$~P-1, 2 & 3

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

Decided on:- 28th May, 2024

\+ **O.M.P. (COMM) 518/2023 & I.As. 25419/2023, 25420/2023**

WADIA TECHNO ENGINEERING SERVICES LIMITED ..... Petitioner

versus

DIRECTOR GENERAL OF MARRIED ACCOMMODATION PROJECT & ANR. ..... Respondents

\+ **O.M.P. (COMM) 526/2023 & I.As. 25658/2023, 25659/2023**

WADIA TECHNO ENGINEERING SERVICES LIMITED. ..... Petitioner

versus

DIRECTOR GENERAL OF MARRIED ACCOMMODATION PROJECT & ANR. ..... Respondents

\+ **O.M.P. (COMM) 527/2023 & I.As. 25660/2023, 25661/2023**

WADIA TECHNO ENGINEERING SERVICES LIMITED. ..... Petitioner

versus

DIRECTOR GENERAL OF MARRIED ACCOMMODATION PROJECT & ANR. ..... Respondents

Appearance:- Mr. Jayant Mehta, Senior Advocate with Mr. Shambo Nandy & Ms. Nikita Sethi, Advocates for Wadia Techno Engineering Services Ltd. in Item Nos. 37 to 39.

Mr. Shashank Garg, CGSC with Ms. Aradhya

Chaturvedi & Ms. Nishtha Jain, Advocates for Respondent in Item No. 37.

Mr. Kirtiman Singh, CGSC with Mr. Varun Pratap Singh, Mr. Waize Ali Noor, Mr. Varun Rajawat & Mr. Aryan, Advocates for Respondent in Item Nos. 38 & 39.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By way of these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner assails three arbitral awards dated 17.08.2023, which arise out of similar contracts between the parties. The contracts were for consultancy services to be provided by the petitioner, in connection with construction of various married accommodation projects of the respondent.

2. The nature of the contracts, and contentions of the parties, in all three cases, are on similar lines. The petitions have, therefore, been taken up for hearing together, with the consent of learned counsel for the parties.

A. FACTS

3. The respondent issued notices inviting bids on 12.02.2009 for selection of a "Detailed Engineering and Project Management Consultant" ["the Consultant"] for three married accommodation projects. The Consultant was required to provide services at the pre-construction stage, during construction, and post-construction. These included preparation of the tender for appointment of a contractor to carry out the construction, selection of the contractor and supervision of the

contractor's performance. The detailed scope of work was provided in the tender documents. Payment of consultancy charges was to be made in 5 stages. 30% of the consultancy payment was payable during the pre-construction phase (Stage 1 and Stage 2 payments), 55% during the construction phase (Stage 3 payment) and 15% in the post-construction phase (Stage 4 and Stage 5 payments).

4. The petitioner's bids for the three consultancy contracts were the lowest, and Letters of Acceptance were issued in its favour on 22.05.2009. Parties also entered into three contracts, all dated 22.05.2009 ["Contract"].

5. The details of the contracts in each of the case are provided below:

Case No.	OMP (COMM) 518/2023 ["**Vizag case**"]	OMP (COMM) 526/2023 ["**Pune case**"]	OMP (COMM) 527/2023 ["**Ahmednagar case**"]
Site of Project	Behmunipatnam (Vizag)	Kirkee (Pune) and Lonavala (Navy)	Ahmednagar, Deolali & Nasik
Fee provided under the Contract	1.18% of the Project Cost	1.51% of the Project Cost	1.9% of the Project Cost
Estimated project cost	Rs. 254 crores	Rs. 243 crores	Rs. 195 crores
Estimated time for completion	3 years	3 years	3 years

6. Contractors were duly engaged for construction of the projects, but the projects took much longer to complete, compared to the originally contemplated periods. The petitioner contended that it was entitled to

enhanced compensation as a result. The petitioner's claims in the Vizag case were also based upon an enhancement in the project cost paid to the contractor. In the Pune and Ahmednagar cases, the contracts of the original contractors were terminated and "risk and cost contracts" were entered into with other contractors for completion of the projects. The petitioner sought enhanced compensation based upon the value of the risk and cost contracts in those two cases.

7. As the parties were not able to arrive at an agreement on these claims, the disputes were referred to arbitration under the three contracts.

8. The petitioner raised the following claims before the learned Arbitrator:

Claim No.	*Particulars of Claim*	*Amount of Claim (Rs.)* [Vizag case]	*Amount of Claim (Rs.)* [Pune case]	*Amount of Claim (Rs.)* [Ahmednagar case]
01	*Towards enhancement in DEPMC Fees (Stage - 1 and Stage - 2) consequent to enhancement of the Project Cost, after adjusting the payments received on this account as per Appendix- A.*	*13,63,874.00*	*47,78,298.00*	*52,44,322.00*
02	*Towards enhancement in DEPMC Fees (Stage – 3), consequent to enhancement of the Project Cost, after adjusting the*	*23,30,820.00*	*1,13,39,318.00*	*80,03,787.00*

