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**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**Arb. Appeal No.38 of 2024**

**Decided on: 5th November, 2024**

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State of H.P. and another **.....Appellants**

**Versus**

M/s Gurcharan Industries **.....Respondent**

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**Coram**

**Ms. Justice Jyotsna Rewal Dua**

**Whether approved for reporting?[1] Yes**

For the Appellants: Mr. Sikander Bhushan, Deputy Advocate General.

For the Respondent: Mr. J.S. Bhogal, Senior Advocate with Ms. Srishti Verma and Ms. Swati Verma, Advocates.

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**Jyotsna Rewal Dua, Judge**

Objections preferred by the appellants under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') against the award passed by the learned Arbitrator on 15.09.2017 were dismissed by the learned District Judge on 15.06.2022. Feeling aggrieved, recourse has been taken by the appellants to Section 37 of the Act.

**2.** **Relevant factual matrix** of the case is that:-

**2(i).** An agreement was executed on 28.04.2007 between the respondent/claimant and the appellants for

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[1]**Whether reporters of print and electronic media may be allowed to see the order? Yes.**

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construction of balance work of Tara Devi Gumber Road in Km 0/0 to 11/720 (SH: Formation cutting including R/walls, Soiling, M/T cross drainage, side drain and parapets). The agreement contained Clause No.25 for referring the dispute/differences, which may arise between the parties, to arbitration.

**2(ii).** Differences arose between the parties. Accordingly, the Superintending Engineer, Arbitration Circle, HPPWD Solan was appointed as the Sole Arbitrator for deciding and making the award regarding claims and disputes made by the respondent/claimant and also the counter claim preferred by the appellants.

**2(iii).** The respondent/claimant preferred three claims, viz. Claim No.1 for Rs.17,99,012/- on account of price escalation; Claim No.2 for Rs.1,46,540/- on account of illegal recovery of stones; and claim No.3 towards interest @ 18% per annum on the overdue payment. The appellants preferred counter claim for Rs.9,46,280/- on account of compensation for the delay in execution of the work.

**2(iv).** Learned Arbitrator passed the award on 28.11.2013, allowing Rs.13,75,233/- on account of price escalation under Claim No.1 of the respondent/claimant. The respondent/claimant did not press claim No.2, which

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was treated as withdrawn. No compensation was awarded to the respondent/claimant for claim No.3. Counter claim preferred by the appellants was also not allowed.

**2(v).** The respondent/claimant filed an appeal against the award dated 28.11.2013 under Section 34 of the Act before the learned District Judge. This appeal (Arbitration Case No.1-S/2 of 2014) was decided on 29.09.2016. The case was remanded back to the learned Arbitrator for decision afresh in accordance with law.

**2(vi).** Learned Arbitrator again entered into the reference on 17.10.2016. Award was finally passed on 15.09.2017. The respondent/claimant was awarded Rs.13,71,829/- on account of price escalation against Claim No.1.

**2(vii).** The appellants preferred objections under Section 34 of the Act against the award dated 15.09.2017 before the learned District Judge, Shimla. The objections were dismissed on 15.06.2022.

In the above background, the appellants have preferred the present appeal under Section 37 of the Act against the judgment dated 15.06.2022.

**3. Submissions:-**

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**3(i).** Learned Deputy Advocate General contended that the learned Arbitrator as well as learned District Judge fell into error in allowing Claim No.1 of the respondent/ claimant by awarding it a sum of Rs.13,71,829/- for price escalation. The respondent/claimant had claimed price escalation in respect of the work executed in view of Clause 10(CC) of the contract executed between the parties, whereas, the respondent had itself given a written undertaking that it would not claim 'anything extra' on account of work executed. The words 'anything extra' would include the price escalation claim. Therefore, the respondent/claimant was not entitled to price escalation in view of it having given an undertaking for not claiming 'anything extra'.

