* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Judgment reserved on : 06 October 2023**
Judgment pronounced on : 02 November 2023

\+ FAO (COMM) 140/2021

NATIONAL PROJECTS CONSTRUCTIONS CORPORATION LTD. (NPCC) ..... Appellant
Through: Mr. Rajat Arora, Ms. Mariya Shahab & Mr. Nibin Louis, Advs.

versus

M/S AAC INDIA PVT. LTD. ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

JUDGMENT

DHARMESH SHARMA, J.

1. This Judgment shall decide the present appeal preferred by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996[1] read with Section 13(1A) of the Commercial Courts Act, 2015[2] for setting aside the impugned judgment dated 12 March 2021 passed by learned Additional District Judge-03, South District, Saket Courts, New Delhi[3] in ARBTN No.20824/2016, whereby the learned ADJ chose to partially set aside the award dated 29 August 2016 on the

[1] A&C Act
[2] CC Act
[3] ADJ

aspect of liquidated damages[4] to be paid by the appellant to the respondent.

FACTUAL BACKGROUND:

2. The appellant, which is a Government Enterprise under the Ministry of Water Resources and also a company registered under the Companies Act, 1956 consequent to letter of intent[5] dated 03 March 2017 entered into an agreement dated 13 March 2007 as Project Management Consultant of the Central Reserve Police Force[6] with the respondent, which was a micro enterprise stated to be having a turnover of less than Rs. 10 Lacs, for installation of Fire Protection System for the Auditorium Block, CRPF Campus, Vasant Kunj, New Delhi. The project was stipulated to be completed within a period of 7 months from the date of issuance of LOI for total contract value of Rs. 90,79,200/-. However, performance got delayed.

3. To cut a long story short, the appellant claimed that the respondent was in breach of its obligations under the contract and delayed its performance by taking about 33 months for completion of work, and therefore, in terms of clause 35.5 of the contract, LD was levied and adjusted against the payment payable to the respondent not only for the abnormal delay but also for causing damage to the reputation of the appellant for the delay caused; and accordingly payment for a sum of Rs. 1,13,97,341/- i.e., 10% of the work cost of the CRPF camp project was withheld. The respondent in terms of clause 52 of the 'General Conditions' of the contract invoked

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[4] LD
[5] LOI

arbitration and accordingly Sh. Suresh Chandra Garg, Ex. General Manager of the appellant was appointed as the Sole Arbitrator to adjudicate upon the disputes between the parties vide appointment/nomination letter dated 17 April 2014. The Arbitrator entered upon the reference, conducted the proceedings, and eventually passed the award dated 29 August 2016.

4. After considering the dispute between the parties in light of various clauses of the contract, the Arbitrator partly granted the reliefs claimed by the claimant/respondent as follows:-

> **"Claim No.1:**
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> The claim for refund of Rs. 9,68,470/- was disallowed after adjusting LD of Rs. 9,17,000/- giving balance of Rs. 51,470/- to the claimant;
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> **Claim No.2:**
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> Claim No.2 for an amount of Rs. 4,47,578- towards the balance of security deposit was allowed;
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> **Claim No.3:**
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> Claim for unfair profit earned by the respondent by utilizing payments received from CRPF against RA bills of claimant amounting to Rs. 1,78,486/- with interest was declined;
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> **Claim No.4:**
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> Direct expenses induced by the respondent towards Pump Operator plus interest besides insurance charges was rejected;
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> **Claim No.5:**
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> Claim for escalation charges and interest upon escalation charges was rejected;
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> **Claim No.6:**
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> Claim for damages of loss of profits and loss as well as goodwill amounting to Rs. 25,00,000/- was rejected;
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> **Claim No.7:**
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> Fair compensation on account of harassment, mental agony and physical harm to the tune of Rs. 5,00,000/- was rejected; and
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> **INTEREST:**
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> Interest was allowed on the claim No.1 @ 6% per annum from the date of appointment of the Arbitrator i.e., 17 April 2014 till the date of Award and it was directed that in case interest is not paid

[6] CRPF

within 60 days, it shall carry interest @ 9% per annum from the date of the Award till payment."