	payments received on this account as per Appendix- B.			
03	*Towards enhancement in DEPMC Fees (Stage-4 and Stage-5) consequent to enhancement of the Project Cost, as per Appendix - C*	*61,95,798.00*	*77,60,817.00*	*75,84,696.00*
04	*Additional fee for the extended period taking into consideration the rise in the CPI*	*4,63,59,763.00 [From 22 May 2012 – 31 August 2015]*	*11,96,08,555.00 [From 22 May 2012 – 31 August 2015]*	*12,01,33,446.00 [From 22 May 2012 – 31 October 2018]*
	Total: Claim nos. 1 to 4.	*5,62,50,255.00*	*14,34,86,988.00*	*14,09,66,251.00*
05	*Towards amounts wrongly withheld/ recovered from bills of WTESL on account of over-deductions against DOs, deductions on account of staff attendance/vetting of design & drawings during execution of work at site etc.*	*21,69,415.00*		
06	*Towards amounts due and payable to the Claimant on account of variation in Service Tax on*			

	account of GST.			
07	*Towards providing services during extended Defect Liability period (DLP) from September, 2017 to January, 2019 (17 months)*	*30,78,819.00*		
	Total Claim no. 5 to 7	*74,75,493.00*		
08a.	*Interest on total amount on Claim nos. 1 to 4*	*1,45,68,816.00 [Interest @10% p.a. on Rs.5,62,50,255 w.e.f. 29.03.2019-31.10.2021]*	*3,77,37,087.00 [Interest @10% p.a. on Rs.14,34,86,988 w.e.f. 14.03.2019-31.10.2021]*	*3,66,51,225.00 [Interest @10% p.a. on Rs.14,09,66,251 w.e.f. 27.03.2019-31.10.2021]*
08b.	*Interest on total amount of Claim nos. 5 to 7*	*19,36,153.00 [Interest @10% p.a. on Rs.74,75,493, w.e.f 29.03.2019 to 31.10.2021]*		
	Grand Total Claim nos. 1 to 7 + Interest (nos. 8a + 8b)	*802,30,717.00*		
09	*Pendente lite interest till the date of the award.*			
10	*Further interest from the date of the Award till the actual date of payment.*			
11	*Cost of Arbitration*			
12	*Total*	*802,30,717.00*	*18,12,24,066.00*	*17,76,17,476.00*

9. It can be seen therefrom that the petitioner's claims fell broadly in three heads:

I. Claims for additional remuneration arising out of enhancement of the project costs (Claim Nos. 1, 2 and 3 before the learned Arbitrator). In the Pune and Ahmednagar cases, these claims arose out of the value of the risk and cost contracts, whereas in the Vizag case, the enhancement was in the value of the original contract.

II. Claims due to prolongation of the Contract (Claim No. 4 in all three cases, and Claim No. 7 in the Vizag case)

III. Miscellaneous Claims (Claim Nos. 5 and 6 before the learned Arbitrator – only in the Vizag case)

10. The Statement of Defence of the Union of India ["UOI"] was filed belatedly, and not taken on record in the arbitrations arising out of the Vizag and Ahmednagar cases, but was accepted in the Pune case, subject to costs.

11. The learned Arbitrator has rejected all the petitioner's claims.

12. The relevant contractual clauses, findings of the learned Arbitrator and submissions of the parties are dealt with separately under each of these broad heads of claim. Section B of this judgment deals with the escalation claim in the Vizag case[1]. Section C deals with the claim arising out of the value of the "risk and cost contracts" – this is relevant only to the Pune and Ahmednagar cases[2]. Section D deals with the claims arising out of prolongation of the Contract. This analysis is

[1] OMP (COMM) 518/2023.
[2] OMP (Comm) 526/2023 and 527/2023.

common to all three cases. Section E deals with certain miscellaneous claims, which were only made in the Vizag case.

B. CLAIMS ARISING OUT OF ENHANCEMENT IN PROJECT COST IN THE VIZAG CONTRACT:

(i) Contractual Clauses

13. The "Consultancy Charges (Settled Fee)" payable by the respondent to the consultant is defined in Clause 1.10 of the Contract as follows:

> *"1.10 "CONSULTANCY CHARGES (SETTLED FEE)" shall mean the amount calculated by multiplying the percentage quoted by the consultant in his financial proposal with project cost."*

14. The term "Project Cost" is defined in Clause 1.9 of the Contract. Clause 1.9 was amended by an amendment dated 25.02.2019, and the revised definition reads as follows:

> *"PROJECT COST" shall mean summation of cost of contracts concluded with lowest tenders adjusted with cost of variation/deviation during execution or DPR cost of work contracted which ever is less"*

(ii) Submissions

15. Claim Nos. 1, 2 and 3 asserted by the petitioner proceed on the basis that the project cost awarded to the contractor was finally enhanced to approximately Rs.314 crores, rather than the initial estimate of Rs.254 crores, contained in the tender. It is, therefore, contended that the petitioner's bid of 1.18% of the "Project Cost", entitled it to 1.18% of the enhanced cost, rather than the original estimated cost of Rs.254 crores.

16. Mr. Jayant Mehta, learned Senior Counsel for the petitioner, submitted that the learned Arbitrator has erroneously characterised Claim Nos. 1, 2 and 3 as claims which arise from prolongation of the Contract. Mr. Mehta drew my attention to paragraph 36 of the award, where these

claims have correctly been identified as claims arising out of enhancement in the project cost, but submitted that they have thereafter been conflated with Claim Nos. 4 and 7, which are based upon prolongation of the Contract.