Another point urged by the learned Deputy Advocate General is that the learned Arbitrator had no jurisdiction to determine respondent's claim under Clause 10(CC) of the contract with respect to price escalation. This claim could not have been arbitrated. Learned Arbitrator had illegally assumed the jurisdiction to determine a non-arbitral claim.

**3(ii).** Learned Senior Counsel appearing for the respondent/claimant submitted that the learned Arbitrator

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has correctly interpreted the words 'anything extra' in the affidavit furnished by the respondent/claimant as not to include the price escalation claim. The view of the Arbitrator has not been interfered by the learned District Judge while deciding the objections preferred by the appellants under Section 34 of the Act. It has been correctly held that 'anything extra' does not mean that price escalation has been excluded. Once the Arbitrator has taken a view, which is a plausible view, there is no reason to give another interpretation, that too under Section 37 of the Act, when the view has also been affirmed by the learned District Judge while deciding the objections under Section 34 of the Act.

It was also submitted that the question of jurisdiction of Arbitrator to determine the claim under Section 10(CC) of the contract was never raised by the appellants before the learned Arbitrator. Hence, in view of Section 16 read with Section 4 of the Act, the appellants are now debarred in law from raising the issue of jurisdiction.

**4.** I have **heard** learned counsel for the parties and considered the case file. My **observations** are as under:-

**4(i).** It is not in dispute that the contract executed between the parties on 28.04.2007 contained Clause

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No.10(CC) providing compensation for price escalation. The clause reads as under:-

> *"Clause 10(CC): If the prices of materials (not being materials supplied or services rendered at fixed prices by the Dept. in accordance with clause 10 & 34 hereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract including such period for which the contract validity is extended under the provisions of clause-5 of the contract without any action under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less. Such compensation for escalation in the prices of materials and labour, when due, shall be worked out based on the following provisions:*
>
> *1. The base date for working out such escalation shall be the last date on which tenders were stipulated to be received.*
>
> *2. The cost of work on which escalation will be payable shall be reckoned as 85% of the cost of work as per the bills, running or final and from this amount the value of materials supplied under clause 10 of this contract or services rendered at fixed charges as per clause 34 of this contract, and proposed to be recovered in the particular bills shall be deducted before the amount of compensation for escalation is worked out, in the case of materials brought to site for which any secured advance is included in the bill the full value of such materials as assessed by the Engineer-in-Charge (and not the reduced amount for which secured advance has been paid) shall be included in the cost of work done for operation of this clause. Similarly when such materials are incorporated in the work and the secured advance is deducted from the bill, the full-assessed value of the materials originally considered for operation of this clause should be deducted from the cost of work shown in the bill, running or final. Further the cost of the work shall not include any work for*

*which payment is made under clause 12 or 12(A) at prevailing market rates.*

*3. The components of materials, labour P.O.L. etc. shall be pre-determined for every work and incorporated in the conditions of contract attached to the tender, papers and the decision of the Engineer-in-Charge in working out such percentage shall be binding on the contractor.*

*4. The compensation for escalation for materials labour and P.O.L. shall be worked out as per the formula given below:*

*(i) VM = W X x/ 100 X (MI - $MI_o$)/ $MI_o$*

*VM = Variation in materials cost i.e. increase or decrease in the amount in rupees to be paid or recovered.*

*W = Cost of work done, worked out as indicated in sub para 2 above.*

*X = Component of materials expressed as percent of the total value of work.*

*MI & $MI_o$ = All India whole sale index for commodities for the period under reckoning as published by the Economic Advisor to Government of India, Ministry of Industry and Commerce, for the period under consideration and valid at the time of receipt of tenders, respectively.*

*(ii) VF = W x Z/ 100 x (F1 - $FI_o$)/ $FI_o$*

*VF = Variation in cost of fuel, oil and lubricant increase or decrease in rupees to be paid or recovered.*

