sufficient the contractor shall be called upon in writing and shall be liable to pay the same within 30 days.

If the contractor shall fail to pay the required sum within the aforesaid period of 30 days, the Engineer-in-Charge shall have the right to sell any or all of the contractors' unused materials, constructional plant, implements, temporary buildings, etc. and apply the proceeds of sale thereof towards the satisfaction of any sums due from the contractor under the contract and if thereafter there be any balance outstanding from the contractor, it shall be recovered in accordance with the provisions of the contract.

Any sums in excess of the amounts due to Government and unsold materials, constructional plant, etc., shall be returned to the contractor, provided always that if cost or anticipated cost of completion by Government of the works or part of the works is less than the amount which the contractor would have been paid had he completed the works or part of the works, such benefit shall not accrue to the contractor."

33. In terms of clause 14 of GCC, the petitioner submits that a notice of 30 days was served upon the respondent on 12.12.2006 to pay the extra cost incurred in completing the balance work namely Rs. 1,53,62,653/-. Since the same remained unpaid, the petitioner issued press notice to sell the material and tools & plants(T&P) of the respondent/contractor.

34. The petitioner submits that the respondent no.1 had raised the said issue before the Arbitrator and no order was passed restraining the petitioner from selling the same. Further, the respondent no.1 itself abstained from participating in the open auction/sale.

35. It is submitted that the petitioner sold the said materials for a sum of Rs. 1,65,045/-, however the learned Arbitrator without any basis or evidence on the quality and condition of the said items, awarded a sum of Rs. 8,04,827/- in favour of the respondent.

Submissions by the respondent

36. The respondent submits that the present claim has also been awarded on account of the unjust termination notice and the said finding is based on detailed pleading and factual details.

37. It is submitted that the learned Arbitrator has awarded the amount after detailed analysis on the quantification of the amounts, since the unilateral auction of material could not have been done. In addition, the auction price did not reflect the actual value of the auctioned goods.

Claim No.5 (Damages towards idling of manpower, staff and machinery due to the respondents various breaches of the contract):

38. The petitioner has not raised any grounds of challenge under the said claim.

Claim No. 6: Damages due to loss of expected profits on the work that remained to be executed due to illegal rescission of the contract

39. The petitioner submits that there is no evidence that the respondents could have finished/completed the work within reasonable time, therefore there is no question of payment of loss of expected profits. The contract was rescinded on account of slow pace of work of the respondent and was done in accordance with the terms of the contract, hence the Arbitrator erred in not appreciating the non-fulfilment of obligations by the respondents and therefore an award of 2% on balance work is patently perverse.

40. The respondent submits that question of loss of expected profits on balance works is squarely covered by the judgment of the Hon'ble Supreme Court **in *A.T. Brij Paul v State of Gujarat (1984) 4 SCC 59*.** The operative portion reads as under:-

> *"11. Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by*

the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.

41. In view of the above, the respondent submits that it is entitled to receive expected profit as a percentage of value of the balance work. Though, a percent of 15% is propounded as a norm in *A.T. Brij Paul (Supra)*, the learned Arbitrator has only awarded 2% of the balance value of works on account of loss of profit.

Claim No. 7 (Interest):

42. The petitioner submits that the awarded interest @12% is exorbitant especially since the commercial rate for long term fixed deposit is between 6% to 7%.

Claim No. 8: Litigation expense:

43. The petitioner submits that other than payment of Rs. 40,000/- to learned Arbitrator, nothing is on record to show expenses incurred in litigation.

44. The respondent submits that the amount of Rs. 80,000/- towards litigation is fair and reasonable, considering the expenses incurred.

Counter Claim No.1: For Compensation under clause 2 GCC

45. The petitioner submits that the respondent is liable for non- completion of the project within the stipulated time and therefore is bound to pay compensation of Rs. 44,83,616/- in terms of clause 2 of GCC, which reads as under:-

"CLAUSE 2
COMPENSATION FOR DELAY

If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below or such smaller amount as the

Superintending Engineer (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/week (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete. This will also apply to items or group of items for which a separate period of completion has been specified.

i) Completion period (as originally stipulated) not exceeding 3 months @ 1% per day.
ii) Completion period (as originally stipulated) exceeding 3 months @1% per week.

Provided always that the total amount of compensation for delay to be paid under this Condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set- off against any sum payable to the Contractor under this or any other contract with the Government."

46. The respondent submits that the rejection of counterclaim is due to the fact that the rescission of contract has been declared illegal and unjust by the learned Arbitrator and correctly so. Without prejudice, the petitioner has failed to show any actual loss suffered by it due to the alleged delay in **completion** of works.

Counter Claim No.2: Damages/Compensation for the work remaining incomplete/un-executed by the claimant under clause 3 of the contract

Submissions by the petitioner

47. The petitioner submits that in terms of clause 3 of the GCC, the petitioner is entitled to receive risk and cost amount for completion of balance work from the third party. In view of the fact that the contract was rightly rescinded between the parties, the respondent is liable to pay an amount of Rs. 1,53,31,293/- to the petitioner.

Submissions by the respondent

48. The respondent submits that the learned Arbitrator has come to the finding that the contract was rightly rescinded in the Impugned Award after a detailed analysis based upon the pleadings and evidence on record. In a limited jurisdiction under section 34 of the Arbitration and Conciliation Act, 1996, the same does not warrant any interference. This court cannot re-appreciate evidence as it does not act as an appellate court.

49. Further, the petitioner is also seeking allowing of: (a) Counter Claim No. 4 for an amount of Rs.3,95,335/- on account of Salary/wages paid to the supervisory staff; (b) Counter Claim No. 5 for an amount of Rs.4,00,000/- as litigation expenses; (c) Counter Claim No. 6, i.e. Claim of interest: *pendente lite* and future interest.

Analysis

50. Before proceeding with the objections raised by the petitioner, it is pertinent to mention the scope of interference under section 34 of the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court in *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, (2022) 2 SCC 275has summarized the position in law. The operative portion of which reads as under:-

> *"**14.** The law on interference in matters of awards under the 1996 Act has been circumscribed with the object of minimising interference by courts in arbitration matters. One of the grounds on which an award may be set aside is "patent illegality". What would constitute "patent illegality" has been elaborated in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], where "patent illegality" that broadly falls under the head of "Public Policy", has been divided into three sub-heads in the following words : (SCC p. 81, para 42)*
>
> > *"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three sub-heads:*
> >
> > *42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the*

sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

> *'**28. Rules applicable to substance of dispute**.—(1) Where the place of arbitration is situated in India,—*
>
> *(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;'*

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> *'**28. Rules applicable to substance of dispute**.—(1)-(2) * * *
> (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.'*

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

(emphasis supplied)

***15.** In SsangyongEngg. & Construction Co. Ltd. v. NHAI, speaking for the Bench, R.F. Nariman, J. has spelt out the contours of the limited scope of judicial interference in reviewing the arbitral awards under the 1996 Act and observed thus : (SCC pp. 169-71, paras 34-41)*

> *"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian*

law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco , as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders .

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of Associate Builders, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco, as understood in Associate Builders , and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest,

cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

(emphasis supplied)

16. *In Delhi Airport Metro Express (P) Ltd. [Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 1 SCC 131] referring to the facets of patent illegality, this Court has held as under : (SCC p. 150, para 29)*

> *"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."*
>
> *(Emphasis Supplied)*

51. With this being the position in law, I shall now be dealing with the contentions raised by the parties. The same can be classified under three heads: a) finding on delay attributable to the petitioner; b) wrongful interpretation of terms of the contract and c) interest and litigation costs.

Finding on delay attributable to the petitioner

52. In the present case, the fountainhead of all the disputes is whether the delay in completion of the project was attributable to the acts of the petitioner or

the respondent. The learned Arbitrator concluded that the delay in the work was attributable to the petitioner. The operative portion of the Award concluding the same reads as under:-

> *"2.9 I am therefore of the opinion that the work mainly got delayed on account of late issue of the structural drawings and because of the decision for the use of machine made bricks from Jhajjar coming up at a very late stage of the extended period. The delays in the issue of drawings are attributable purely to the respondents while the blame for late approval of the source of machine made bricks has to be shared by both the parties. Other reasons cited by the parties for the delay in the work are not of material nature as they were only minor irritants that did not contribute appreciably to the extension of the contract period. Apart from this, the extension of five months given by the engineer in charge of the respondents in December 2004 for completing the work was not based on any analysis done to ascertain the reasonable time required thereafter but was rather on an Ad-Hoc basis as clarified by them in the oral hearings. Clause 5 of the contract, under which the extension of time has to be sanctioned, designates the S.E. as the competent authority to decide how much extension of time is to be granted but the respondents have not produced any orders from him sanctioning the extension of time. The extension of time of five months was granted by the Engineer in Charge and it was he only who thereafter decided that no further extension was warranted; such a decision should have – been taken at the S.E.'s level only as per the condition of the contract. I do not find that the extension of time of five months given on 23.12.2004 to complete the remaining work was sufficient and reasonable and the respondents should have given more time for the same either at the time when they originally extended the stipulated date of completion or should have granted further extension to the claimants in the month of May 2005 when the first extension granted by them was on the verge of expiring. The claimants cannot be blamed for not being able to complete the work by the stipulated date of completion or by the extended date of completion. I also observe that there was very slow action on the part of the respondents in calling the risk and cost tender for the remaining work once they had rescinded the original contract of the claimant in May 2005. The tenders for the balance work were invited to be received*

on 18.9.2006 (nearly 16 months after the rescission) and the work was awarded only on 1.12.2006. This clearly indicates that there was hardly any urgency for completing this work. In view of all this, I do not find the rescission of the contract by the respondents on 9.5.2005 just and reasonable. In the absence of the orders of the S.E. concerning how much extension of time was justified, the decision to terminate the contract is also contractually incorrect."

53. The petitioner has challenged the said finding on various grounds, including a) that the drawings were supplied in time by the petitioner, contrary to the observation by the learned Arbitrator; b) that the work had stopped in March, 2005 based on site entries since there was no cement on site and the machine-moulded bricks were not procured by the respondent; c) there was no fault in extension of time by the petitioner; and (d) that the respondent failed in getting approval for M-20 and M-25 concrete from an approved laboratory.

54. Even though the scope under section 34 of the Arbitration and Conciliation Act, 1996 is limited and the court need not go into evidence, I am of the view that there was relevant material available before the learned Arbitrator and the same was duly considered to arrive at his finding that the delay is attributable to the petitioner. The said conclusion can be arrived in view of the following:-

55. With regard to non-issue of drawings, the learned Arbitrator in the Impugned Award has observed as under:-

"*2.3 I have studied carefully the voluminous documentary evidence filed by the parties in support of their contentions and have also carefully considered the pleadings, oral and written, as made by the parties. The claimants' main stress for not being able to complete the work in the stipulated contract period was on the delayed issue of the structural drawings which were not made available to them in the beginning of the work itself and it was because of this that the work could not be properly planned and executed with the required pace. Non issue of structural drawings in time and their revisions from time to time also effected the planning for the execution of the work, rotation of the shuttering and procurement of reinforcing steel of the required diameters in advance.*

The claimants have filed a tabular statement showing the issue of structural drawings to them from time to time and the revisions that each drawing had undergone. The respondents have pleaded that the claimants had been executing the concrete framework in a lethargic manner without keeping the time frame in mind; they have also filed a tabular statement showing the dates of issue of drawings viz. a viz. the actual dates of casting of various members of the RC.C. framework and have concluded from there that it was the claimants who delayed the work. It is seen from the details filed by the parties that number of revisions of the structural drawings issued by the respondents was taking place even after the good for construction drawings were issued. It is also a fact that the issue of structural drawings started from the date 24.11.2003 and continued up to 17.2.2005 when the scheduled date of completion of the work was 23.12.2004. It is clear from these dates that it was certainly not possible for the claimants to complete the work by the initial stipulated date of completion and that it would have been necessary to give a reasonable time to the claimants for completing the work after the stipulated date of completion….."

56. The petitioner has stated that all the drawings were made available to the respondent in between 26.08.2003 to 17.11.2003 and minor revisions were made immediately by the Engineer-in-charge on site. The learned Arbitrator observed that the issue of structural drawings continued till 17.02.2005, long after the stipulated date of completion of work, i.e. on 23.12.2004. The same can also be seen from entries in the Drawing Register before the learned Arbitrator. It is reproduced as under:-

S.No.	Drawing No.	Detail of drawing	No. of Sets	Date of Receipt	Date of Issue to Contract	Signature of J.E.	Signature of Contractor	Signature of AE/EE	Remarks.
111.	LB/S-701 R1	STRUCTURAL ARRANG. AT III Floor Level.	01 No	20-10-04	20-10-04.				
112.	LB/S-702 (Achrana Copy)	STRUCTURAL ARRANG. AT TERRACE LEVEL.	01 No.	19.10.04	20-10-04				
113.	SK-01	ALUMINIUM WINDOWS (SLIDING & FIXED)	01 No	01-11-04	01-11-04				
114.	SK-02	ALUMINIUM WINDOWS (CASEMENT WIN	01 No.	01-11-04	01-11-04				
115.	SK-03	ALUMINIUM DOORS	01 No	01-11-04	01-11-04				
116.	LB/S-702 (Achrana Copy)	Structural Arrgt. Terrace Level.	01 No.	08-11-04	08-11-04				
117.	LB/S-461 (Achrana Copy) (Sheet No. 1)	Beam Detail At Terrace Lvl.	01 No.	08-11-04	08-11-04				
118.	LB/S-462 (Achrana copy) (Sheet No. 2)	Beam Detail At Terrace Lvl.	01 No.	08-11-04	08-11-04				
119.	LB/S-463 (Achrana copy) (Sheet No. 3)	Beam Detail At Terrace Lvl.	01 No.	08-11-04	08-11-04				
120.	LB/S-702	STRUCTURAL ARRGMT. TERRACE Level	01 No.	09-12-04	10-12-04				
121.	LB/S-461	Beam Details At Terrace Lvl.	01 No.	09-12-04	10-12-04				
122.	LB/S-462	——— do. ———	01 No.	09-12-04	10-12-04				
123.	LB/S-463	——— do ———	01 No.	09-12-04	10-12-04				
124.	LB/S-702 R1	Structural Arrgt Terrace Level.	01 No.	23-12-04	24-12-04				
125.	LB/S-302-R1	Column Schedule.	01 No.	23-12-04	24-12-04				
126.	LB/S-703	STRUCTURAL ARRT. Machine Room Staircase Mumty Plan & Beam Details	02 No.	24-01-05	24-01-05				
127.	LB/S-703 Rev. R.	Structural Arrangement m/c Room, Stair-case Mumty Plan & Beam Details.	02 No.	17-2-05	17-02-05				
128.		Terrace floor Plan.	01 No	17-2-05	17-02-05				