17. Mr. Shashank Garg, learned counsel appeared for the UOI in O.M.P.(COMM) 518/2023, did not argue against Mr. Mehta's interpretation of the Contract, but handed up certain documents in Court to suggest that the petitioner's claim for payment @ 1.18% on the basis of a project cost of Rs.314 crores had, in fact, been accepted and paid.

(iii) Analysis

18. Mr. Mehta's submission in this regard appears to be merited. In paragraph 36 of the impugned award, the learned Arbitrator has categorised Claim Nos. 1 to 3 as claims based upon enhancement in the Project Cost, in contradistinction to Claim Nos. 4 and 7 ("Prolongation of Contract").

19. However, the learned Arbitrator has thereafter dealt with the question of prolongation of the Contract, and rejected Claim Nos. 1 to 3, in addition to Claim Nos. 4 and 7. In paragraphs 46 and 49 of the impugned award, reference is made to provisions relating to risk and cost contracts, whereas there was no risk and cost contract in this case. It appears that the award has thus proceeded on a misconception, and the petitioner's case that it was entitled to additional compensation, on the ground of enhancement of the project cost has not been decided. The following observations in paragraph 49 of the award also suggest that the distinction between claims arising out of enhancement of project cost and claims arising out of prolongation of the Contract has escaped attention:

> *"49. ……. I am of the view that the claimant is not entitled to the claim nos. 1 to 4 and 7 on account of prolongation of the contract, in view of the specific bar in the CA for any extra payment for the delay in completion of project."*

20. Upon a reading of Clause 1.10 of the Contract and the definition of "Project Cost" (Clause 1.9), the petitioner claimed 1.18% of the value of the contracts awarded to the contractor adjusted with the variations/deviations during execution of work or DPR cost of work contracted, whichever is less. The petitioner's claims on this account, although noticed in paragraph 36 of the award, have not been adjudicated at all.

21. The documents handed up by Mr. Garg to show that the petitioner has in fact been paid at the rate of 1.18%, calculated on the base of ₹314 crores, are disputed by Mr. Mehta. These documents are post-award documents. A factual dispute of this nature cannot be adjudicated in the present proceedings, but the rights and contentions of the parties in this regard are reserved.

22. For the aforesaid reasons, the impugned award in the Vizag case, insofar as it rejects Claim Nos. 1, 2 and 3 of the petitioner, is liable to be set aside. The petitioner will, however, be at liberty to institute fresh arbitration proceedings for the said claims.

C. CLAIMS ARISING OUT OF RISK AND COST CONTRACTS AWARDED IN THE PUNE AND AHMEDNAGAR CASES:

(i) Contractual Clauses

23. In addition to Clauses 1.9 and 1.10 of the contracts, which are similar to the clauses in the Vizag contract, two further clauses deal specifically with the fee payable to the petitioner in the event risk and

cost contracts are awarded: -

> *"22.Responsibility of the consultant team will be interalia as below:-*
>
> *(q) Whenever, the owner exercises his authority to cancel any of the contract with contractor (s), inventory of the following shall be made jointly by the consultant, Project Manager and the concerned contractor or their accredited representative and in case of failure of the concerned contractor or their accredited representative to join within the period notified to him, by the consultant and the Project Manager as per details given below:-*
>
> *xxxx xxxx xxxx*
>
> *(iv) Temporary office and /or stroge shed/space constructed at site. The consultant shall prepare tender documents based on the details prepared above and shall submit 25 Copies of complete tender documents for Issue of risk and cost tender(s). On receipt of bids, consultant shall carryout the tender evaluation and submit recommendation**. The consultant shall be compensated for preparing detailed risk and cost contract documents, draft advertisement for risk and cost work, identify and recommending suitable contractors and evaluation of tender documents in all respect including technical and financial evaluation and submission of recommendations to DGMAP for approval @ 0.10% of accepted amount of risk and cost contract.** The consultant shall finalise the final bill of the contractor (s) whose contract(s) has/have been terminated.*
>
> *Note: **For the purpose of settled fee the amount of contract originally accepted shall be taken into account and the amount of risk & cost contract(s) shall not be considered for settled fee**."*[3]

24. While dealing with this claim, Mr. Mehta also relied upon Article 16 of the Contract, which is in the following terms:

> *"Article 16 FAIRNESS AND GOOD FAITH*
>
> *Good Faith*
>
> *The Parties undertake to act in good faith with respect to each other's rights under this Contract and to adopt all reasonable measures to ensure the realization of the objectives of this Contract.*
>
> *Operation of the Contract*
>
> *The Parties recognize that it is impractical in this Contract to provide*

[3] Emphasis supplied.

for every contingency which may arise during the life of the Contract, and the Parties hereby agree that it is their intention that this Contract shall operate fairly as between them, and without detriment to the interest of either of them, and that, if during the term of this Contract either Party believes that this Contract operation is unfairly, the Parties will use their best efforts to agree on such action as may be necessary to remove the cause or causes of such unfairness but on failure to agree on any action pursuant to this clause shall give rise to a dispute subject to arbitration in accordance with Clause thereof."