*W= Value of work done, worked out indicated in sub-para 2 above.*

*Z = Component of P.O.L. expressed percent of total value of work as indicated under the special conditions of contract.*

*Addition ..... Deletion..... Correction..... Overwriting.....*

*(Contractor .....) (Ex-Engineer .....)*

*F1 & $FI_O$ = Average index number of wholesale price for group (fuel, power light and lubricant) as published weekly by the Economic Advisor to Government of India, Ministry of Industry and Commerce, for the period under consideration and valid at the time of receipt of tenders, respectively.*

*5. The following principals shall be followed while working out indices mentioned in sub-para 4 above.*

*(a) The compensation for escalations shall be worked out at quarterly intervals and shall be with respect to the cost work done during the three calendar*

*months of the said work. The first such payment shall be made at the end of the three months after the month (excluding) in which the tender was accepted and there after the three months. At the time of completion of the work, the last period for payment might become less than three months, depending on the actual date of completion.*

*(b) The index (MI/FI) etc.) relevant to any quarter for which such compensation is paid shall be the arithmetical average of the indices relevant to the three calendar months. If the period up to date of completion after the quarter covered by the last such installment of payment, is less than three months the index $MI_o$ & $FI_o$ shall be the average of the indices for the month falling within that period.*

*(c) The base index, MI & FI etc. shall be the one relating the month in which the tender was stipulated to be received.*

6. *The compensation for escalation for labour shall be worked out as per formula given below:*

*(iii) $VL = W \times Y/100 \times (LI - LI_o)/LI_o$*

*VL =Variation in labour cost i.e. increase or decrease in the amount in rupees to be paid or recovered.*

*W = Value of work done, worked as indicated in sub para 2 above.*

*Y = Component of labour expressed as percent of the total value of work.*

*$LI_O$ =Minimum daily wage in Rupees of an unskilled adult male mazdoor, as fixed under any law, statutory rule or order as on the last date on which tenders for the work were to be received.*

*LI =Minimum wage in Rupees of an unskilled adult male mazdoor, as fixed under any law, statutory rule or order as applicable on the last day of the quarter previous to one during which the escalation is being paid.*

7. *The following principles will be followed while working out the compensation as per sub para 6 above.*

*(a) The minimum wage of an unskilled male mazdoor mentioned in sub-para 6 above shall be the higher of the following two figures, namely those notified by Govt. of India, Ministry of Labour and those notified by the local administration, but relevant to the place of work and the period of reckoning.*

*(b) The escalation for labour also shall be paid at the same quarterly intervals when escalation due to increase in cost of materials and/or P.O.L. is paid under*

*this clause, If such revision of minimum wages takes place during any such quarterly intervals, the escalation compensation shall be payable for work done in all quarters subsequent to the quarter in which the revision of minimum wages takes place.*

*(c) Irrespective of variation in minimum wages of any category of labour, for the purpose of this clause, the variation in the rates for an unskilled adult male mazdoor alone shall form the basis for working out the escalation compensation payable on the labour component.*

8. *In the event the price of materials and/or wages of labour required for execution of the works decrease(s), there shall be downward adjustment of the cost of work so that such price of materials and/or wages of labour shall be deductible from the cost of work under this contract and in this regard formula herein before stated under this clause 10(cc) shall mutatis mutandis apply, provided that :*

*(i) No such adjustment for the decrease in the price of materials and/or wages of labour afore-mentioned would be made in case of contracts in which the stipulated period of completion of the work is Twelve months or less.*

*(ii) The Engineer-in-charge shall otherwise be entitled to lay down the principles on which the provision of this sub-clause shall be implemented from time to time and the decision of the Engineer-in-charge on this behalf shall be final and binding.*

*(iii) Irrespective of actual period of construction, for works where stipulated period for construction is six (6) months or less, sub-clause 10(c) only will be applicable and where stipulated period for construction is more than six (6) months, sub-clause 10(cc) only will be applicable.*