5. Simultaneously, the Arbitrator also dealt with the counter claims of the appellant herein and arrived at the following decision:

(i) Claim for loss of reputation to the respondent/organization to Rs. 1,00,00,000/- was rejected.

(ii) Claim for damages incurred by the appellant due to breach of contract and negligence amounting to Rs. 2,00,00,000/- was also rejected.

6. The award was challenged by the respondent/claimant under Section 34 of the A&C Act and the learned ADJ vide the impugned judgment dated 12 March 2021 considered the proposition of law propounded in **ONGC Ltd. v. Saw Pipes Ltd.**[7]**; Associate Builders v. Delhi Development Authority**[8]**; Mcdermott International Inc. v. Burn Standard Company Ltd.**[9]**; P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.**[10]**; Sumitomo Heavy Industries Ltd. v. ONGC Ltd.**[11]**; Bharat Coking Coal Ltd. v. Annapurna Construction**[12]**; MTNL v. Fujitshu India Private Ltd.**[13], **ACME Manufacturing Company Ltd. v. Union of India**[14]**; Sunil Kukreja v. North West Sales and Marketing Ltd.**[15]**; R.S. Jiwani & Ors. v. Ircon International Ltd.,**[16] **and Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Private**

[7] (2003) 5 SCC 705
[8] (2015) 3 SCC 49
[9] (2006) 11 SCC 181
[10] (2012) 1 SCC 594
[11] (2010) 11 SCC 296
[12] (2003) 8 SCC 154
[13] 2015 SCC OnLine Del 7437
[14] 2019, SCC OnLine Del 10650
[15] OMP (Comm.) 456/2017
[16] 2009 SCC OnLine 2021

Limited[17]; and found that insofar as the findings by the Arbitrator with regard to claim No.1 was concerned and having regard to clauses 35.0, 35.1 of GC-14; 48.3, 48.4 and 49 of the GC-22, learned ADJ proceeded to hold as under:

> "45. From above provisions/clause of the contract, it is admittedly clear that if there is delay in completion of work then the contractor shall pay the compensation (liquidated damages and penalty) @ 1% (One percent) of the cost for every incomplete work per week of delay subject to a maximum of 10% of the total cost of the contract value. It is pertinent to mentioned here that for imposition of liquidated damages and penalty, if any, there must be a delay. It is not in dispute between the parties that there was delay in completion of work and the total completion period for the works was assigned for 10 months from the date of issuing of letter of intent i.e., from 03.03.2007 whereas the total time consumed in completion of the work was about 33 months. *But, question is as to whether the claimant/petitioner was responsible for the said delay or not.* The respondent had filed Counter Claim also against the petitioner before learned Arbitrator but same was rejected. **It is concluded by the learned Arbitrator while deciding/rejecting the Counter Claim No. 1 and Counter Claim No. 2 that even there was enormous delay in execution of the works but the same cannot be segregated between the parties on the basis of the correspondence on the records of the arbitrator, hence no breach of the contract is established.** Hence, it is categorically concluded/observed by the learned Arbitrator that the enormous delay cannot be segregated between the parties and hence, no breach of the contract is established. **Neither during deciding claims of the petitioner nor the counter claims of the respondent, it is observed/concluded by the learned Arbitrator that the claimant/petitioner was responsible for the delay, or the delay was caused by the petitioner only. In my view, unless there is delay due to the claimant/petitioner, terms of contract (Clause 35.1 of GC-14 read with Clause 48.4 of GC-22) cannot be invoked by the respondent for imposing said liquidated damages and penalty.**
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> 46. The learned Arbitrator proceeded on premise that there is an admitted position that CRPF imposed liquidated damages and same was recovered in proportionate manner**. I do not find any**

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[17] 2019 SCC OnLine 6562 (*This case has been reversed in Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd., 2021 SCC OnLine SC 695*)