(ii) Submissions

25. Mr. Mehta submitted that, in the Pune and Ahmednagar cases, the petitioner was compelled to provide services for engagement of the risk and cost contractors and completion of the project by the contractor so appointed. The original estimated cost of the projects, thus increased from Rs.243 crores to Rs.342 crores [in the Pune case] and from Rs.195 crores to Rs.266 crores [in the Ahmednagar case]. According to the petitioner, the consultancy charges defined in Clause 1.10 were required to be computed on the basis of the enhanced project cost.

26. Mr. Kirtiman Singh, learned Central Government Standing Counsel, who appeared for the respondent in these two petitions, however, submitted that the learned Arbitrator has dealt with these claims on the basis of Clause 22(q)(iv) quoted above, which specifically provides for the compensation payable to the consultant in the event of a risk and cost contract, and for the settled fee to be unaffected.

27. Mr. Mehta, in rejoinder, submitted that these Clauses must take colour from Article 16 of the Contract, which provides for the parties to act fairly and in good faith. He submitted that the

contractual clauses having been drafted by the respondent, in the event of any ambiguity, they ought to be interpreted in favour of the petitioner, following the doctrine of *contra proferentem*.

(iii) Analysis

28. With regard to the petitioner's claim for enhancement of consultancy fee based upon the value of the risk and cost contract, the learned Arbitrator has proceeded on the basis of Clause 22(q)(iv), extracted above. The interpretation is that the petitioner was entitled to 0.10% of the value of the risk and cost contracts, for the additional services it was required to perform, but not to an enhancement in the settled consultancy fee.[4] It is not disputed that the petitioner has been paid 0.10% of the value of the risk and cost contracts.

29. The Court is obliged to defer to the interpretation of contractual terms by the learned Arbitrator, unless the construction of the contract is found to be irrational or perverse. Reference may be made in this connection to the judgment of the Supreme Court in *National Highways Authority of India v. M/s Hindustan Construction Company Ltd.*[5] I do not find the petitioner' s case to meet this high standard in these two cases. Unlike the Vizag case, where the award contains no specific discussion of the petitioner's enhancement claims, I do not find any such infirmity in these

[4] Paragraphs 58(d), 58(e) and 65 in the Pune case; paragraphs 43(d), 43(e) and 50 in the Ahmednagar case.
[5] 2024 SCC OnLine SC 802.

awards. The clauses relating to risk and cost contracts – which are relevant in the Pune and Ahmednagar cases – have been specifically discussed, and the analysis in the award is supported by a bare reading of Clause 22(q)(iv).

30. In view of the limited scope of interference of the Court in such cases, I do not find Mr. Mehta's other arguments - based on Article 16 of the Contract and the doctrine of *contra proferentem* - persuasive. These arguments suggest, at best, that interpretative guidance could be drawn from Article 16 and that benefit of doubt should have been given to the petitioner. The underlying premise is that the relevant contractual clauses were ambiguous and required construction. That exercise, however, fell within the domain of the learned Arbitrator and has been undertaken in the impugned award, in a manner which, for the reasons aforesaid, I consider to be beyond the pale of interference.

31. The contention of the petitioner with regard to Claim Nos. 1, 2 and 3, in the Pune and Ahmednagar cases is, therefore, rejected.

D. CLAIMS ARISING OUT OF PROLONGATION OF THE CONTRACT [CLAIM NOS. 4 AND 7 IN THE VIZAG CASE, AND CLAIM NO. 4 IN THE PUNE AND AHMEDNAGAR CASE]

(i) Contractual Clauses

32. The original project completion schedule in Article 24 of the Contract contemplated the following phases[6]:

S. No	Phases	Timeline Vizag case	Timeline Pune case	Timeline Ahmednagar case
a.	Go ahead preparation of DPR.	1 week*	1 week*	1 week*
b.	Preparation and submission of DPR (final) (including updating the deficiency of CPR).	12 weeks*	12 weeks*	12 weeks*
c.	Approval of DPR by the OWNER.	3 weeks*	3 weeks*	3 weeks*
d.	Go ahead for execution.	1 week*	1 week*	1 week*
e.	Preparation of tender documents and Submission of a soft copy (floppy) and twenty-five (25) hard copies thereof.	2 weeks	2 weeks	2 weeks
f.	Evaluation of quoted tender documents and submissions of recommendations.	3 weeks	3 weeks	3 weeks
g.	Execution of Project.	20-30 months depending on Project	20-30 months depending on Project	20-30 months depending on Project

33. Article 24, which provided for the project completion schedule, contained a note in the following terms:

> *"Note 1: - The exact time for execution of the project will be as per contract (s) concluded with contractor (s) i.e. Builder and* ***it shall be noted by the consultant that in case of any delay in completion of the project for whatsoever reasons, the consultant shall not be relieved of his responsibilities after the period given against execution of project and shall not be entitled for any compensation/ extra charges on this account as consultant's agreement shall accordingly deemed to have been extended with "NIL" financial effect****. The rates quoted in financial proposal shall be final and nothing extra on this account shall be payable to the consultant."*[7]

34. Mr. Garg and Mr. Singh also placed reliance upon the "Scope of Work" provisions in the Contract, particularly during the pre-construction and construction phases. The relevant clauses are reproduced below:

[6] The timelines marked with "*" are approximate timelines.
[7] Emphasis Supplied.