*Provided always that the provision of the preceding clause 10(c) shall not be applicable for contracts where provision of this clause are applicable but in case where provision of this clause aren't applicable the provision of clause 10(c) will become applicable.*

*For the operation of sub clause 10(cc), the components of materials, labour, P.O.L. as indicated in para (3) of the sub clause have been predetermined for different types of work and shall be adopted depending on their applicability relevant to the work. The predetermined values are as below.*

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| | | | |
|---|---|---|---|
| *(A)* | *Building Works* | *Materials %age* | *Labour %age* |
| *1.* | *Load bearing masonry structures* | *75.00* | *25.00* |
| *2.* | *RCC framed structures* | *80.00* | *20.00* |
| *(B)* | *Road Works* | | |
| *1.* | *Earth Work (average) Classification* | *35.00* | *65.00* |
| *2.* | *Retaining/Breast Wall* | *75.00* | *25.00* |
| *3.* | *Cross drainage/Metalling/ Tarring* | *80.00* | *20.00* |
| *4.* | *For composite works involving earth work, retaining structures etc. the percentages of material and labour components shall be worked out on the basis of above percentages by taking their weighted means.* | | |
| *(C)* | *Bridge Works* | | |
| *1.* | *Bridge/I/c its components* | *85.00* | *15.00* |
| *2.* | *For composite bridge works with provision for approach roads, the percentages of materials and labour components shall be worked out from Percentages indiciated under (B) 1 to 4 above and (c) 1."* | | |

During hearing of the case on 04.11.2024, learned Senior Counsel for the respondent/claimant had placed on record proceedings of the 8th hearing held before the learned Arbitrator on 23.06.2017. In terms of the proceedings, the respondent/claimant had submitted the copy of 10(CC) claim of the respondent/claimant duly checked by the Superintending Engineer, 4th Circle, HPPWD, Shimla vide his letter dated 20.06.2017, amounting to Rs.13,71,829/-. It is this amount, which has been allowed by the learned Arbitrator under Claim No.1 to the respondent/claimant towards price escalation.

Appellants' contention is that the respondent/ claimant had furnished an affidavit that he would not be claiming 'anything extra'. Learned Arbitrator has given a plausible view that the words 'anything extra' figuring in the affidavit of the respondent/claimant would not mean that it would give up its claim of price escalation, which is admissible to it under Clause 10(CC) of the Contract. Anything extra would obviously have reference to something beyond the contract. The price escalation available to the respondent/claimant in terms of Clause 10(CC) of the contract cannot be construed to be an extra payment.

At this stage, it would be appropriate to refer to ***Indian Oil Corporation Limited through its Senior Manager Versus Shree Ganesh Petroleum Rajgurunagar through its Proprietor Laxman Dagdu Thite***[2], wherein Hon'ble Supreme Court held that the Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot

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[2] (2022) 4 SCC 463

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interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.

In view of the above, there arises no question in the given facts of the case to interfere or to take a view contrary to the view taken by the learned Arbitrator, as affirmed by the learned District Judge.

**4(ii).** The question of learned Arbitrator having no jurisdiction to determine the claim under Clause 10(CC) of the contract cannot be permitted to be raised. Section 16 of the Act deals with the competence of the Arbitral Tribunal to rule on its jurisdiction. In terms of Sub-Section (2) of Section 16, the plea that the Arbitral Tribunal does not have jurisdiction, has to be raised not later than the submission of statement of defence. Section 16(2) of the Act reads as under:-

> *"16. Competence of arbitral tribunal to rule on its jurisdiction.*
> *(1) .....*
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*
> *(3) to (6) ....."*

In the above context, Section 4 of the Act also becomes relevant, which pertains to waiver of right to object and reads as under:-

> *"4. Waiver of right to object.- A party who knows that-*
> *(a) any provision of this Part from which the parties may derogate, or*
> *(b) any requirement under the arbitration agreement,*
> *has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."*