57. The learned Arbitrator has placed reliance on this chart and come to the conclusion that the petitioner was revising drawings till 17.02.2005. The same is evident from the last couple of entries in the above said chart. That being so, it was not possible for the respondent to complete the construction till 23.12.2004, i.e. the stipulated date of completion.

58. The petitioner has attempted to suggest that the revised drawings were just minor clarifications and had no effect of delaying the work since the respondent at no point raised the said issue. The above stand of the petitioner is belied in view of the letter dated 19.04.2005 issued by the respondent categorically highlighting the fact that non-issue of structural drawings has delayed the project. The letter is reproduced as under:-

Surya Engineers

LIB-DWK - 2003-04/S 101

Date: 19-04-2005

The Executive Engineer
Netaji Subhas Institute of Technology
Azad Hind Fauj Marg, Sec-3, Dwarka
New Delhi - 110045

Sub: Extension of Library Building & Computer Centre at NSIT, Sec-3, Dwarka, New Delhi.
Ref.: Your letter no. F.201(586)/2001-02/LB&CC/E.Cell/NSIT/ 1354 dt. 30.03-05
Contract Agreement No.: 01/EE(C)/NSIT/2003-04

Dear Sir,

In continuation to our letter no. LIB-DWK - 2003-04/S99 dt. 12-04-05, our detailed reply to your above referred show cause notice is as under:-

The Tender for the above cited work was submitted on dt. 16-05-02. That due to some administrative reasons NSIT shows its inability in deciding the tender & requested for extention of validity of the tender by various letters for a period of 15 months approx. We kept on extended the validity & finally the contract was awarded on dt. 14/08/03.

As soon as the work was allotted to the undersigned agency, the agency immediately started the work at site by putting its full strength as desired. Although some minor problems were there at site by avoiding the same, the agency put its manual power, material & machinery etc. in a very short period. As you were very well aware about the non-availability of the steel from the RINL, SAIL, TATA but agency tried its best in procuring the steel and only by your intervention the RINL was able to supply the required steel. Although the agency requested several times to your office to make changes in brand/approved manufacture of steel etc. but all in vain and this is the first cause of delay in progress of the work.

Due to non-supply of structural drawings etc. we were unable to workout the factual dia wise requirement and due to this reason as apprehended by the agency steel prices increased day by day and negligence on the part of the department, steel could not be procured in one go and even after drawings were supplied, the RINL, SAIL, TATA failed to supply the same in one go. Even our various requests made to your office, you are adamant on your same decision in changing the brand of steel.

Although there are so many instances where the CPWD changed the approved brands in case of non-availability etc. (Copy of CPWD order already supplied to your office).

Contd.

Surya Engineers

By these reasons the progress got slow and we were compelled to procure the steel etc. in high rates and when you have taken the decision to procure the steel from the other brands it was too late and for a very small requirement it was made. Although you also provide us a copy of steel rates from your approved manufacturer which was in higher to our rates and by presuming that department is willing /ready to pay higher rates as it were in market, we procured the same.

It is well established from the records that due to non-supply of drawings/decisions on your part the work delayed which is totally out of our control.

That due to order of Hon'ble Supreme Court for using Fly Ash the bricks were not available in the market due to the indefinite strike made by the brick kiln owners and only after approx. 12 months some of the brick kilns started. Rates were already increased upto/more than 100% in the market. This situation was again beyond the control of undersigned agency.

Further we are sorry to invite your kind attention to take some decisions for procurement of bricks from Jhajjar etc. We hope that your decision will be given to us at the earliest.

That your kind attention was put on so many times about our withheld payments without any reasons on our part although we were making our sincere efforts to complete the work in time which can be verified that one of the agency which was working with you, even after taking a huge amount as compensation, stopped the work in the same premises.

As you are well aware of our following payments are due to you, again we are defining the same as under:-

1.	Deduction on account of part rate only	Rs.412488/-
2.	Deduction on account of applying unapproved weight factor of steel	Rs.114755/-
3.	Non payment of wastage of steel	Rs 354421/-
4.	Deduction on account of Expose shutter finish	Rs.874113/-
5.	Deduction in 9th RA/ bill for misc.	Rs.50000/-
6.	Non payment of increase in steel prices as per clause 10C	
	Steel	Rs.4309854/-
	Labour	Rs.809000/-
	Petrol oil Lubricant	Rs.863000/-
	Sand, Grit & Bricks	Rs.600000/-

That due to withholding of our payments amounting to Rs. 90,00,000 (Rs. Ninty Lacs only) approx. detailed above, is one of the reason by which delay comes due to financial back log on the part of department. This amount is a very huge, which comes to approx. 1/5th of the total Tender value, and as per civil practice no one generally invest 10% of the total Tender value which comes to 45 lacs only.

59. The learned Arbitrator, who is a technical person, held that delay in finalizing of drawings and the time to time revisions has consequently had a major impact on the planning for the execution of the work. The learned Arbitrator perused the material on record and observed that it was the delay in issuance of drawings that precluded the advance planning for procuring of steel and thereby leading to delay in execution of the RCC framework of the structure. Therefore, the objection raised by the petitioner that the non-issue of drawings did not negatively impact the execution of the project is rejected.