*"**Construction Phase***

21. The consultant shall execute services defined below from the start of construction up to commissioning and handing over of the project for operation. These will be provided by way of using the consultant's expertise and experience in project for operation. These will be provided by way of using the consultant's expertise and experience in projects to implement the entire project as per drawing and specifications. ***The consultant shall depute minimum required personnel as per enclosed Appendix 'G' for full time day. to day supervision, checking of quality and quantity of work, finalization of running Account and final bills and complete Project handed by a qualified and experienced Resident Engineer to look after the interest of Owner and provide monthly reports & special reports (when required).***

xxxx xxxx xxxx

22. Responsibility of the consultant team will be interalia as below:

(a) ***Supervision of works by the appointed team to ensure execution as per Drawings, specification, and contract documents****. Preparation of omission/ addition deviation orders against the measurable section / item of Sch 'A' and taking measurement, recoding MB's as directed by PM.*

Note: In the event of bad workmanship and defective work noticed during execution, the same shall be either rectified or de valued. However, the consultant shall be charged liquidity damages for in adequate/bad supervision @ 10% of value of devaluation cost/ rectification cost as assessed in terms of contract provision. Similarly, in case of deviation order because of incorrect specification, wrong drafting of specification the consultant shall be charged @ 10% of value of such deviations as liquidity damages."[8]

(i) Submissions

35. Mr. Mehta submitted that the projects were in fact completed over a much longer period than agreed - 64 months in the Vizag case, 77 months in the Pune case and 93 months in the Ahmednagar case. The petitioner was, thus, compelled to render consultancy services for

[8] Emphasis supplied.

additional periods at all the three sites, for which it incurred considerable costs particularly by way of remuneration to its engineers and other professional employees. It sought reimbursement for these costs in all the three cases.

36. In the Vizag case, the petitioner raised an additional claim for services rendered in the defect liability period of two years which ended in August, 2017 [Claim No. 7]. According to the petitioner, the defect liability period was also extended until January, 2019, leading to further costs.

37. Mr. Mehta submitted that the learned Arbitrator has erroneously rejected these claims, finding against the petitioner, both on the question of liability, and on lack of evidence.

38. Mr. Mehta argued that the learned Arbitrator's reliance upon Note-1 to Article 24 of the Contract was misplaced, and such a clause could not be enforced, absent a finding that the delay was attributable to the petitioner. He further submitted that the clause prohibiting extra payment to the Consultant, even if the Contract was extended, is void and would, in any event, be valid only during the original term of the Contract. He contended that such a clause is not a fetter on the power of the arbitrator to award compensation. Mr. Mehta placed reliance upon the judgments in *K.N. Sathyapalan v. State of Kerala*[9] and *Associated Construction v. Pawanhans Helicopters Limited*[10]. He has also added reference to the judgments in *Simplex Concrete Piles (India) Ltd. v. Union of India*[11] and

[9] (2007) 13 SCC 43.
[10] (2008) 16 SCC 128.
[11] 2010 SCC OnLine Del 821.

Asian Techs Ltd. v. Union of India[12], in his written submissions.

39. Mr. Mehta further submitted that, in the facts of the present case, the learned Arbitrator has not returned a finding that the delay was attributable to the petitioner, and that the inordinate delays in these cases ought to militate against such a strict reading of Note – 1 of Clause 24 of the Contract.

40. Mr. Mehta relied upon Article 16 of the Contract[13], to submit that the parties had expressly agreed upon a reading of the Contract which accords with a reasonable and fair transaction. According to him, the reading of the Contract by the respondents, which has been accepted by the learned Arbitrator, is wholly unreasonable. He argued that the petitioner could not have been expected to continue to provide its services for such an inordinately expanded time frame, without some compensation.

41. On the question of evidence, Mr. Mehta submitted that the petitioner had led evidence with regard to rise in the Consumer Price Index [“CPI”], which is a reasonable and objective basis for the Arbitral Tribunal to adjudicate the petitioner’s claim that it had paid enhanced remuneration to its employees during the contract prolongation period. He relied upon the judgments of the Supreme Court in *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd*[14]. and of this Court in *Salwan Construction Company v. Union of India*[15], to submit that such an index can be used as a convenient measure of damages.

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[12] (2009) 10 SCC 354.
[13] Extracted in paragraph 24 above.
[14] (2022) 1 SCC 753.
[15] 1977 SCC OnLine Del 55.

42. Mr. Garg and Mr. Singh supported the findings of the learned Arbitrator on the respondent's liability for prolongation compensation, and submitted that the Court should defer to the learned Arbitrator, unless the interpretation is found to be manifestly irrational or perverse.