The above provisions have been considered and deliberated by the Hon'ble Apex Court in ***MSP Infrastructure Limited Versus Madhya Pradesh Road Development Corporation Limited***[3], which holds that a party is bound by virtue of Section 16(2) to raise any objection it may have to the jurisdiction of the Tribunal before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. The party cannot raise the question after it has submitted to the jurisdiction of the Tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even

[3] (2015) 13 SCC 713

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after the passing of a decree. Para relevant to the context reads as under:-

> *"14. Section 16(2) of the Arbitration Act, 1996 reads as follows:*
>
> *"16.(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator."*
>
> *On a plain reading, this provision mandates that a plea that the Tribunal does not have jurisdiction shall not be raised later than the submission of the statement of defence. There is no doubt about either the meaning of the words used in the Section nor the intention. Simply put, there is a prohibition on the party from raising a plea that the Tribunal does not have jurisdiction after the party has submitted its statement of defence. The intention is very clear. So is the mischief that it seeks to prevent. This provision disables a party from petitioning an Tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the Tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the Arbitration Act, 1996. This is exactly what has been done by the Respondent Corporation. They did not raise the question of jurisdiction at any stage. They did not raise it in their statement of defence; they did not raise it at any time before the Tribunal; they suffered the award; they preferred a petition under Section 34 and after two years raised the question of jurisdiction of the Tribunal. In our view, the mandate of Section 34 clearly prohibits such a cause. A party is bound, by virtue of sub-section (2) of Section 16, to raise any objection it may have to the jurisdiction of the Tribunal before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the Tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree."*

In ***Quippo Construction Equipment Limited Versus Janardan Nirman Private Limited***[4], Hon'ble Apex Court, considering the facts of that case where the respondent therein did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the respondent was deemed to have waived all such objections. It was further held that the respondent was precluded from raising any such objection pertaining to jurisdiction/venue of arbitration etc. Relevant paras from the judgment are as under:-

> *"24. It was possible for the respondent to raise submissions that arbitration pertaining to each of the agreements be considered and dealt with separately. It was also possible for him to contend that in respect of the agreement where the venue was agreed to be at Kolkata, the arbitration proceedings be conducted accordingly. Considering the facts that the respondent failed to participate in the proceedings before the Arbitrator and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the respondent must be deemed to have waived all such objections.*
>
> *25. In the circumstances, the respondent is now precluded from raising any submission or objection as to the venue of arbitration, the conclusion drawn by the Court at Alipore while dismissing Miscellaneous Case No.298 of 2015 was quite correct and did not call for any interference. The High Court, in our view, was in error in setting aside said Order. In any case, the fact that the cause title showed that the present appellant was otherwise amenable to the jurisdiction of the*

[4] (2020) 18 SCC 277

*Alipore Court, could not be the decisive or determining criteria."*

***Sweta Construction Versus Chhattisgarh State Power Generation Company Limited***[5] considered *(2018) 16 SCC 758 (Lion Engg. Consultants v. State of M.P.)* and *(2018) 10 SCC 826 (M.P. Rural Road Development Authority v. L.G. Chaudhary Engineers & Contractors)* vis-a-vis raising objections under Section 16 of the Act and held that a party cannot be permitted to approbate and reprobate, that too in arbitration proceedings defeating the very purpose of an alternative dispute resolution through arbitration as an expeditious remedy. Paragraphs relevant to the context read as under:-

> *"15. However, as pointed by the learned counsel for the respondent, there appears to be some lack of clarity on the issue raised in the present petition on account of the same three Judge Bench having opined in another order passed in Lion Engg. Consultants v. State of M.P. on 22-3-2018 i.e. about three weeks after that. The issue however, raised was whether there was any bar to the plea of jurisdiction being raised by way of an objection under Section 34 of the 1996 Act even if no objection was raised under Section 16 of that Act. It was opined that public policy of India refers to law enforced in India i.e., both Central law as well as the State law. The respondent State was given liberty to argue before the trial Court its objections that 1996 Act stood excluded by the State Adhiniyam even without formal pleadings being a pure legal plea. This was in the context of an amendment sought being beyond limitation. In that context there is an observation in one sentence, "we do not see any bar to plea of jurisdiction being raised by*

