* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Judgment reserved on: 17.08.2026**

Judgment pronounced on: 10.09.2026

CNR No. DLHC010300652023

\+ O.M.P. (COMM) 293/2023 & I.A. 14489/2023

ECO GREEN BUILDTECH PVT LTD .....Petitioner

Through: Mr. S K Maniktala, Mr. Udit Maniktala, Mr. Akshay Sharma, Mr. Sanchit Jain, Mr. Vikas Rana, Mr. Shikhar Prakash & Mr. Mohit Sharma, Advs.

versus

VIKARTAN INFRASTRUCTURE PVT LTD .....Respondent

Through: Mr. Somnath Bharti, Sr. Adv. with Mr. Bhupesh Narula, Ms. Rinku Narula, Mr. Anurag Ekka & Mr. Kanishk Taneja, Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

JUDGMENT

1. The present petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') challenging the award dated 28.02.2023 and the additional award dated 27.03.2023.

2. The dispute arises out of the contract for construction and development of 'Sikka Kamya Greens, Sector-10, Greater Noida'. The letter of acceptance dated 09.04.2016 was for a contract value of Rs.53,73,50,000/- with a stipulated completion period of thirty-four

months i.e. up to 08.02.2019. During the execution of the work dispute arose between the parties concerning *inter alia* delay in execution, release of payments and party responsible for the prolongation of the contract. The parties thereafter executed a Memorandum of Understanding (MOU) dated 27.09.2018. and effect thereof is contentious. The respondent alleged that the petitioner failed to comply with its obligations under the MOU whereas the petitioner relied upon the MOU for having settled the accounts and claims between the parties.

2.1 The respondent attributed the delay and consequent prolongation of the works to breaches committed by the petitioner, particularly non-release of payments, non-supply of requisite material and failure to remove various hindrances at site. The respondent claimed compensation towards amount due for work executed, escalation, Works Contract Tax (WCT), damages for idling/under-utilisation of plant and machinery, additional overheads, material lying at site, loss of profit/profitability due to non-completion of work consequent to breach attributable to the petitioner (hereinafter 'claim for loss'), interest and costs. The petitioner disputed the claims and alleged that the delay was attributable to the respondent for failure to deploy adequate manpower and machinery and abandonment of the works.

2.2 Arbitration was invoked by the respondent on 13.07.2020. A sole arbitrator was appointed with the consent of the parties by the

Court *vide* order dated 14.08.2020. During the arbitral proceedings an independent engineer was appointed as the Local Commissioner (hereinafter referred to as 'LC') to measure the work executed at site and to prepare an inventory of the material plant, machinery tools and equipment belonging to the respondent. The LC inspected the site between 29.08.2020 and 02.09.2020 and submitted the report dated 31.12.2020 followed by a supplementary report dated 28.02.2021.

2.3 Before the arbitral tribunal (for short 'the tribunal') the respondent raised twelve claims aggregating to Rs.15,07,05,796/- apart from interest while the petitioner preferred thirteen counterclaims aggregating to Rs.4,02,71,750/- apart from interest and costs. The principal controversy before the tribunal concerned the party responsible for the delay and the consequences flowing therefrom.

2.4 Upon consideration of the contractual document, correspondence, MOU, LC report and material placed on record the tribunal held petitioner to be responsible for delay and breach of contractual obligations and that no corresponding breach on the part of the respondent was established. The tribunal further held that the MOU was binding upon the parties but did not constitute novation of the original contract. The tribunal partly allowed the claims relating to work executed, WCT, idling/under-utilisation of machinery, additional overhead, material lying at site and loss of profit/profitability and rejected the claims towards escalation and other heads. All the counterclaims of the petitioner were rejected. On an application under Section 33 of the Act, the tribunal passed the additional award dated 27.03.2023 correcting typographical and computational error in the original award. Significantly, the computation under claim no.6 relating to additional overheads was corrected from Rs.2,04,53,218/- to Rs.2,84,53,218/-.

3. Learned counsel for the petitioner submits that the award having passed after expiry of the mandate of the tribunal is liable to be set aside. The contention is that the rejoinder was filed on 25.02.2022 and the award was passed on 28.02.2023 i.e. beyond the period of one year. The submission is that the proceedings recorded during conciliation undertaken by the tribunal were relied upon while passing the award. Learned counsel assails the amount awarded under claim no.1 contending that the quantum of work done was determined on the basis of the report of LC, without affording the petitioner an opportunity to object to the report. The argument is that the acceptance of LC report during conciliation proceedings could not have been relied upon after failure of conciliation. It is submitted that the tribunal without reconciling the figure of Rs.11,82,55,494/- mentioned in the MoU, erred in considering that the respondent received Rs.10,72,84,936/-. It is urged that the tribunal erroneously added Krishi Kalyan Cess to the amount awarded that to without the respondent establishing that the cess was leviable at the relevant time.