> **such admission in the pleadings of the parties that CRPF imposed liquidated damages and same was recovered in proportionate manner.** The petitioner has clearly stated in second last para of page nine of its Statement of Claim dated 14.06.2014, (which has been referred by the Mr. Arora in support of his submissions) that the payments which were withheld on false and frivolous reasons from past bills of the claimants were officially named LD in the month of May/June 2009. By said para, the petitioner has only been referring the letter of the Zonal Manager, NPCC written to CRPF proposing to them to release payment of NPCC's RA bill after deducting a sum of RS. 1,13,97341/- i.e., 10% of the work cost of CRPF Camp Project with NPCC inclusive of Rs. 38,89,916/- already withheld by CRPF so as to complete the entire works by 30.06.09.
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> 47. For the admissions, the learned Arbitrator referred the only Letter/Correspondence dated 09.10.2009 of the claimant/petitioner annexed along with the claim petition. The only reason/document/evidence on the basis of which the learned Arbitrator rejected the claim of the petitioner is the said Letter/Correspondence dated 09.10.2009. At the juncture, it would be relevant to extract the contents of the said letter:-
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> > "It was informed to us that your clients, M/s. CRPF have withheld an amount of 10% of the total contract price towards liquidated damages which also includes NPCC's PMC. The discussions are underway between NPCC and CRPF and the release of this withheld amount could take some time. Therefore, M/s NPCC have no choice but to withhold proportionate amount from the dues of all working agencies at the said site.
> >
> > It was brought by us to the kind notice of the Zonal Manager that it would become very difficult for us to maintain our cash flow if such heavy amount was deducted from our bills though we had agreed to share such recoveries in proportion of the value of our work, <u>if made by M/S CRPF from M/s NPCC</u>.
> >
> > The Zonal Manager, Sh. Manohar Lal, on our request, kindly consented to immediately release half of the amount of the security deposited by us i.c. Rs.9,00,000.00 and balance of our dues after adjusting the amount proposed to the withheld towards liquidated damages i.e. Rs. 9,17,000/- from the same."

7. It was thus concluded by the learned ADJ that the CRPF and the NPCC/appellant were in negotiations for release of the amount

withheld and that there was no evidence that 10% of the amount was withheld by the CRPF. Accordingly, the arbitral award dated 29 August 2016 was partially set aside and the award was modified to the extent of awarding a sum of Rs. 9,17,000/- to the petitioner although disallowing any claim for further interest, and also leaving the parties free to resort to arbitration in case they so desired.

GROUNDS FOR APPEAL:

8. The impugned award is assailed in the present appeal before this Court *inter alia* on the grounds that the learned ADJ completely misconstrued the letter dated 09 October 2009 on the record and placed an erroneous construction on the provisions of the contract; and that despite concluding that there was delay on the part of the claimant/respondent in completing the project, contradicted itself by not allowing imposition of LD and rather modified the award, which course has no sanction in law.

ANALYSIS AND DECISION:

9. Having regard to the issues raised and canvassed by the learned counsels at the Bar, it would be apposite to take note of the principles enunciated by the Apex Court in some of the recent decisions on the scope of challenge and interference with an arbitral award under Section 34 as also the scope of appeal under Section 37 of the Act. Before we advert to some recent pronouncements in law, it would be expedient to reproduce the two provisions, which read as under:

> "34. Application for setting aside arbitral award. –(1) Recourse to a Court against an arbitral award **may be made only** by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award **may be set aside** by the Court only if-
(*a*) the party making the application establishes on the basis of the record of the arbitral tribunal that-
(*i*) a party was under some incapacity; or
(*ii*) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(*iii*) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(*iv*) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
(*v*) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
(*b*) the Court finds that—
(*i*) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
(*ii*) the arbitral award is in conflict with the public policy of India.
Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-
(*i*) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or
(*ii*) it is in contravention with the fundamental policy of Indian law; or
(*iii*) it is in conflict with the most basic notions of morality or justice.
Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.
(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:
Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:
Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.
(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.
37. Appealable orders.—(1) (Notwithstanding anything contained in any other law for the time being in force, an appeal) shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

((*a*) refusing to refer the parties to arbitration under Section 8;

(*b*) granting or refusing to grant any measure under Section 9;

(*c*) setting aside or refusing to set aside an arbitral award under Section 34.)

