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

% ***Pronounced on: 13th March, 2023***

\+ **OMP (COMM.) 283/ 2021**

M/S. MODI CONSTRUCTION COMPANY
Kanke Road,
Ranchi-834008
Through Navin Modi,
Authorized Signatory ..... Appellant

Through: Mr. Ravi Shankar Dvivedi, Mr. Sushant Kumar Sarkar, Mr. Rishabh Jain, Ms. Arti Dwivedi, Advocates.

versus

M/S IRCON INTERNATIONAL LIMITED
Ground Floor,
DRM Office Building,
South Western Railways,
Near City Railway Station,
Bangalore- 560023 ..... Respondent

Through: Mr. Suman K. Doval and Mr. Hari Krishan Pandey, Advocates.

\+ **OMP (COMM.) 313/ 2021**

M/S. MODI CONSTRUCTION COMPANY
Kanke Road,
Ranchi-834008
Through Navin Modi,
Authorized Signatory ..... Appellant

Through: Mr. Ravi Shankar Dvivedi, Mr. Sushant Kumar Sarkar, Mr. Rishabh Jain, Ms. Arti Dwivedi, Advocates.

versus

M/S IRCON INTERNATIONAL LIMITED
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CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

1. In the aforesaid Petitions under Section 34 of the Arbitration & Conciliation Act, 1996 (*hereinafter referred to as the A & C Act, 1996)* has been filed to challenge the Award dated 18.11.2020 with corrections made on 12.12.2020 passed by the Majority Arbitral Tribunal.

2. The facts in brief are that Government of Andhra Pradesh awarded a contract for the project 'Widening and Strengthening of the Warangal-Karimnagar-Raiputnam Road (APSH 1)' to the respondent. The respondent in turn divided the project into two parts: first section from Warangal to Karimnagar (km 06.00 to 66.00) denoted as APSH-1(a) and other from Karimnagar to Raiputnam (km 164.00 to 219.10) denoted as APSH-1(b). For the execution of the contract and works connected to the project, the respondent awarded several contracts to other agencies. The entire work of APSH-1 (a) was entrusted to the petitioner through two contracts, the breakup being, the first one for the widening and strengthening of the Road (excluding Bill No.5 – Bitumen Work & Bill No.8 – Road Furniture) dated

05.05.1998 and the second one for the asphalting work involved dated 29.08.1998. After entering into above two Contract Agreements, execution of work from both the contracts from km 6.00 to 22.00 was withdrawn from the petitioner and was given to another agency by a tripartite Agreement dated 05.08.1999. The petitioner thus, executed work only from km 22.0 onwards.

3. During the course of execution of the two contracts, disputes arose between the parties. The Contract provided for referral of disputes to a Disputes Review Board, but it was never constituted by mutual consent. The matter was referred to a Conciliator who was appointed by the Respondent vide letter dated 19.08.2003. However, the conciliation proceedings were terminated by the Conciliator on 29.08.2006. Thereafter, the Petitioner invoked Arbitration under clause (Sub Clause 67.3, Conditions of Particular Application) by its letter dated 10.05.2007 and eventually three Member Arbitral Tribunal was constituted.

4. The parties presented their Statement of Claim and Defence and led their evidence. The learned Arbitral Tribunal gave a Majority Award and a Dissenting Award by one Arbitrator dated 18.11.2020 in respect of the claims. The learned Dissenting Arbitrator awarded *Compound Interest* while the Majority Tribunal awarded *Simple Interest*. The only challenge in the present petition is grant of Simple Interest by the Majority Tribunal instead of Compound interest as awarded by the Minority Award.

5. Clause 60.8(b) of the Contract provided for two things; one for compound interest and other for the rate of interest. The grant of simple interest by Majority Award has been challenged on the ground that the finding is perverse since the respondent in its Statement of defence, had only

taken an objection to the rate of interest without specifying whether it was to be compound or simple. When no objection has been raised on behalf of the respondent that this Clause was null and void as the rate of interest had not been prescribed, the compound interest should not have been denied merely because the rate of interest was not mentioned. The Majority Tribunal failed to consider the severability of the Clause and wrongly held the entire Clause as void merely because the rate of interest was not specified. In fact, the correct position of law has been narrated in the Minority Award which must prevail in the present case and the finding of the Majority Tribunal granting simple interest, must be rejected.