3.1 *Vis-a-vis* claim no.3 it is argued that the tribunal erred in awarding the amount deducted by the petitioner towards WCT as the tribunal failed to consider that the petitioner was in litigation with the taxation authorities and for this reason WCT was not deposited.

3.2 The award of Rs.1,04,29,203/- under claim no.4 towards idling of resources arranged on rent is contested having been allowed in absence of evidence of rent paid.

3.3 With respect to claim no.6 it is argued that the damages awarded of Rs.2,84,53,218/- for additional overheads due to breach of contract was contrary to the terms of the MOU. Submission is that the respondent failed to produce the evidence to demonstrate deployment of staff. The submission is that the respondent executed the work even after the MOU and received the corresponding payments yet the tribunal awarded damages for overheads claimed for the entire period.

3.4 Insofar as claim no.8 is concerned learned counsel assails the awarding of cost of building material lying at the site, for having awarded without evidence of either the existence of the material lying at site or value thereof.

3.5 Claim no.9 towards claim for loss is stated to have been allowed in lack of evidence and the quantification was done relying upon the experience of the arbitrator. The approach of the tribunal for mitigation of losses was based on conjecture and sheer guess work.

4. *Per contra* the challenge to the mandate of the tribunal is misconceived, the rejoinder was filed on 10.05.2022 and the award was passed within the period prescribed under Section 29A(1) of the

Act. The submission is that no conciliation proceedings as contemplated under Section 61 of the Act and no initiation as per the procedure prescribed under Section 62 of the Act were undertaken. Reliance is placed on the decision of the Calcutta High Court in ***MFAR Constructions Private Limited v. Bengal Shrishti Infrastructure Development Limited FMAT (ARBAWARD) No.30/2022***.

4.1 For claim no.1 learned counsel for the respondent submits that the quantum of work executed by the respondent was duly supported by calculations tabulated in document C-77. The report of the LC was rightly relied upon by the tribunal for determination of work executed and it is borne out from the attendance sheet that the LC conducted the inspection in presence of the parties.

4.2 As regards claim no.3 the submission is that the petitioner despite deducting the WCT from the payments due, failed to deposit it with the concerned tax authorities.

4.3 Awarding of claim no.4 is defended by stating that a reasonable amount was awarded and not the claimed amount. Moreover, there were documents on record to establish that the machinery and other resources were arranged on rent and kept available for execution of the work.

4.4 It is canvassed that once breach of terms of contract by the petitioner stood established, the respondent was entitled to be compensated for consequential expenditure and overheads on account of prolongation of work thus claim no.6 was rightly awarded.

4.5 With regard to claim no.8 the argument is that the material and machinery at site were not permitted to be removed by the petitioner and the resources could not be deployed for other project. The submission is that cost of material was calculated in the report of the LC.

4.6 *Vis-a-vis* claim no.9 towards claim for loss the contention is that the respondent was entitled to compensation at the rate of 10% yet the tribunal awarded only 7.5%. It is canvassed that Hudson formula is a recognised method and can be relied upon for claiming loss in case of a breach of contract, in support the judgement of the Calcutta High Court in ***State of West Bengal v. S.K. Manjhi FMA 573/2024*** is relied upon.

5. Heard learned counsel for the parties at length and perused the relevant record with their able assistance.

6. The contention of learned counsel for the petitioner that the mandate of the tribunal expired prior to passing of the award, is factually wrong. Section 29A(1) of the Act provides that in matters other than international commercial arbitration the tribunal shall make the award within twelve months of completion of the pleadings. The argument of the learned counsel is based upon a fact that the rejoinder by the respondent was filed on 25.02.2022 whereas from the perusal of the record it is evident that it was filed on 10.05.2022 and was dated 25.02.2022. In other words, the pleadings were complete on

10.05.2022 and within the prescribed statutory period of twelve months the award was passed.

7. Before dealing with the issue of conciliation proceedings undertaken by the tribunal it would be relevant to reproduce the relevant portion of the procedural order dated 23.08.2022:

> "3. The Respondent raised certain issues regarding the report submitted by the local Commissioner which were minor in nature. Both the parties informed that they were agreeable to amicable settlement of and the principal amount of their respective claims/counter claims which was welcomed by this tribunal.
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> 4. The parties started conciliation of their respective claims and counter claims in the most cordial environment. The Claimant handed over the detail of amount payable to him to the Respondent against the work existing at site and duly measured by the local Commissioner which was discussed at length and it was concluded that the Respondent is broadly satisfied with the report of the local Commissioner in the corresponding amount of work existing at site except slight minor variation due to computational mistakes which was not objected by the Claimant.
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> 5. The Respondent sought some time to verify the detail of the further claims of the Claimant regarding material and T &P of the Claimant lying at site with most positive attitude and stated that he is ready to use the same on payment basis.
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> 6. Both the parties were hopeful that they would settle their grievances against each other by way of conciliation proceedings in the next one or two meetings for which it was decided with the consent of

> both the parties that the next meeting would be held on 27 /08/2022 at 1 1 :00 am. The Claimant would arrange the venue and inform to all concerned in advance. The expenses of the same shall be borne equally by both the parties."