(2) An appeal shall also lie to a court from an order of the arbitral tribunal—

(*a*) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(*b*) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

10. The scope and ambit of the aforesaid provisions have come to be elaborated upon in umpteen number of cases decided by the Apex Court as well various High Courts including this Court. Avoiding a long academic discussion, we shall refer to a few decisions hereinafter. It is well ordained that the jurisdiction of the Court under

Section 34 is neither in the nature of an appellate nor it is in nature of a revisional remedy. It is also well settled that an award can be set aside on limited grounds which have been spelt out vide sub-sections (2) and (3) of Section 34 by filing an application and Section 34 proceedings do not entail a challenge on the merits of the award. This becomes evident from a reading of sub-section (4) whereupon receipt of an application, the Court may adjourn the Section 34 proceedings and direct the Arbitral Tribunal to resume the arbitral proceedings or take such action as would eliminate the grounds for setting aside the arbitral award. It is also relevant to take note that Section 34 is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985, under which no power to modify an award is given to a court hearing a challenge to an award[18].

11. In the aforesaid well settled position in law, we commence the discussion on case law citing the case of **MMTC Ltd. v. Vedanta Ltd**.[19], wherein the agreement between the parties envisaged that the goods manufactured by the respondent were to be stored and handled by the appellant as also to be marketed by it raising invoices in the name of the customers after taking 100% advance. It was further stipulated that the amount was then to be remitted to the respondent after deducting service charges/commission at an agreed rate. It

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[18] Article 34. Application for setting aside as exclusive recourse against arbitral award.—
(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

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4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the Arbitral Tribunal's opinion will eliminate the grounds for setting aside."

appears that there were certain communications between the parties enabling the appellant to have the liberty to supply the goods to the customers against letter of credit i.e. without advance payment while maintaining that it was the total responsibility of the appellant to ensure the *bona fides* of the letter of credit furnished as also to ensure that the principal amount besides interest was paid on the due date against the letter of credit. A dispute arose with regard to supplies made by the appellant to Hindustan Transmission Products Limited [“HTPL”] since payment was not made and the respondent invoked the arbitration clause. The majority of the arbitral tribunal found in favour of the respondent and on the award being challenged, the Single Judge as well as the Division Bench of the High Court of Bombay found in favour of the respondent. On further challenge to the Supreme Court, a plea was advanced as to the arbitrability of the dispute as also the plea that the courts should have come to a different conclusion based on evaluation of evidence on the record as regards the alteration affected by the parties envisaging a distinct type of customers. Additionally, another plea was taken that the supplies had not been made to HTPL independent of the contract between the parties. Outrightly rejecting the aforesaid pleas, the Supreme Court elucidated the contours of the power under Section 34 and 37 of the Act as under:-

> “As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot

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[19] (2019) 4 SCC 163

> **undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision**. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

12. Another case in point is decision in **NHAI v. M. Hakeem**[20], wherein the Supreme Court delved into the issue as to whether power of the Court under Section 34 of the Act to set aside an award of an Arbitrator would include the power to modify such an award. It was a case wherein the Division Bench of the Madras High Court had disposed of large number of appeals under Section 37 of the Act laying down as matter of law that arbitral awards made under the National Highways Act, 1956 read with Section 34 of the A&C Act should be so read as to permit modification of an arbitral award and thereby the Division Bench enhanced the amount of compensation awarded by the Arbitrator. Frowning upon such course of action, it was categorically held as under:-

> "It can therefore be said that this question has now been settled finally by at least 3 decisions [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , [*Kinnari Mullick* v. *Ghanshyam Das Damani*, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [*Dakshin Haryana Bijli Vitran Nigam Ltd.* v. *Navigant Technologies (P) Ltd.*, (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, **revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law** on International Commercial Arbitration, 1985 which, as has been pointed out in *Redfern and Hunter on International*

[20] (2021) 9 SCC 1

Arbitration, makes it clear that, **given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand** the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.

{paragraph 42}

Quite obviously if one were to include **the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done.** In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended **that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996.** It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over." {paragraph 48}

{Bold Emphasized}

13. The *dictum* that there is no power vested in the Court to modify, revise or vary the terms of an award under section 34 was further reiterated in a decision titled **Hindustan Construction Company Limited v. National Highways Authority of India**[21], wherein the Supreme Court held that "*Courts under Section 34 are not granted the corrective lens and cannot re-appreciate the decision on merits unless the conclusions drawn are patently perverse.*" Likewise, in the case of **Reliance Infrastructure Ltd. v. State of Goa**[22]**,** decision in the case of **Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation**[23] was referred with approval and it was observed that "*The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the*

[21] 2023 SCC OnLine SC 1063
[22] 2023 SCC OnLine SC 604
[23] (2022) 1 SCC 131

award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law".