6. **Submissions heard** and the written Submissions on behalf of the Petitioner and Respondent have also been perused.

7. At the outset, it is pertinent to note that in OMP (COMM) 313/2021 the petitioner has raised a claim for the additional cost incurred in extending bank Guarantees which were illegally withheld against bridging Finances. The same is not being pressed by the Petitioner and is hereby dismissed.

8. The parties had admittedly entered into two Contract Agreements dated 05.05.1998 and 29.08.1998 for the work of widening and strengthening of Warangal- Raiputnam Road (Warangal-KarimNagar Section km 6.00 to 66.00) and for the work of widening and strengthening of Warangal- Karimnagar Road APSH-I-A Asphalt work respectively. The disputes had arisen between the parties and the disputes were referred to the Arbitral Tribunal comprising of three members. Two Awards were passed, one by the Majority Arbitral Tribunal awarding interest @ 9% Simple Interest p.a. The Dissenting learned Arbitrator in the minority Award granted interest @ 9% to be Compounded monthly instead of Simple

Interest per annum. The sole challenge in both the petitions is denial of compound interest on the pre-Award amount by the Majority Award.

9. The claimant/appellant in terms of sub clause 60.8 of COPA had claimed interest on the various claimed amount for three periods namely: pre reference, *pendente lite* and post award. The entire controversy is on the interpretation of Sub clause 60.8(b) of COPA which provided that:

> *"(b)In the event of failure of the Employer to make payment within times stated,* ***the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to bid*** *upon all sums unpaid from the date upon which the same should have been paid in the currencies in which the payments are due. The provisions of this Sub-Clause are without prejudice to the Contractor's entitlement under Clause 69 or otherwise."*

10. Dissenting learned Arbitrator in minority Award observed that the provision of payment of interest compounded monthly was specifically inbuilt in the contract conditions, which was applicable to all payments till the final payment/settlement of all the disputes and till the Final Certificate was issued by the Respondent. The interest payable was liable to be compounded monthly as agreed between the parties which could not be altered by the Arbitral Tribunal. Though in the said Sub Clause, the rate of interest was to be as per Annexure to Bid in which the rate of interest was left as blank, but the fundamental principle of interpretation of contract is that the provisions of the contract should be read harmoniously and such part of the Contract which can be segregated must be given effect to in terms of Section 23 (3) of the Contract Act, 1872. Even though the rate of interest was not provided that could not invalidate the manner of calculation of the interest and therefore, while agreeing to grant the interest @ 9 % the

Dissenting Arbitrator directed that the interest must be compounded monthly.

11. The *Majority Tribunal* however, held that when in the Clause providing for interest, the rate of interest was left blank and was not specified, the entire clause could not be operated, suffered from uncertainty and was ineffective. Thus, the entire clause became defunct *ipso facto.* The observations of Majority Tribunal invalidating Sub- Clause 60.8 of COPA are as under:

> *"[139] Having concluded that the Tribunal is empowered under the Contract to award interest claimed along with a Claim, the issue to be addressed is as to whether interest, compounded monthly or simple interest, be awarded.*
>
> *The case laws relied upon by the Claimant cannot be disputed; it is well settled that payment of compound interest is in order, subject to the provisions of the Contract (emphasis given).*
>
> *Provisions of the Contract, therefore, now need to be examined by the Tribunal. Sub- Clause 60.8(b) requires that the rate of interest will be that prescribed in the Appendix to Bid. It is undisputed that the said Appendix does not prescribe interest; in fact, it does not even mention it. Without the rate of interest, the said Clause cannot be operated, suffers from uncertainty and is ineffective. The said Clause is, therefore, void under Section 29 of The Indian Contract Act (emphasis added).*
>
> *The Claimant's argument that notwithstanding the absence of mention of a rate of interest in the Appendix, prevailing/current prime leading rates must be considered as the Contract between the Parties is a commercial contract has no legal basis, as also his submission that the rate of interest to be adopted in the Contract was to be as per actual and accordingly the Parties willingly did not mention any specific rate in the Appendix to*

Bid. The Arbitral Tribunal cannot amend a contract and introduce new conditions and provisions.