8. From reading of the procedural order it is evident that the tribunal undertook conciliation on the request of the parties. In conciliation proceedings it was recorded that the petitioner raised objections regarding the report of the LC which were considered to be minor in nature as both the parties agreed for an amicable settlement of the principal amounts of their respective claims and counter-claims. The proceedings recorded during the conciliation were relied while adjudicating the claims in arbitration. The proceedings during conciliation cannot be considered and relied upon in case the arbitration of dispute is necessitated. The proceedings during conciliation are different but when an issue is contested equal opportunity is to be provided to both the parties to present their case. The judgement of the Calcutta High Court in ***MFAR Constructions*** (supra) does not advance the case of the respondent. The dispute is not as to whether the tribunal could have attempted for conciliation but the issue is that the contents of the proceedings of conciliation cannot be relied upon while deciding the subject matter of arbitration and this was not decided by the Calcutta High Court.

8.1 In case of an unsuccessful settlement through alternative dispute resolution methods, the confidentiality of such proceedings shall be kept alive and the insights of the proceedings shall not be brought to the notice of the court. Reliance in this regard be made to the following decisions of the Supreme Court:

8.2 In ***Moti Ram v. Ashok Kumar***, (2011) 1 SCC 466, it was held:

> "2. In this connection, we would like to state that mediation proceedings are totally confidential proceedings. This is unlike proceedings in court which are conducted openly in the public gaze. If the mediation succeeds, then the mediator should send the agreement signed by both the parties to the court without mentioning what transpired during the mediation proceedings. <u>If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the court stating that the "mediation has been unsuccessful". Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings</u>. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process.
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> 3. We are compelled to observe this because the mediators should know what kind of reports they should send to the courts. <u>The report sent in this Court should not have mentioned the proposals made by the parties, but should only have stated that the mediation was unsuccessful</u>."

8.3 In ***Perry Kansagra v. Smriti Madan Kansagra,*** (2019) 20 SCC 753, it was held :

"27. We, thus, have line of cases dealing with mediation/conciliation and other proceedings in general and Rule 8 of the Rules dealing inter alia, with custody issues which is in the nature of an exception to the norms of confidentiality. It is true that the process of mediation is founded on the element of confidentiality. Qualitatively, mediation or conciliation stands on a completely different footing as against regular adjudicatory processes. Instead of an adversarial stand in adjudicatory proceedings, the idea of mediation is to resolve the dispute at a level which is amicable rather than adversarial. In the process, the parties may make statements which they otherwise would not have made while the matter was pending adjudication before a court of law. Such statements which are essentially made in order to see if there could be a settlement, ought not to be used against the maker of such statements in case at a later point the attempts at mediation completely fail. If the statements are allowed to be used at subsequent stages, the element of confidence which is essential for healthy mediation/conciliation would be completely lost. The element of confidentiality and the assurance that the statements would not be relied upon helps the parties bury the hatchet and move towards resolution of the disputes. The confidentiality is, thus, an important element of mediation/conciliation."

(*emphasis supplied*)

9. It is pertinent to mention that document C-77 relied by learned counsel for the respondent to substantiate the quantum of work, does not enhance the case of the respondent as C-77 is a self-serving document. There is no discussion in the award of the evidence

establishing that the Krishi Kalyan Cess was leviable at the relevant time. Another facet is that the MOU records an amount of Rs.11,82,55,494/- as having been paid to the respondent but this amount was subject to reconciliation. The issue has not been dealt with and the tribunal proceeded on the basis that there was no dispute regarding payment of Rs.10,72,84,936/- made to the respondent. The award of claim no.1 without reconciling the amount of Rs.11,82,55,494/- mentioned in MOU, granting of opportunity to the petitioner to contest the LC report and being bereft of reasons, is patently illegal and is liable to be set aside.

10. The respondent made claim no.3 seeking refund of the amount deducted for WCT and not deposited with the tax authorities. The petitioner does not dispute the factum of deduction and non-deposit, the only explanation given is that litigation is pending between the petitioner and the tax authorities. There is nothing produced on record to support that pendency of litigation was a ground for non-deposit of the deducted amount. No case is made out for interference in awarding of claim no.3.