14. In the light of the aforesaid proposition of law, reverting to the instant matter, we have no hesitation in holding that learned ADJ went beyond the scope of Section 34 of the A&C Act and the decision to modify the award is flawed and unsustainable in law. Learned ADJ in paragraphs (45), (46) and (47) of the impugned judgment as reproduced above in paragraph (6) of this judgment, observed that the Arbitrator rightly held that there was enormous delay in the execution of works, and yet took a diametrically erroneous view that the Arbitrator could not categorically attribute the delay in execution of the work to any of the parties to the dispute. It was never the claim of the claimant/respondent that it was appellant who was responsible for the delay. No evidence was led to prove that either the appellant or any of the other sub-contractors caused any delay in the completion of the project. Evidently, the claimant/respondent was independently tasked with the work of installation of the fire security system. We would refer to the relevant clause of the contract later wherein it was stipulated that no escalation costs were payable either.

15. Secondly, learned ADJ completely misconstrued the contents and import of letter/ correspondence dated 09 October 2009 since the earlier letter/correspondence reference 306/NCR Zone/006 dated 04 Marcy 2009 was overlooked that clearly spelt out that CRPF had withheld 10% of the works cost while releasing the payment of 11th, 12th and 13th RA bills for late completion of work *inter alia* bringing

out that work was required to be completed by 30 June 2009. Insofar as letter dated 09 October 2009 is concerned, this was written by the claimant/respondent consequent to a meeting held with the stake holders on 07 October 2009 with regard to overdue payment of RA 9 and it was acknowledged that 10% of the total amount of works contract had been withheld towards LD.

16. At this juncture, it would be relevant to reproduce the relevant stipulations in the works contract, which are as under:

> **"35.0 of GC-14 -** Compensation for delay (Liquidated damages):- if the contractor fails to maintain the required progress in terms of clauses or to complete the work and clear the site on or before the contract or extended date period of completion, he shall, without prejudice to any other right or remedy of the Corporation on account of such breach, pay as agreed compensation amount calculated as stipulated below or such smaller amount as be fixed by the authority on the contract value of the work for every week that the progress remains below that specified in relevant clause of contract or that the work remains incomplete. This shall also apply to items or group of items for which separate period of completion has been specified. For this purpose the term 'Contract Value' shall be the value at contract rates of the work as ordered.
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> **35.1 of GC-14** – Liquidated damages and penalty shall be @1% (one percent) of the cost for every incomplete work per week of delay subject to a maximum of 10% of the total cost of the contract value. The amount of compensation/liquidity damages may be adjusted or set-off against any sum payable to the contractor under this or any other contract with the Corporation.
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> **48.3 of GC-22 –** Payment of account – Interim bills shall be submitted by the contractor at intervals of one month on or before the date fixed by the Engineer-in-charge for the work executed. The Engineer-in-charge shall then arrange to have the measurements/bills verified jointly with the contractor or his agent. Payment of this jointly measured bill or any other payment whatsoever shall only be made to the contractor on receipt of the same from the client (M/s. CRPF). No claim whatsoever including interest shall be payable to the contractor on this account.
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> **48.4 of GC-22 –** In case, the client imposes any recovery including the arbitration award or whatsoever, the same shall be recovered from the contractor/

> **49 of GC – 22** – Escalation: No escalation, whatsoever the reason may be, shall be paid. The rates quoted by the agency shall remain firm throughout the period of the contract and also during the extended period of the contract, if any."

17. A careful perusal of the aforesaid clauses would show that LD and penalty were stipulated to be @ 1% of the cost of incomplete work per week of delay subject to maximum of 10 % of the total cost of contract value and it was stipulated that LD may be adjusted and set off against any sum payable to the Contractor/NPCC. It is also manifest that the contract stipulated payment by CRPF to the appellant alone. The appellant was enjoined upon to verify the bills towards the work done received from the sub-contractors. As an inevitable corollary, on imposition of LD, the appellant was well within its rights to withhold 10% of the contract value in such proportion from each of the sub-contractors including the claimant/respondent.