60. Further, with regard to submission that the work had come to a standstill in March 2005 since there was no cement on site, the learned Arbitrator has observed the following:-

> *"2.3 The respondents had pleaded that the claimants had totally stopped work in the month of March 2005, which also does not appear to be correct. The cement register shows that the work was continuing up to the first week of May 2005 though in a restricted way which according to the claimants was due to non approval of the source of the machine made bricks."*

61. The petitioner has relied upon the entries in the Cement Register to show that there was no cement stock between 17.03.2005 to 07.04.2005. The learned Arbitrator considered and rejected the said averment and observed that the entries in the cement register shows to the contrary and that the work was continuing in a subdued manner till first week of May. The relevant entries of the cement register are reproduced as under:-

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19.2.05	200 bag	M/s Sunny Engineers J.K. Cement 43 Grade Ch. No. NIL dt. 19.2.05	16398 bag	—	—	—	—	—	—	202 bag	[signature]	[signature] 19.2.05	
				21.2.05	80 bag	R.C.C. in mumty slab 3-4 /7-8	—	80 bag	16276 bag	122 bag	[signature]	[signature] 21.2.05	
		Veh. No. DL-1G B-8139		22.2.05	20 bag	R.C.C. in Column in M/Room slab	03 bag	17 bag	16293 bag	105 bag	[signature]	[signature] 22.2.05	
				23.2.05	100 bag	R.C.C. in M/R Floor slab 1-2/D-E & B/W	07 bag	93 bag	16386 bag	12 bag	[signature]	[signature] 23.2.05	[signature] 23.2
				26.2.05	12 bag	Column R.C.C. at M/R Room at grid 1-2/D-E	02 bag	10 bag	16396 bag	02 bag	[signature]	[signature] 26.2.05	
27.2.05	200 bag	M/s Sunny Engineers J.K. Cement 43 grade Ch. No. NIL dt. 26.2.05 Veh. No. DL-1G B-8139	16598 bag	—	—	—	—	—	—	202	[signature]	[signature] 27.2.05	
				28.2.05	100 bag	R.C.C. in M/C Room floor slab D-E/9-10 Top slab	02 bag	98 bag	16494	104 bag	[signature]	[signature] 28.2.05	
				2.3.05	25 bag	R.C.C. in Column & B/W 9-10/D-E	01 bag	24 bag	16518	80 bag	[signature]	[signature] 2.3.05	
				4.3.05	60 bag	R.C.C. in M/C Room Top slab D-E/1-2 & B/W	04 bag	56 bag	16574 bag	24 bag	[signature]	[signature] 4.3.05	
07.3.05	50 bag	M/s Sunny Engineers J.K. Cement 43 grade Veh. No. by Truck Ch. No. 107 dt. 7.3.05	16648 bag	—	—	—	—	—	—	74 bag	[signature]	[signature] 7.3.05	
				8.3.05	50 bag	R.C.C. in Terrace slab M/C Room D-E/9-10 & B.W.	—	50 bag	16624 bag	24 bag	[signature]	[signature] 8.3.05	
				9.3.05	05 bag	B/W & Misc. repair	—	05 bag	16629 bag	19 bag	[signature]	[signature] 9.3.05	
				11.3.05	05 bag	—do—	01 bag	04 bag	16633 bag	15 bag	[signature]	[signature] 11.3.05	
				14.3.05	05 bag	—do—	01 bag	04 bag	16637 bag	11 bag	[signature]	[signature] 14.3.05	
				15.3.05	05 bag	—do—	02 bag	03 bag	16640 bag	8 bag	[signature]	[signature] 15.3.05	
				16.3.05	05 bag	—do—	01 bag	04 bag	16644 bag	04 bag	[signature]	[signature] 16.3.05	
				17.3.05	04 bag	—do—	—	04 bag	16648 bag	NIL	[signature]	[signature] 17.3.05	[signature] 17.3.05

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सीमेन्ट रजिस्टर / Cement Register

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प्राप्ति का विवरण Particulars of Receipt			प्रगामी जोड़ Progressive Total	देने की तारीख Date of issue	देने का विवरण Particulars of Receipt		मात्रा शाम को वापिस दी गई Qty. returned at the end of the day	कुल मात्रा दी गई Total issues	प्रगामी जोड़ Progressive Total	दैनिक शेष Daily Balance	ठेकेदार के हस्ताक्षर Contractor's Initials	क०इ० के हस्ताक्षर J.E.'s Initials	स० कार्य० इ० के ह० A.E's Period check	टिप्पणी Remarks
पाने की तारीख Date of Receipt	मात्रा ली गई Qty. Received	पाने का स्त्रोत Source of Receipt			मात्रा दी गई Qty. issued	किस काम के लिये दी गई Item of work which issued								
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
	B/F =		16648 bags	—	—	—	—	—	16648 bags	NIL	[signature]			
1.4.05	200 bags	M/S Survey Engineers J.K. Cement 43 Grade [illegible] Ch. No. NIL dt. 7-4-05 Veh. No. HR-38 A-4336	16848 bags	—	—	—	—	—	—	200 bags	[signature]	[signature] 07-4-05		
				11.4.05	04 bags	B/Wall II[nd] & III[rd] floor	—	04 bags	16652	196 bags	[signature]	[signature] 11-4-05	[signature] 11/04/05	
				12-4-05	02 bags	— do —	—	02 bags	16654	194 bags	[signature]	[signature] 12-4-05		
				13.4.05	02 bags	— do —	—	02 bags	16656	192 bags	[signature]	[signature] 13-4-05		
				15.4.05	02 bags	— do —	—	02 bags	16658	190 bags	[signature]	[signature] 15-4-05		
				16-4-05	04 bags	B/Wall III[rd] Floor Library Floor	—	04 bags	16662 bags	186 bags	[signature]	[signature] 16-4-05	[signature] 16/04/05	
				18-4-05	05 bags	— do —	01	04 bags	16666 bags	182 bags	[signature]	[signature] 18-4-05		
				19-4-05	02 bags	— do —	—	02 bags	16668 bags	180 bags	[signature]	[signature] 19-4-05		
				20-4-05	02 bags	— do —	—	02 bags	16670	178 bags	[signature]	[signature] 20-4-05		
				21.4.05 ~~21-4-05~~	02 bags	— do —	—	02 bags	16672	176 bags	[signature]	[signature] 21-4-05		
				22-4-05	05 bags	— do —	—	05 bags	16677	171 bags	[signature]	[signature] 22-4-05	[signature] 22/04/05	[signature]
				23-4-05	05 bags	— do —	01 bag	04 bags	16681	167 bags	[signature]	[signature] 23-4-05		
				25-4-05	05 bags	— do —	—	05 bags	16686	162 bags	[signature]	[signature] 25-4-05		
				26-4-05	05 bags	— do —	—	05 bags	16691	157 bags	[signature]	[signature] 26-4-05		
				27-4-05	05 bags	— do —	01 bag	04 bags	16695	153 bags	[signature]	[signature] 27-4-05		
				28-4-05	10 bags	B/Wall II[nd] & III[rd] Floor	02 bags	08 bags	16703	145 bags	[signature]	[signature] 28-4-05	[signature] 28/04/05	

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			29.4.05	10 bag	—do—	01 bag	09 bag	16712	136 bag		28.4.05
			30-4-05	10 bag	—do—	01 bag	09 bag	16721	127 bag		30.4.05
			02.5.05	05 bag	—do—	01 bag	04 bag	16725	123 bag		02.5.05
			03-5-05	02 bag	—do—	—	02 bag	16727	121 bag		3/5/05
Balance Cement transfer to const. of U.G. Water Tank near B-E of M/S Krishna construction Co. as directed by Engineer-in-charge.		16727 bag	2.8.05	121 bag	const. of U.G. Water Tank	—	121 bag	—	NIL		12-8-2005

03/05/05

12/08/05

17/8/05

62. A perusal of the above shows that though there was a 'NIL' stock in the Cement Register in between 17.03.2005 to 07.04.2005, however on 07.04.2005 the daily balance of the cement stock was 200 bags. From thereon, there appears to have been regular issuance of additional cement bags, though in a limited quantity. Therefore, there is no infirmity in the observation of the learned Arbitrator pertaining to the cement register.