43. On the question of evidence, Mr. Garg and Mr. Singh referred to the judgments of this Court in *Satluj Jal Vidyut Nigam v. Jaiprakash Hyundai Consortium and Others*[16] and *NHPC Limited v. Hindustan Construction Company Limited and Others*[17], to submit that a claim for reimbursement of cost cannot be passed upon formulae, but should be anchored in evidence of expenses incurred, to ensure that a litigant is being compensated for actual expenditure and not for notional costs.

(ii) Analysis

44. The learned Arbitrator rejected these claims, relying specifically upon Note – 1 to Article 24, which precludes payments of additional compensation to the petitioner on account of delay in execution of the project. In coming to this conclusion, the learned Arbitrator relied upon the following interpretation of the contractual clauses:

> *"39. In my view, the sum and substance of the afore quoted clauses is as under:*
>
> *(a)* ***The time period prescribed in the CA is not sacrosanct and is variable****, in as much as, was corresponding and contemporises to the contract(s) concluded with the contractor(s), including the risk and cost contractor (s).*
>
> *(b) The claimant was not to be discharged/relieved of its responsibilities, till not only the completion of the project but even thereafter till completion of arbitration(s), if arose between the respondent and its contractor(s), as the claimant was to provide assistance to the respondent in such arbitration proceedings.*

[16] 2023 SCC OnLine Del 4039.
[17] 2023 SCC OnLine Del 8395.

(c) ***The claimant shall not be entitled to any compensation/extra charges for the delayed completion of project****.*

(d) For the purpose of the settled fee the amount of originally accepted contract value shall be taken into account and amount of risk and cost contractor(s) shall not be considered for the settled fee.

(e) The claimant was to prepare all the risk and cost, tender documents, advertisements, evaluate tender documents m all respects and make recommendations of suitable contractor(s) to the respondent and for this work it was to be compensated @ 0.10% of the accepted amount of risk and cost contract(s)

(f) ***The consultancy fee shall include cost towards all staff costs, consultation costs, office expenses and all other costs which claimant may incur in carrying out the services described in the contract****.*

(g) The consultancy fee was payable in five stages.

*(h)****The Consultancy charges were to be worked out in terms of clause 1.10 and no escalation was payable on any account except for any increase in scope of work ordered by the respondent during the execution of the projects****.''*[18]

45. The learned Arbitrator rejected the petitioner's reliance upon the judgments of the Supreme Court in *K.N. Sathyapalan*[19], of this Court in *Punj Lloyd Ltd. v. Ministry of Health & Family Welfare*[20] and of the Bombay High Court in *Union of India v. Suraj Infrastructure Pvt. Ltd.*,[21] on the basis that the parties were aware of the possibility of time overruns while entering into the contract. The learned Arbitrator also held that the respondent cannot be blamed entirely for the delay, particularly having regard to the petitioner's specific role as the consultant supervising the project.

46. Despite having come to this conclusion, the learned Arbitrator also examined the material placed on record by the petitioner and held that the

[18] Emphasis Supplied.
[19] Supra (note 9).
[20] 2018 SCC OnLine Del 8650.
[21] 2012 SCC OnLine Bom 1373.

material was insufficient to prove a claim on this nature. The petitioner's claims were based only upon rise in the CPI and consequent enhancement of the remuneration package of all categories of employees. The findings of the learned Arbitrator in this regard are reproduced below:

> *"55. If the matter is viewed from another angle then also the claimant is not entitled to the claim nos.4 and 7 since it has failed to prove these claims by leading cogent evidence. The claimant can not be said to be not in possession of the evidence in support of these claims. For the reasons best known to it the claimant has chosen to calculate these claims on the basis of CPI by taking it as a fact that the entire staff as per the Appendix-G remained deployed after the start of construction stage continuously. In the claim no.4 the claimant has stated: " ..... due to enhancement of remuneration package of all categories of employees including the engineers and staff, deputed for construction supervision work under construction stage, the fee receivable against this stage necessitated revision. ....." Similarly, in claim no.7 the claimant has alleged that it was compelled to provide its services beyond DLP period of 2 years, that is, from August 20 17 to January 20 19. The details of the amount claimed is mentioned in Appendix 'G' and a perusal thereof shows that the claimant has claimed salary of 4 staff, that is, Resident Engineer, Civil Engineer, electrical Engineer and Computer Engineer. The claims have been raised by increasing the salary in view of CPI Index. In ordinary course of its business claimant would have been maintaining records, including attendance register, salary slips/payment vouchers, bank statements, account books etc. containing names and designation of the employees deputed at the sites and could have conveniently produced the same. On the one hand the stand of the claimant is that progress of construction work by the contractor(s) was dismal and at times the work remained stalled; obviously during such period(s) when contractors' contract was terminated and the process of engagement of risk and cost contractor was undertaken, during this period obviously there would have been no construction activity at site and in such circumstances, it is highly improbable that the supervisory staff would have remained deputed at the sites. In my view, it was necessary for the claimant to had lead sufficient evidence to prove that the staff in terms of the appendix-G remained deputed all along the period, for which present claim has been raised. The names and designation of such staff ought to have been disclosed; besides proof of their salary and mode of payment. It is further noted that as per the clause 5 of the Appendix G to the CA, the claimant was not required to depute the four staff, as mentioned in the Appendix G of SOC (the calculation sheet) and the*

claimant was to depute only one Assistant Civil Engineer and One Assistant Electrical Engineer, during the DLP. Be that as it may, no documentary evidence has been lead that the staff as mentioned in the calculation sheet, remained deployed for two years of alleged extended DLP. It is trite law that a party to the lis, who is in possession of the best evidence, has to produce it in the court and if he fails to do so an adverse inference has to be drawn against such party that had it been produced it would have gone against him. In the facts of this case I am of the view that CPI index would not be sufficient to award this claim, even if for the sake of argument, the contention of the claimant that it was entitled to the damages for prolongation of the contract, is accepted. Both these claims have to be rejected on this ground as well."