18. There is no gainsaying that there are a catena of cases on the proposition that where damage or loss is difficult or impossible to prove, the Court is empowered to award liquidated amount stipulated in the contract, if it is a genuine pre-estimate of damage or loss, or reasonable compensation for the said amount loss or damage. The claim for LD in such cases is well within the purview of Section 74 of the Indian Contract Act, 1872 for which reference can be had to the decision in **M/s. Kailash Nath Associates v. Delhi Development Authority**[24]**.**

19. It is pertinent to mention here that the Arbitrator while holding that LD were payable held as under:-

"The perusal of the above terms and conditions of the contract, clearly provides that the client imposes any recovery (clause 48.4 above) the same shall be recovered from the contractor. In the present case, it is admitted positions on the part of both the parties that the client (CRPF) imposed LD In terms of the clause 35.1 above and which was recovered proportionately from the contractors engaged for execution of the contract. The client (CRPF) imposed the LD to the extent of 10% of the contract value and recovered from the bills, hence the amount of LD was reduced from the due payment of the contractors including the claimant, which inter alia further confirm that the payment of dues stand reduced in the application of the terms of the contract. The clause 48.3 above clearly provides that the payment of jointly measured bill or any other payment whatsoever shall only be made to the contractor on receipt of the same from the client (CRPF). No claim whatsoever including interest shall be payable to the contractor on this account. Accordingly, if in terms of clause 48.3, the reduced payments due to LD imposed and recovered have been paid by the client for a reduced amount in that circumstances, the contractor is left with no legal right to make the claim in this account in the application of the aforesaid terms of the contract itself. It is amply established in various decision of the court that the correspondences, offer etc. exchanged between the parties, cannot take away the valid concluded contract. The valid concluded contract shall prevail upon such correspondence etc. The Indian Contract Act does not enable a party to the contract to ignore the express provisions thereof and to claim 'the payment of consideration on the ground different to the contract on some vague plea of equity and the arbitrator's are not justified in ignoring the expressed terms of the contract prescribing the consideration payable in the contract itself.

The Tribunal has further noted that the Claimant vide their correspondence dated 09.10.2009 (annexed along with the Claim Petition) addressed to Unit Officer, NPCC Ltd., CRPF unit agreed for proportionate deduction on account of LD for an amount of Rs.9,17,000.00 as per discussion held in the Chamber of the Zonal Manager during the course of meeting on 7th October 2009.

In the light of above discussion, it is concluded that the terms of the contract as well as deduction on account of LD agreed by the Claimant vide letter dated 09.10.2009 shall prevail while deciding the issue between the parties and accordingly, in the implication of terms of the contract under clause 35.1, 48.4 & 48.3 of GCC, I hold

[24] (2015) 4 SCC 136

> that the deductions made by the respondent on account of liquidated damages as being imposed and deducted by the client (CRPF) are not payable to the claimant. Therefore, after deducting an amount of Rs. 9,17,000/- (LD) out of the claimed amount of Rs. 9,68,477/-, the balance amount of Rs. 51,477/- awarded in favour of the claimant. The interest portion will be dealt separately"

20. *Ex facie*, such reasoning is a fair and reasonable view based on the material produced before the Arbitrator. Thus, there was never any dispute that the clause for levy of LD had been invoked and accordingly LD were imposed. Hence, the finding given by the learned ADJ that imposition of LD was only being negotiated upon is absolutely flawed and there was no 'patent illegality' committed by the Arbitrator in passing the impugned award and the award could not have been modified by the learned ADJ in exercise of his powers under Section 34 of the A&C Act.

21. Accordingly, the impugned order dated 22 March 2021 passed by the learned ADJ is set aside to the extent it had struck down the award dated 29 August 2016 on the aspect of payment of LD and the award dated 29 August 2016 passed by the Arbitrator is upheld in its entirety. The parties are left to bear their own costs.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

November 02, 2023
Sadique