Further, the Claimant's argument of comparing and seeking support from the stipulations relating to Bridging Finance in the Contract Agreement is misplaced. The stipulation relating to Bridging Finance prescribed interest to be charged 'as per actual'; and as what constitutes actual was determined by the Conciliator in his Award. The stipulation relating to interest payable was thus not totally absent and, in any event, settled by a due process prescribed under the Act.

The Tribunal concludes that the contention of the Claimant that he is entitled to payment of compound interest on a monthly basis under the said Clause as untenable. In other words, the Claimant cannot seek any shelter under this Sub-Clause and the Respondent's objection, sustains."

12. In the present case, the only controversy is whether the interest @ 9 % that has been awarded by the learned Arbitrator is to be calculated as simple interest as directed by the Majority decision or it should be compounded monthly as held in the dissenting opinion of the learned Arbitrator.

13. This controversy needs to be examined in the light of the limited scope of interference which the Court has under Section 34 of the A & C Act, 1996. To question the legality of the decision of the minority or the majority opinion, we need to first test if the grounds of challenge to the Award are met by the test laid down by the Apex court in various cases. In *ONGC v. Saw Pipes* (2003) 5 SCC 705, the Apex Court had observed that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the court would have no jurisdiction to interfere with the award. However, this would depend upon reference made to the arbitrator: **(a)** if there is a general

reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the court could interfere; **(b)** in a case of reasoned award, the court can set aside the same if it is on the face of it, erroneous on the proposition of law or its application; and **(c)** if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit its being set aside, unless the court is satisfied that the arbitrator had proceeded illegally.

14. Comprehensive judicial literature on the scope of interference on the ground of Public Policy under Section 34 was postulated in *Associate Builders v. DDA* (2015) 3 SCC 49. The Apex Court placed reliance on the judgment of *ONGC v. Saw Pipes* (supra) to determine the contours of *Public Policy* wherein an award can be set aside if it is violative of the *'fundamental policy of Indian law', 'the interest of India', 'Justice or morality'* or leads to a *'Patent Illegality'*.

15. The ground of *'patent illegality'* is applied when there is a contravention of the substantive law of India, the Arbitration Act or the rules applicable to the substance of the dispute. In *Hindustan Zinc Limited vs Friends Coal Carbonisation* (2006) 4 SCC 445, The Hon'ble Apex Court referred to the principles laid down in *Saw Pipes* (supra) and clarified that it is open to the court to consider whether an Award is against the specific terms of contract, and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

16. Similarly in *Ssangyong Engineering and Construction Co. Ltd v. N.H.A.I* (2019) 15 SCC 131 and *Anglo American Metallurgical Coal Pty Ltd v. MMTC Ltd* 2020 SCC OnLine SC 1030 the Apex Court observed the circumstances that would attract a "patent illegality" appearing on the face

of the award are if: (i) the arbitrator fails to give reasons in the award in violation of Section 31(3) of the A&C Act; (ii) the arbitrator has taken an impossible view in construing the contract; (iii) the arbitrator transgresses his jurisdiction, and (iv) if the arbitrator has made a perverse finding based on no evidence, overlooking vital evidence or based on documents taken up as evidence without giving proper notice to the parties.

17. The controversy raised by way of present petitions may now be considered in the light of above stated scope of interference under S.34 of the A&C Act, 1996 on the ground of *"patent illegality"*.

18. Indisputably, the ld. Arbitrator is empowered to grant interest while adjudicating a money claim. While examining the Claim to interest it must be understood that *the underlying principle guiding award of interest is that it is essentially compensatory in nature* as explained by the Constitution Bench of the Apex Court in *Irrigation Department, State of Orissa vs. G.C. Roy* (1992) 1 SCC 508, wherein it observed that a person deprived of the use of money to which he is legitimately entitled, has a right to be compensated for the deprivation which may be called interest, compensation or damages. This basic consideration is as much valid for the period for which the dispute is pending before the Arbitrator as it is for the period prior to or before the reference was made to the Arbitrator. This is also the principle incorporated in Section 34 of the Code of Civil Procedure, 1908 and there is no reason or principle to hold otherwise in the cases referred for arbitration.