47. Having considered the arguments of learned counsel on this point, I am of the view that the impugned awards do not call for any interference, as far as the prolongation claims are concerned. The nature of the contracts must first be borne in mind. The Contract was for consultancy services related to a construction project. The compensation sought is, thus, for increased cost during the execution phase of the Contract, which the petitioner itself was required to manage and supervise.

48. The learned Arbitrator further noticed that the petitioner is an experienced consultant who would have been aware of the possible eventuality of delay in completion of the project, but nevertheless accepted a fixed fee. The learned Arbitrator found that, even according to the petitioner, delay in completion of the project was not attributable to the respondent, but to the contractor. The only grievance agitated by the petitioner against the respondent concerns delay in terminating the contractor's engagement. The learned Arbitrator noticed that the petitioner was not able to justify its claim that it supervised the work as required under the Contract and that it submitted reports and communications to the respondent, recommending termination of the

contractor's agreement. In fact, the learned Arbitrator found that the petitioner recommended extension of the time to the contractor and disbelieved the evidence of the petitioner's witnesses that this was done on the directions of the respondent's representative. On this evidence, the learned Arbitrator rejected the petitioner's allegations with regard to delay attributable to the respondent.

49. I am unable to discern any perversity or arbitrariness in these findings of the learned Arbitrator. The construction of the Contract and assessment of evidence are ordinarily matters within the remit of the Arbitral Tribunal. In the present case, the learned Arbitrator proceeded on a reasonable assessment of the material before it, to arrive at the conclusion that the respondent was not liable for the delay in completion of the project and that the petitioner was, in fact, responsible for supervision of the contractor, including for timely construction.

50. Having come to this conclusion, I am of the view that the impugned awards cannot also be characterized as arbitrary or perverse, for holding the petitioner to the contractual terms incorporated in Note – 1 to Clause 24 of the contracts. The provision is unambiguous. It refers specifically to the fact that the Consultant would continue to render services, even if there was a delay in competition of the project "for whatsoever reasons", and that it would not be paid any compensation on this account.

51. The judgments cited by Mr. Mehta do not, in my view, apply to the factual situation which obtains in the present case. In *K.N. Sathyapalan*[22], the Court proceeded on the basis that the contractor had been prevented

from completing the project within time by the action of the employer, and therefore upheld an award granting enhancement of cost, despite a contractual provision to the contrary. The judgement in *Associated Constructions*[23] is also distinguishable for the same reason. The said judgments apply in cases where the claimant is able to show that the delay was on account of the respondent, unlike in the present case.

52. In the judgment of this Court in *Simplex Concrete*[24], cited by Mr. Mehta, an award of damages by a learned Arbitrator was upheld on the ground that contractual clauses which prevented the award of damages, even if the respondent had delayed the contract, were void as they were in conflict with Section 23 of the Indian Contract Act, 1872. This Court followed the judgment of the Supreme Court in *Asian Techs*[25], in preference to the judgment of the Supreme Court in *Ramnath International Construction (P) Ltd. v. Union of India*[26] . The judgement is of little assistance in the present case, as the threshold factual finding with regard to delay being attributable to the respondent alone, is against the petitioner.

53. For the sake of completeness, I may add that I am also of the view that the learned Arbitrator has correctly found against the petitioner on the question of sufficiency of evidence with regard to this claim. It may be noted that the claim is one for reimbursement of expenses, but no evidence of those expenses or payments was led. Instead, the petitioner relied only upon rise in the CPI to submit that it had incurred

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[22] Supra (note 9).
[23] Supra (note 10).
[24] Supra (note 11).
[25] Supra (note 12).

prolongation costs. The CPI is not, in any event, a measure of wages or remuneration of the particular categories of employees for which the petitioner claimed remuneration. It is only an index of prices of a basket of consumption commodities and would, at best, provide a vague and uncertain co-relation with fluctuation in remuneration of particular classes of employees.

54. The respondent's reliance upon the judgments in *Satluj Jal Vidyut Nigam*[27] and *NHPC*[28] is also appropriate. In *Satluj Jal Vidyut Nigam*[29], the claim in question was on account of enhancement in labour costs based on a percentage of value of work done. This Court held that such claims must be based on evidence and not upon "mathematical derivations or adoption of novel formula". Similarly, in *NHPC*[30], the Court specifically drew a distinction between a claim for damages which may require to be quantified on the basis of a formula, and a claim for reimbursement of costs for which evidence would necessarily be required.