63. The learned Arbitrator also came to the conclusion that the work was continuing in a subdued manner due to the non-approval of the source of machine made bricks by the petitioner**.** The petitioner has attempted to suggest that no approval was required for the purchase of bricks from any sources, as defined in the contract. The said issue was not raised before the learned Arbitrator.

64. Besides the above contention, the petitioner has also alleged that false letters claiming that the bricks were not available were sent by the respondent. The same was responded to by a survey by the petitioner where it was observed that there was no shortage of bricks. This dispute on facts between the parties regarding the availability/non-availability of the machine moulded bricks was duly considered by the learned Arbitrator. The operative portion of the Award in this regard reads as under:-

> *"2.4 There also was some difference of opinion between the respondents and the claimants regarding the procurement of machine made bricks. The agreement provides that the machine made bricks would be arranged from Chandigarh or nearby areas as they were not available in Delhi. The respondents interpreted this condition to mean that the bricks would have to be arranged from Chandigarh and/or areas around Chandigrh while the claimants interpreted it to mean that the bricks had to be arranged from either Chandigarh or from the areas neighboring Delhi. The claimants in December 2004 had requested the respondents to take some alternative decision and thereafter the respondents engineer- in- charge had visited Chandigarh and ascertained that the machine made bricks were easily available there.*

There was however some controversy between the parties regarding the availability of bricks in Chandigarh. In their letter dated 27.12.2004, the respondents indicated that the machine moulded bricks from Chandigarh were also being used by the D.S.I.D.C. in their Bawana project. The claimants found that the bricks being used in the Bawana project were not conforming to the specifications and reported this to the respondents in their letter dated 9.4.2005. The claimants in this very letter had shown their willingness to get the bricks which were being used on the Bawana project of D.S.I.D.C but since these bricks were not conforming to the specifications, they requested the respondents to allow them to bring the bricks from Jhajjar from MIS Priya Clay Products which had been approved by the respondents earlier in April 2004. The respondents approved the use of bricks from Jhajjar and Hissar in their letter dated 13.4.2005 subject to rate adjustment because of the difference in the transportation charges from these places and from Chandigarh. The decision regarding the bricks being taken in the middle of the month of April 2005 certainly did not leave enough time for the claimants to complete the work by the extended date of 23.5.2005. The condition as stipulated in the contract for the use of machine made bricks can not be taken to mean that the bricks were to be got from Chandigarh or around Chandigarh only; they could be arranged from other nearby areas also and Jhajjar and Hissar can not be precluded for obtaining such bricks as per the condition of the contract so long as the bricks from these sources conformed to the required specifications. The decision to get the machine made bricks having been taken only in the middle of April 2005, it can not be conceived rationally that it would have been possible to complete the work by the end of the extended period. The respondents pleading that the claimants did not bring any machine made bricks even after the approval given on 13.4.2005 has to be viewed in the light of a couple of letters written by them immediately thereafter which conveyed an impression that the respondents had already reached a conclusion that they would be rescinding the contract. Another important issue in this connection is that whether the external cladding work should have been taken up for execution from bottom to top or from top to bottom of the building. The claimants have maintained that this work was to be taken up from top to bottom because the exposed brickwork to be done with

the machine made bricks was a final finishing item of work while the respondents have pleaded that this work should have been taken up from bottom to top to save time specially because there are projections in the building at each floor level. This point however looses much of its significance in view of the fact that the procurement of the machine made bricks became possible after middle of April 2005 when the casting of the R.C.C. framework was already over. At that time the work could have been proceeded with from top to bottom also without the fear of mortar spilling on the exposed brickwork below which in all probability might have been the case if the brickwork had been taken up from bottom to top. It is also important in this regard that the claimants in their programme submitted in the beginning of the work had considered doing the exposed brickwork only after the structure had been completed and which was the reason given by them for not getting the machine made bricks earlier to the casting of the terrace slab."

65. Based upon the said facts, in para 2.9 of the Award, the learned Arbitrator came to the conclusion that the blame for late approval for the source of machine-moulded bricks has to be shared by both the parties. The learned Arbitrator considered the entire correspondence exchanged between the parties to arrive at the said finding.

66. Even otherwise, the argument of no shortage of bricks, etc are all arguments on factual matrix which cannot be entertained at this stage and in view of the judgment of the Hon'ble Supreme Court in *SAL Udyog (supra)* wherein reliance is placed on *Ssangyong Engg. & Construction Co. Ltd. v NHAI* reappreciation of evidence is beyond the scope of enquiry under section 34 of the Arbitration and Conciliation Act, 1996.

67. Further, with regard to extension of five months, the learned Arbitrator has observed as under:-

"*2.3……The contract had been provisionally extended by the respondents up to 23.5.2005 on 23.12.2004 on an ad hoc basis. The time of a little more than three months available to the claimants for completing the work remaining to be done after the issue of the last*

structural drawings can not be considered reasonable. The structural drawings of the terrace floor were made available by the respondents in December 2004 and the laying of the floor at this level could have been taken up only thereafter and completed much beyond the initial stipulated date of completion. The respondents did not produce the justification as to how they had considered five months extension sufficient for the completion of the work since at the time of granting extension, complete drawings had not been issued. Apparently, the respondents had not done any exercise to work out the reasonable time that would be required to complete the work after the date of issue of the terrace floor drawings in December 2004 and simply extended the time period by five months on an Ad-Hoc basis. No revised programme was insisted upon from the claimants for completing the work prior to giving the extension in December 2004. The claimants had sought extension beyond the date of 23.5.2005 in their letter dated 19.4.2005 which was in reply to the respondents show cause notice under clause 3 of the contract and this showed that they were interested in carrying out the remaining work but the respondents did not think it fit to extend the time any further…"

68. The petitioner submits that the respondent/contractor took 3 and a half months to complete RCC just for one floor whereas as per the schedule the RCC work for all floors should have been completed within the said time frame. The learned Arbitrator has observed that no revised timeline was insisted upon by the petitioner from the respondents, therefore there was no intention of completion of project on the part of the petitioner and not the respondent. The petitioner has failed to show any non-consideration of facts/evidence, as alleged. Having held there is no infinity in the finding that the delay was caused due to the acts of the petitioner, including non-supply of the drawings in time, the argument that RCC work of only one floor was completed in the extended period merits no consideration.