19. The Apex court in the case of *State of Haryana and Others v. S.L. Arora and Company*, (2010) 3 SCC 690, that according to Section 31 of the A & C Act, 1996 in the pre-award period, interest has to be awarded as

specified in the Contract while in the absence of contract, the interest may be granted by the Arbitral Tribunal as per its own discretion. Further, if the Contract provides for compounding of the interest or provides for payment of interest upon interest or for interest payable on the principle to be treated as part of the principle for the purpose of calculation of interest during the subsequent period, the Arbitral Tribunal should give effect to it. However, if the Award is challenged under Section 34 of the A & C Act, 1996 and if the Court finds that the interest awarded is in conflict with or violative of the public policy of India, it may set aside that part of the Award.

20. The difference between clause (a) and clause (b) of Section 31 (7) of the Act, 1996 was explained thus:

(i) Clause (a) relates to pre-award period and the Contract binds and prevails in regard to grant of interest during this period.

(ii) Clause (b) gives the discretion to the Arbitral Tribunal to award interest for the post-award period but it is not subject to any contract and the Arbitral Tribunal may grant interest in exercise of its discretion.

21. Now, coming to the facts of the present case, the Majority Tribunal, while granting simple interest observed that Clause 60.8 of COPA (Conditions of Particular Application) was not the only clause providing for the payment of interest on interim payments and final statement. Various clauses/stipulations contained in the Contract Agreement are required to be looked into which laid down the procedure, including time-frame, for raising claims. It was observed by the Tribunal that the Claimant had not led any evidence to establish that the procedure under such sub-clauses was followed by it.

22. It was further noted that the monthly statements for claiming the interim payments were governed by sub-clause 60.1 of the Conditions of Particular Application and vide item (k), the contractor is required to include *"any other sum, expressed in applicable currency or currencies, to which the Contractor may be entitled under the Contract or otherwise".* The Tribunal noted from the documents placed before it that the claim for interest @ 18% p.a. was first made by the claimant vide letter dated 27.01.2001 (Exhibit R123, Document RR3); the demand was for "*all withheld payments and on other claims from the date of submission"* but without any quantification. There was no mention of the interest being on a monthly compounded basis. Subsequently, *vide* Letter dated 25.03.2001 (Exhibit R8) total 19 claims were made and the interest claimed was @ 18 % p.a without any quantification. The only document where compound interest was claimed is in the calculation of the claimed amounts filed along with the amended Claims wherein the calculation of interest was on the formula of compound interest. In the entire pleadings, however, no claim for compound interest was made.

23. Further, in the conciliation proceedings before the Conciliator, the claimant again included payment of interest @ 18 % p.a on his claim amounts, past and *pendent lite.* The Conciliation proceedings however remained inconclusive. The claimant then submitted a Draft Final Statement Part B but again neither the rate of interest nor the amount was indicated. It got established that there were various claims that were made from time to time and the rate of interest claimed at 18 % p.a, without any quantification or qualification of it being compounded monthly. The provisions of sub Clause 53.1 and 53.3 were thus, never followed.

24. It further held that because the rate of interest was left blank in Clause 60.8 (b) in the Appendix to the Bid to which a reference was made in the said clause. It was held to be uncertain and ineffective and therefore void under Section 29 of the Indian Contract Act. Further, the claimant claimed interest free "mobilization Advance" as a percentage of the Contract value. The second type of advance to which the claimant was entitled was Machinery Advance which was also free of interest. The respondent, in turn, was entitled to interest free advances for the above two from the Principal Employer under the Main Contract and consequently these two types of advances were in the nature of pass on and therefore, not relevant to help arrive at a reasonable rate of interest by the Tribunal. The third type of advance was Bridging Finance for which the interest was claimed @ 15.5 % on the principle of reciprocity of rate of interest by stating that the same is the rate that it had to pay its bankers in the overdraft maintained by it. The Respondent submitted that the interest rate was calculated on a monthly compounding basis by taking an arbitrary rate of 15.5% as the same was not indicated in the contract or adopted for any transaction between the parties. The Tribunal noted that the petitioner's claim of interest @ 15.5% by comparing and seeking support from stipulations related to Bridging Finance in the Contract Agreements was misplaced. The Tribunal concluded that the claim of the Petitioner of compounded interest on a monthly basis was untenable for this reason as well.