[5] (2024) 4 SCC 722

*way of an objection under Section 34 of the Act even if no objection was raised under Section 16 of that Act."*

16. *If we appreciate the aforesaid observation in Lion Engg. Consultants and that too emerging from identical Bench in the two matters, we would have to construe as what is meant by this sentence extracted aforesaid. We take note of the fact that this is an order and not a judgment. The controversy before the court was something different as noticed by us aforesaid. In that context, this sentence has been inserted, but that does not take away the law laid down in the substantive judgment (in M.P. Rural Road Development Authority) dealing with the issue at hand in respect of awards already made where petitions were pending before the competent Court under Section 34 of the said Act.*

17. *This Court (in M.P. Rural Road Development Authority) in the context of the 1996 Act and the Adhiniyam, keeping in mind the cleavage of judicial view earlier and expounding on the law in that judgment has in succinct terms set out that the objections under Section 34 of the said Act, where no such plea of jurisdiction was raised in proceedings before the Arbitrator, should not be dealt with "alone" on the plea of jurisdiction i.e., it should be considered on merits. One can say that possibly this part of the order can also be read as one made under Article 142 of the Constitution of India to do substantive justice inter se the parties, more so, when arbitration as an alternative dispute resolution mechanism presupposes an expeditious disposal of commercial disputes and that objective would stand nullified if a contrary view was taken.*

18. *We are also of the view that in particular facts of the present case, the position is even more gross because when the appellant claimed arbitration, the respondent accepted invocation of arbitration, suggested a panel of Arbitrators, the appellant chose one of the Arbitrators out of the two suggested and the Arbitrator was so appointed as the sole Arbitrator. Thus, the arbitration proceedings commenced in pursuance to the acts of the respondent and it cannot be permitted to get away to say that the whole process was gone through because of some misconception or inappropriate legal advice. Arbitration by consent is always possible. The mode and manner of conduct of arbitration is possible and how those arbitration proceedings would be governed is also a matter of consent. If at all there were any rights of the respondent to have claimed arbitration under the*

> *Adhiniyam, that right was never exercised or waived. The respondent cannot be permitted to approbate and reprobate and that too in arbitration proceedings and that too in dispute or resolution through the method of arbitration defeating the very purpose of an alternative dispute resolution to arbitration as an expeditious remedy."*

In view of the law laid down by the Hon'ble Apex Court, in the given facts and circumstances of the case, it has to be held that the present appeal lacks substance as the respondent/claimant cannot be held to be debarred from claiming the price escalation admissible to it under Clause 10(CC) of the contract executed between the parties. The view taken by the learned Arbitrator that the affidavit of the respondent/claimant that it would not claim 'anything extra' cannot debar it from claiming benefits accruing to it under Clause 10(CC) of the Contract as 'anything extra' would mean extraneous to the contract and not something to which the respondent/claimant was entitled to in terms of the contract. The second objection taken by the appellants that the Arbitrator had no jurisdiction to determine respondent's claim under Clause 10(CC) of the contract is also misplaced as admittedly no such objection was taken by the appellants at the time of submission of their defence before the learned Arbitrator. In light of

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Section 16(2) of the Act, such objection cannot be permitted to be raised by the appellants after suffering the award.

**5.** For the foregoing reasons, no interference is called for with the impugned award dated 15.09.2017 passed by the learned Arbitrator, as affirmed by the learned District Judge on 15.06.2022. This appeal, therefore, lacks merit and is accordingly dismissed alongwith pending miscellaneous application(s), if any.

Jyotsna Rewal Dua
Judge

November 05, 2024
*Mukesh*