69. The learned Arbitrator, after a perusal of the documentary evidence on record, observed that there was no communication by the petitioner that work

was delayed on account of M-20 and M-25 design mix not being available. The operative portion of the Award reads as under:-

> *"2.8 The respondents have laid emphasis on the delay on the part of the claimants in getting the mix design done for M-20 and M-25 concrete from an approved laboratory. The claimants have clarified that immediately after the award of work, quarries were visited and inspected and approved by the respondents and then only they could supply - the materials to the respondents for testing. They also explained that the coarse sand sample was rejected by the C.P.W.D. Lab after testing but the same sand was later on approved by the respondents for use in the work. The claimants also stated that the laboratory from which the mix design was to be done was approved by the respondents in October 2003 only as per entry in the site order book and it was thereafter only that the process of R.C.C. mix design could be initiated. I have carefully gone through the site order book entries relied upon by the respondents in this regard and find that these entries had been made more by way of reminding the claimants to get the mix design done timely rather than by way of pointing out delays in the execution of the work. There is no mention by the respondents in any of the communications that the work was held up on account of the design mix not available. I also find that the quantity of work to be done with M-25 concrete, mix design for which came at a slightly later date than M-20 mix, was small and this could not have contributed to any appreciable delay in the execution of the work."*

70. The argument of the petitioner that the entry in site order book dated 07.10.2003 reminded the respondent/contractor that there is delay in submitting approval of the design of the concrete mix was specifically rejected by the learned Arbitrator. The learned Arbitrator has duly perused the evidence on record and arrived at the above finding which, in my view, is neither perverse nor contradictory to the material on record. The learned Arbitrator categorically held that the entry of 07.10.2003 in site order book was merely a reminder and not pointing out delay in execution of work due to the concrete mix not being approved.

71. In view of the above, the petitioner has failed to show any grounds for interference in the finding of delay. I shall now proceed to decide other claims decided on the basis of the finding that delay is attributable to the actions of the petitioner:

a. Claim 1: Work done but not paid

72. The learned Arbitrator has awarded an amount of Rs. 11,05,447/- in favour of the respondent on account of work done but not paid for.

73. The petitioner has primarily challenged the Award on claim no. 1 on the ground that extra payment for shutter finish could not have been given when the objective, in terms of item no. 3.5 of BOQ, was not achieved. He relies on photographs and entries in the site-order book to show that no shutter finish work was done and the work done by the respondent was also not acceptable.

74. A perusal of the Impugned Award shows that the learned Arbitrator duly perused the same and concluded that this work done by the respondent was accepted and not rejected by the petitioner, hence the petitioner ought to pay for the exposed shutter finish. Thereafter, the learned Arbitrator quantified the amount and deduced a sum of 10% of the value of the work on the ground that the rubbing finish was not done. The reasoning of the learned Arbitrator is based on the fact that non-payment for unexecuted work by the petitioner is correct however payment for partially executed work shall be done.

75. I do not find any reason that calls for interference in the said finding. The petitioner has once again raised factual grounds. The basis of its arguments stem from entries in the site-order book and photographs of the shutter finish work. An adjudication, as sought, on the basis of these entries and photographs will amount to reappreciation of not only the evidence but also of facts. The same is impermissible and hence the objection to awarding of claim no. 1 is rejected.

b. Claim 3 : Refund of Security Deposit

76. The learned Arbitrator awarded a refund of Rs. 5,00,000/- in favour of the respondent.

77. Since the finding of the learned Arbitrator that the rescission of the contract by the petitioner was unjust and illegal has been upheld, I find no reason to interfere with the finding that the security/earnest money deposited by the respondent must be returned.

c. Claim 4: Damages sustained on account of Loss of Material, Tools and Plants, Shuttering Material Etc, and for the Advances made to the suppliers due to the unjustified rescission of the contract

78. The learned Arbitrator awarded Rs. 8,04,827/- in favour of the respondent.

79. The petitioner states that since the rescission of the contract was correctly done under clause 3 of the GCC, the petitioner was within its right to recover any excess expenditure incurred by it in terms of clause 14 of GCC, whereby if the due amounts are not paid back, the petitioner was within its right to proceed with selling of the unused materials, T&P and equipment at site. Pursuant to the above said clauses, the petitioner sold the material and T&P of the respondent at Rs. 1,65,045/-. Further, it is submitted by the petitioner that the learned Arbitrator has wrongly calculated the Sale Price of the goods.

80. Since the finding of the learned Arbitrator that the rescission of contract was unjust and illegal has been upheld, the respondent is within its right to receive damages suffered towards loss of materials, tools and plants, shuttering material etc as well as for its illegal confiscation. As regards the quantification, the submission that the learned Arbitrator has awarded amounts without due considerations is without merit especially since the learned Arbitrator has shown detailed quantification for the amounts arrived at. The operative portion of the Award in this regard reads as under:-

"7.1 7.1 The claimants brought out that the respondents did not allow them to shift their T & P and materials and machinery lying at the work site as also the batching plant and shuttering materials and some other articles after they had wrongfully rescinded the contract despite requests made in this connection and that they had suffered huge losses on this account. They also stated that the measurements of the materials etc. lying at site were jointly recorded by the parties and that there was no dispute regarding the quantity. They then referred to their Annexure- III and stated that the details of the claim were given therein. The respondents denied the claim and stressed that there was nothing wrong and unjust in their rescinding the contract and that the claimants T & P, materials and machinery detained by them was required to be sold off to partially offset the amount to be recovered from the claimants under various clauses of the contract and for which they had already made counter claims.

7.2It has already been held earlier that the rescission of the contract by the respondents was unjust and unwarranted. There was therefore no cause for the respondents to confiscate the materials and T &P and the machinery of the claimants. So far as the counter claims of the respondents are concerned they are being adjudicated in the later part of this award. Even otherwise, the respondents failed to produce the orders through which they had confiscated the materials, T & P and the plant etc. No notice under any clause of the contract was served on the claimants for taking over the plant and machinery and materials of the claimants and the claimants were never asked to furnishreasons why such an action should not be taken against them. The respondents pleading that the action under clause 14 of the G.C.C. of the contract was to be taken after the contract was rescinded is not acceptable; however, there is no such action by the respondents even after the contract was rescinded by them. In the absence of the show cause notice and in the absence of any orders confiscating the machinery, the action of the respondents to seize the machinery etc. and then subsequently dispose it of through public auction was without any basis and illegal and hence ultra-vires. The respondents were well aware that the claimants had raised a claim in arbitration for the materials and machinery and T &P etc. that had not been allowed to be taken away from the site and that a decision in the matter was pending in the arbitration for which the proceedings were continuing but even then they auctioned the articles seized by them and disposed off the same. Auctioning of the

material and machinery etc. which did not belong to the respondents despite protests from the claimants was illegal. The respondents are therefore required to pay the depreciated value of the articles seized by them to the claimants.