55. The case of *Salwan Construction*[31], cited by Mr. Mehta, was a case of a non-speaking award under the Arbitration Act, 1940. The Court held in that context, that a claim for escalation could have been decided on the basis of an index. Further, the quantum of escalation was available in a subsequent contract between the same parties. Such a situation is not available in the present case.

56. Mr. Mehta submitted that that the insufficiency of evidence ought

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[26] (2007) 2 SCC 453.
[27] Supra (note 16).
[28] Supra (note 17).
[29] Supra (note 16).
[30] Supra (note 17).
[31] Supra (note 15).

not to have weighed with the learned Arbitrator, at least in those cases where no defence had been taken on record. His reliance upon the judgement of the Supreme Court in *Union of India v. Ibrahim Uddin*[32] is, in my view, misconceived. In the said judgement, the Supreme Court summarised the law on adverse inference as follows:

> *"24. Thus, in view of the above, the law on the issue can be summarised to the effect that the issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side.* ***The court cannot lose sight of the fact that burden of proof is on the party which makes a factual averment.*** *The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents, etc. as is required under Order 11 CPC. Conduct and diligence of the other party is also of paramount importance. Presumption of adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and the other side failed to comply with the court's order, the court may be justified in drawing the adverse inference.* ***All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary****."*[33]

I do not find the approach taken by the learned Arbitrator to be contrary to these principles. The onus of proving the quantum of damages was upon the petitioner. It chose not to lead any evidence other than the CPI. The learned Arbitrator was well within the jurisdiction to assess the evidence, and come to a conclusion as to whether he was satisfied on a balance of probabilities, that the petitioner had incurred the expenditure

[32] (2012) 8 SCC 148.
[33] Emphasis supplied.

for which it claimed reimbursement.

57. For the aforesaid reasons, I find no ground to interfere with the findings of the learned Arbitrator on claims Nos. 4 and 7.

E. MISCELLANEOUS CLAIMS [CLAIM NOS. 5 AND 6 IN THE VIZAG CASE]

(i) Submissions

58. These two claims concern deduction from the petitioner's bills and for service tax in GST. According to the petitioner, these claims were raised in the statement of claim and supported in the affidavit of evidence filed by the petitioner's witness. In the absence of any effective cross-examination on these claims, Mr. Mehta submitted that the learned Arbitrator ought to have allowed the claims.

(ii) Analysis

59. The learned Arbitrator, however, rejected both the claims on the ground that they were sought to be justified only by calculation sheets prepared by the petitioner, without any documentary evidence. The relevant observations in the impugned award are as follows:

> *"57. The claim no.5 is towards the amounts recovered by the respondent from the bills of the claimant towards the over-deductions against DOs, deduction on account of attendance. The learned counsel for the claimant has placed reliance on the Appendix E to the SOC. I have perused the Appendix E and I find it to be self serving calculation sheet prepared by the claimant and is completely vogue. These claims are not even supported by any documentary evidence. The bald statement that the amounts have deducted wrongly is not sufficient to prove this contention of the claimant. The claimant has not even placed and proved on record such bills from which the amounts have been allegedly deducted. It is further stated here that the claimant has claimed Rs.3,29,159.49 towards the variation in Service Tax in Appendix E and the same amount has also been claimed in Appendix F to the SOC. Be that as it may no evidence has been lead by the claimant to prove this claim and the same is rejected.*

xxxx xxxx xxxx

59. As per the aforequoted clause the service tax is included in the remuneration; but at the same time in case of increase of rate of service tax after the submission of last date of tender it was payable and in case of decrease it was recoverable from the claimant. Any new and additional tax was payable by the respondent. Therefore, it was to be proved by the claimant that there was increase in the service tax and to what extend and as to how much GST was payable and at what rate and which period, on GST regime coming in free. The claimant has not lead any documentary evidence in this regard in as much as, even the bills have not be placed to show that GST was included in the bills nor any challan has been filed to prove that any such tax was paid to the GST Department. This claim has remained unproved and is rejected."

60. Although Mr. Mehta submitted that the petitioner's evidence remain unrebutted in the absence of any statement of defence, at least in two of the three cases, I am not inclined to interfere with the arbitral award on a pure question of evidentiary assessment. The learned Arbitrator has noticed that the petitioner had not even placed the bills upon which it claimed that the respondent had made unjustified deductions, or to show that the respondent had been invoiced for GST as claimed in Claim No. 6. Even in the absence of evidence led by the respondent, the learned Arbitrator was well within his jurisdiction to examine the material placed on record by the petitioner in order to satisfy himself that the claims had been duly proven.

61. I am therefore unable to accept the petitioner's challenge on these claims.

CONCLUSION

62. For the reasons aforesaid, O.M.P.(COMM) 518/2023 is partly allowed. The impugned award is set aside, in so far as it rejects Claim Nos. 1, 2 and 3. The petitioner is free to institute fresh arbitration

proceedings for the said claims. The petition is, however, rejected with regard to all other claims.

63. O.M.P.(COMM) 526/2023 and O.M.P.(COMM) 527/2023 are dismissed.

64. The petitions are disposed of in these terms, but without any order as to costs. All pending applications also stand disposed of.

PRATEEK JALAN, J

MAY 28, 2024
'Bhupi / KB'/