25. In the case of *Oriental Structural Engineers Private Limited Vs. State of Kerala* (2021) 6 SCC 150, manner of interpretation of Clause 60.8 of COPA, which is the subject matter of the present Award, came up for consideration. The plea of the rate of interest being left blank was

specifically considered and the contention of the respondent was that not specifying the rate of interest and leaving it blank in the Appendix document amounted to a waiver and no interest was payable on any amount. Rejecting this plea, it was held that once there was a clause for levy of interest, merely because the rate of interest was not specified it would not amount to waiver but the Arbitrator, exercising his discretion, could award the interest at any reasonable rate. In the said case, the learned Arbitrator granted simple interest @ 8 % which was upheld by the Apex court.

26. The Arbitral Tribunal interpreted the terms of the contract and while rejecting the claim of the petitioner for compound Interest, it gave various reasons in which the clause providing for interest was also considered and held to be defunct, null and void being incomplete and vague. The objections of the Appellant that there being no pleading seeking clause 60.8 (b) to be declared null and void, the Ld. Arbitrator has made out a 3rd case in itself, is totally not tenable as it was within the domain of the Arbitrator to interpret the terms of the contract. The Tribunal exercised its discretion on the rate of interest to be granted, in absence of an agreement to this effect. The Majority Award has given a well reasoned Award while granting simple interest.

27. Merely because an alternative view as taken by minority Tribunal had taken, was also possible, does not get encompassed in patent illegality. For this, reference be made to *Dyna Technologies (P) Ltd vs Crompton Greaves Ltd.* (2019) 20 SCC 1 wherein the Apex Court observed that arbitral awards should not be interfered with unless the court comes to a conclusion that the perversity of the award goes to the root of the matter and there is no alternative interpretation that can be possibly taken which may sustain the award. *Where two views are possible, the court cannot interfere in the*

plausible view taken by the arbitrator for which reasoning is provided. If the court comes to the conclusion that such interpretation was reasonably possible then it is not usually required for it to examine the merits of the interpretation provided by the arbitrator.

28. Similarly, the Supreme Court in *Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum, Rajgurunagar* (2022) 4 SCC 463 drew a distinction between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract and observed that the Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation of a contractual provision that is made by the Arbitral Tribunal, 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 interfere with the arbitral award only because the Court is of the opinion that another possible interpretation would have been a better one.

29. The Apex Court has reiterated in *SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63; *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*, (2010) 11 SCC 296 and in *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran* (2012) 5 SCC 306, that if the conclusion of the arbitrator is based on a possible view of the matter and if the view taken by arbitrator is possible one, the court is not expected to interfere with the award.

30. Likewise, in the matter of *MSK Projects India (JV) Limited v. State of Rajasthan* (2011) 10 SCC 573, the Supreme Court held that an error in the construction of the contract cannot be held to be without jurisdiction.

31. As the scope of interference of this Court under Section 34 of A & C Act, 1996 is very limited and the court must restrict itself to the above

principles, this court does not find any infirmity in the Award regarding grant of simple interest by the Tribunal. The Arbitrator has interpreted the terms of contract and the petitioner's claim of interest was based on the interpretation of the term of contract and clause 60.8 (b) of the COPA in particular and applied the principles of law in the impugned award. As established by the above mentioned principles, this court does not sit in appeal over the Award made by an Arbitral Tribunal and cannot substitute its own reasoning for that of the Arbitrators, especially when the same is reasonable. This Court does not find merit in the claim of compound interest raised by the Petitioner herein.

32. The two Petitions are thereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

MARCH 13, 2023
VA/PA