7.3 The main item in the category of machinery seized by the respondents is the concrete batching plant which was purchased new by the claimants at the time of the start of this work and for which the respondents had paid an advance against machinery of nearly RS 9 Lacs. The cost of the batching plant is stated to be a little more than RS 10 Lacs and the claimants have filed vouchers of purchase in support thereof. The claimants have claimed RS 10 Lacs less depreciation for this plant. The respondents have indicated its value as RS. 30,000/= on lump sum basis. The price indicated by the respondents appears highly disproportionate with the cost of the plant. The plant had worked at the site for a period of nearly eighteen months and' considering the life of the plant to be at least 5 years, it would be appropriate to allow a depreciation of 40% to fix the residual value of this plant. I allow the claimants a sum of RS 6,00,000/= for this plant.

7.4 The claimants have claimed the cost for a mini hoist also RS. 1,50,000/= less depreciation. The respondents are allowing a sum of RS. 3,000/= only on lump sum basis for the same. This again appears to be on the lower side. Neither side has given the specifications of the hoist and it is also not known whether it was brought to the site new or second hand. I therefore consider 60% depreciation on this plant and allow only RS. 60,000/= for the mini hoist.

7.5 There are 2 items relating to the ply wood, 8400 sq. ft @ RS 60/= per sq. ft for the ply side making and 6598.21 sq. ft @ RS 30/= per sq. ft for ply cut to some size. The total amount claimed by the claimants for these two items comes to RS. 6,65,367.24 less depreciation; the net value comes to RS 4,79,064/=. The respondents' valuation for these two items on lump sum basis has been given as RS. 13,000/=. The claimants have furnished analyses for the rates that have been claimed by them for these two items. Since the respondents have valued the items on lump sum basis, the valuation seems to have been done in an Ad-hoc manner. The ply had been used on the work for a period of more than 2 years and its residual value could not be as high as is being claimed by the - claimants. I am of the opinion that the depreciated value can not be more than 10% of the -

original value of the price indicated by the claimants. I therefore find that the claimants are entitled to receive a sum ofRS. 66,537/= only for these two items.

7.6 The claimants have claimed a sum ofRS 1,62,900/= for 1810 no. ballies stated to be 9 ft. long. The respondents have classified the ballies to be 6 ft to 9 ft long. The claimants have tried to justify the rate claimed by them for these ballies from the D.S.R. 2002 wherein the rate of safeda ballies, 125 dia. is given as RS 20/= per m. The rate claimed by the claimant is RS 90/= per balli which is high when compared to the D.S.R. rate as mentioned above. If the ballies are considered to be 6 to 9 ft length, the rates will be still lower than the rate of RS. 90/=. Moreover, 125 mm ballies are generally not used and the normal diam. of the ballies is 80mm to 100mm. Considering all these factors and also considering the fact that these ballies had been used for quite some time on the work, I am prepared to accept the depreciated cost of the balli as RS 20/= per balli only and thus the claimants are entitled to receive a sum ofRS 36,200/= only.

7.7 The claimants have claimed for 25 nos. G. I. Sheets of size 8'x 2.5' and 70 G.I. Sheets of size l0'x 2.5'. The amount claimed is RS. 53,250, less depreciation. Though the number of the sheets measured by the respondents is the same, the size differs in so much as the sheets are stated to be 12' and lO'long while the width is stated to be 3' and the valuation of these sheets combined together is RS. 7500/= on lump sum basis. Since the sheets were in use for nearly 2 years and their initial condition not known, I accept the valuation done by the respondents for these and award a sum of RS 7,500 to the claimants.

7.8 The claimants have further claimed RS. 29,400/= for 35 nos. M. S. Challies and 280m of 40 mm diameter M.S.Pipe. The quantity has been accepted by the respondents but their valuation for these articles again on lump sum basis is RS. 1500/= only. I am inclined to accept the respondents valuation as the challies had been used for quiet some time and were in damaged condition and award a sum of RS 1500/= to the claimants.

7.9 The claimants have further claimed a total sum of RS 33,250/= less depreciation towards a number of small items like cup locks for M.S. Pipe, office doors and windows and chairs and tables, hand pump, tasla, baskets, empty drums etc. The respondents have valued these items at approximately RS. 4,000/=. Since the items are too small to have any appreciable value, I am inclined to accept the valuation done by the

respondents for these articles and consider the claimants entitled to receive only RS 4,000/= for these."

81. In view of the above, the learned Arbitrator has given detailed reasonings to arrive at the figures awarded and hence requires no interference by this court under the limited jurisdiction under section 34 of the Arbitration and Conciliation Act, 1996. Therefore, the objections raised against the abovesaid claim are dismissed.

d. Claim 6: Loss of Expected Profits

82. The learned Arbitrator has awarded an amount of Rs. 4,00,000/- , being 2% of the value of work that remained to be done, in favour of the respondent. The operative portion of the Award reads as under:-

"9.2…….The claimants have claimed 15% profit on the value of work that was remaining to be done. I have serious doubts about the claimants earning this much of profit. Normal profit in the execution of such works is to be considered as 7.5% but in this case, since there had been a fair rise in the prices of the materials since the time the claimants had quoted their rates in the year 2002, even this much profit would not have been possible. Since it is not possible to compute the loss of profit with mathematical precision, I assess that the claimants' loss of profit would have been not more than 2% of the value of work remaining to be done and hence award a sum of RS. 4.00 Lacs only to the claimants against this claim."

83. Since I am in agreement with the finding of the learned Arbitrator that the rescission of the contract by the petitioner was unjust, in view of the judgment of ***A.T. Brij Paul v State of Gujarat (supra),*** no fault can be found with the grant of 2% for the purpose of expected profits. The learned Arbitrator duly considered the stage of completion of the project that the respondent was at and did not grant the claim of 15% of expected profits. The learned Arbitrator was of the view that loss of profits would not be more than 2% of the work that remained to be done.

84. Therefore, in view of the fact that the learned Arbitrator duly considered the material on record and passed a reasoned award, the objections raised against the said claim are rejected.

Wrongful Interpretation of terms of the contract between the parties:

Claim 2: Escalation Payments under clause 10C of the contract for increase in the prices of the materials

85. The learned Arbitrator awarded an amount of Rs. 43,09,854/- in favour of the respondent. The operative portion of the Award reads as under:-

> *"5.3 The controversy between the parties has arisen on the phrase '* ***----increases as a direct result of coming into force any fresh law, or statutory rule or order-----'*** *as appearing in italics in para 5.2 above (bold). There is no difference of opinion concerning the words coming into force any fresh law; the controversy is in regard to the words 'statutory rule or order'. The respondents are stressing that the word 'order' in the phrase has to be read along with the word statutory, which is applicable to both 'rule' and 'order'. The claimants hold a different view as according to them the word 'statutory' is connected to the word 'rule' only and does not define the word 'order'; they had argued that if the respondents intended to mean the word 'order' also to be a statutory order, they should have drafted the phrase in dispute as 'statutory rule or statutory order'. I find that there is ambiguity in the phrasing of this portion of clause 10(c). The word 'order' in the phrase 'statutory rule or order' can be interpreted to mean both, statutory order or any other order, which is not statutory in nature. Since the contract conditions had been drafted by the respondents, following the Contra Proferentum Rule, the meaning which is beneficial to the claimants has to be adopted to decide the issue. The word 'order' has therefore to be taken to mean any order issued by the agencies mentioned in the contract for the supply/ purchase of steel etc. The claimants have produced some orders related to the price of steel issued by the SAIL/RINL in the period the steel was purchased by them and have also submitted vouchers relating to the steel purchased from time to time. The claimants have also filed the monthly whole sale price indices, which are brought out by the Ministry of Commerce and Industry, Govt. of India. These indices*

clearly indicate that there was an acute increase in the steel prices during the currency of the contract. The claimants also produced a decision of the Govt. of Tripura where in similar circumstances, the claim of the enhancement in the prices of steel was accepted and reimbursement was allowed. There is clear evidence to show that there was substantial increase in the price of steel from time to time during the currency of the contract and from the vouchers submitted by the claimants it is clear that the claimants had actually paid such increase. This fact was even accepted by the respondents. I, therefore find that the claimants are entitled to receive reimbursement of the increase in the prices of steel from time to time over and above the price prevailing at the time of submission of the tenders plus ten percent which the claimants are to absorb as per the provisions of clause 10(c) of the contract. The claimants are not found entitled to receive any price rise for the materials like aggregate and sand etc. as the same is beyond the purview of clause 10(c).

86. The petitioner has challenged the findings on this claim on account of alleged wrongful/erroneous interpretation of terms of the contract between the parties, being clause 10 C.

87. The law with regard to interpretation is no longer res-integra. It is settled law that where the arbitrator has taken a possible/plausible view, the court would refrain from interfering with the Award under section 34 of the Arbitration and Conciliation Act, 1996. The same can also be seen in view of the judgment of the Hon'ble Supreme Court in *NTPC Ltd. v. Deconar Services (P) Ltd., (2021) 19 SCC 694*. The operative portion of the judgment reads as under:-

"12. Further, it is also a settled proposition that where the arbitrator has taken a possible view, although a different view may be possible on the same evidence, the court would not interfere with the award. This Court in Arosan Enterprises Ltd. v. Union of India [Arosan Enterprises Ltd. v. Union of India, (1999) 9 SCC 449] , held as follows : (SCC p. 475, paras 36-37)

"36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings

under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37. The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined."

13. From the above pronouncements, and from a catena of other judgments of this Court, it is clear that for the objector/appellant in order to succeed in their challenge against an arbitral award, they must show that the award of the arbitrator suffered from perversity or an error of law or that the arbitrator has otherwise misconducted himself. Merely showing that there is another reasonable interpretation or possible view on the basis of the material on the record is insufficient to allow for the interference by the court [see State of U.P. v. Allied Constructions [State of U.P. v. Allied Constructions, (2003) 7 SCC 396] ; Ravindra Kumar Gupta & Co. v. Union of India [Ravindra Kumar Gupta & Co. v. Union of India, (2010) 1 SCC 409 : (2010) 1 SCC (Civ) 130] and Oswal Woollen Mills Limited v. Oswal Agro Mills Ltd. [Oswal Woollen Mills Limited v. Oswal Agro Mills Ltd., (2018) 16 SCC 219 : (2019) 1 SCC (Civ) 426]]."

88. Even otherwise, this court in *Prem Chand Sharma v. DDA(supra)* has held that CPWD rates are not private rates but statutory rates of escalation and therefore the same can be allowed. The learned Arbitrator, in similar terms, relied upon (i) SAIL/RINL price of steel, (ii) Vouchers of steel purchased and most importantly (iii) Monthly wholesale price indices issued by the Ministry

of Commerce and Industry, Govt. of India (which is similar to CPWD cost index) to award escalation in steel prices.

89. To my mind, if the interpretation is fair and reasonable, this court under the limited jurisdiction of section 34 of the Arbitration and Conciliation Act, 1996 cannot interfere in the same. The learned Arbitrator has passed a well-reasoned Award and hence the same merits no interference.

Interest and Cost

Claim No. 7: Interest

90. The petitioner has challenged the interest awarded on account of the same being exorbitant. It is no longer *res integra* that the Arbitrator has the discretion to grant interest and the same cannot be modified/reduced by this court under the limited jurisdiction of section 34 of Arbitration and Conciliation Act, 1996. I have already taken this view in *Star Shares & Stock Brokers Ltd. v. Praveen Gupta*, 2024 SCC OnLine Del 6942. The operative portion reads as under:-

> *"28. The Hon'ble Divison Bench of this court in Anil Kumar Gupta v. MCD, 2023 SCC OnLine Del 7524 has held reduction of interest by the court under section 34 of the Arbitration and Conciliation Act, 1996 amounts to modification of the Award and in view of judgment of Hon'ble Supreme Court in NHAI v. M. Hakeem, (2021) 9 SCC 1 the same is impermissible. The operative portion of the judgment of the Hon'ble Divison Bench of this court in Anil Kumar Gupta v. MCD reads as under:—*
>
> *XXX*
>
> *29. From a combined reading of the above judgments, it can be seen that (a) the arbitral tribunal has the discretion to grant pre-award interest and/or post-award interest, on either whole or part of the principal amount; (b) in proceedings under section 34 of Arbitration and Conciliation Act, 1996, it is impermissible to reduce interest awarded since the same amounts to modification of the Award."*

91. In view of the above, the challenge/objections to the interest awarded is dismissed.

Claim No. 8 Litigation Costs

92. The learned Arbitrator has awarded a sum of Rs. 80,000/- towards litigations costs to the respondent.

93. I do not find any reason to interefere in the same. The respondent has succeeded in claims raised by it before the learned Arbitrator and is therefore entitled to recover litigation costs incurred by it.

Counter-Claims

94. The petitioner raised counter-claims for an amount of Rs. 2,36,27,280/- under various heads premised on the ground that the rescission of the contract was legal and valid, thereby entitling the petitioner to recover amounts, including compensation, damages for incomplete work, salary of the supervisory staff and litigation expenses.

95. I have already upheld the finding of the learned Arbitrator that the rescission of the contract by the petitioner was illegal and unjust. In this view of the matter, the petitioner is not liable to receive amounts, as claimed, since delay is attributable to the acts of the petitioner.

Conclusion

96. For the above said reasons, the petition, alongwith pending applications, are without merit and is hereby dismissed.

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97. In view of the judgment passed in OMP (COMM) 48/2020, the captioned execution petition is allowed. The judgment-debtor shall pay the entire awarded amount alongwith up to date interest within 8 weeks from today to the decree-holder.

98. List for compliance before the Roster Bench on 12.02.2025.

99. Pending applications, if any, are disposed of.

JASMEET SINGH, J

NOVEMBER 19th, 2024