11. For claim no.4 the case set up by the respondent was that the resources arranged on rent remained idle for failure of the petitioner to supply the requisite material in terms of the contract. The tribunal under Sections 55 and 73 of the Indian Contract Act, 1872 (for short 'the Contract Act') proceeded to deal with the claim. It was held that the petitioner was in breach of the terms of the contract. The

contention of the petitioner that the idling of resources constituted a part of the overhead was rejected. In absence of evidence of actual loss or damage suffered by the respondent or the actual rent paid, the tribunal erred in quantifying and awarding the damages. It would be apposite to note that the tribunal recorded that the claim for payment of rent of Rs.2.5 lakhs per month towards machinery was unsupported by vouchers demonstrating rent had actually been paid. The tribunal relying upon personal experience in the filed of construction, quantified the expenses to be two percent of the contract value and awarded Rs.1,04,29,203/- along with interest. The expertise of the tribunal cannot substitute the onus to be discharged by the respondent to prove the actual loss or damage suffered. For awarding of damages under Section 73 of the Contract Act the twin conditions of the breach of terms of the contract and consequential actual loss or damage suffered are mandatory to be established. Reference in this regard be made to ***Kailash Nath Associates v. DDA*** (2015) 4 SCC 136 and ***Fateh Chand v. Balkishan Dass***, 1963 SCC OnLine SC 49. The award of claim no.4 is contrary to the provisions of the Contract Act and the law laid down by the Supreme Court. The award of claim no.4 is patently illegal and liable to be set aside.

12. Claim no.6 concerns damages towards additional overheads occasioned due to the breach of contract by the petitioner. The tribunal held that the claim made was based on the bare minimum requirement of staff for execution of contract and is not unreasonable. The staff

deployment was found to be consistent with trade practise and the site requirements. It is held that had the petitioner not committed the breach, the respondent would have completed the work within the stipulated period thereby not incurring the additional cost. There was no evidence led by the respondent of additional overhead expenditure incurred due to breach of contract. The tribunal relied upon personal experience in the field and CPWD circular MAN-150 and 169 for quantifying the overhead expenses at 7.5% of the contract value. At the cost of repetition, the expertise of the tribunal cannot form the basis for quantification of damages more so, when no evidence of the expenses incurred was produced. Equally, the reliance placed by the tribunal upon the trade practice of deployment of staff is unsupported by evidence on record to establish the prevalence of the trade practice. It would be relevant to note here that the CPWD circulars relied upon by the tribunal were not confronted to the petitioner and is in violation of Section 24(3) of the Act. The relevant portion of the award is reproduced below:

> "11.7.8 On the basis of my long experience in this field the usage of the trade I have no hesitation that the total expenditure to be incurred by the contractor in such type of s building works the minimum expenses to be incurred by the contractor towards overhead expenses is 7.îqk of the contract value which also finds' supports from the CPWD circular MAN-150 and 169. Accordingly, I have no hesitation to decide that the expenditure that had been incurred by the Claimant in the present case for the entire contract period of 34

> months. was Rs. 4,03,01,250/-or Rs.11,85,330/- per month or say Rs. 11,85,000/- per month. The Claimant in the said amount was also required to mitigate the losses and therefore considering 25% towards mitigation of losses the said' amount works out to Rs.8,88,750/- Per month."

13. The award under claim no.6 of Rs.2,04,53,218/- alongwith interest, subsequently corrected by the additional award dated 27.03.2023 to Rs.2,84,53,218/- alongwith interest was awarded on sheer guess work, personal experience of the tribunal. The claim awarded is in violation of Section 24(3) of the Act, against the provisions of the Contract Act and against the decisions of the Supreme Court in ***Kailash Nath Associates v. DDA*** (supra) and ***Fateh Chand v. Balkishan Dass*** (supra) consequently is liable to be set aside.

14. The respondent raised claim no.8 pleading that the material at site was wrongfully retained by the petitioner. The claim was allowed relying upon the fact that the petitioner made a counter-claim for parking, storing and guarding charges. The report of LC and the personal visit of the tribunal to the site was relied to hold that substantial material was lying at the site. The valuation of material by the respondent unsupported by evidence was relied upon to award the claim and a deduction of five percent was made from the claimed amount. The acceptance of the report of the LC by the petitioner during the conciliation proceedings could not have been treated as an acceptance of the report for the purpose of arbitral adjudication. In

violation of Section 18 of the Act whereunder the parties are to be treated equally and fair opportunity is to be provided to present the case, no opportunity was provided to the petitioner to raise objections to the report of the LC. The personal inspection by the tribunal of the site is of no avail, as it neither establish the ownership of the material lying on the site nor furnish any rational basis for determining the cost of the material. The respondent failed to produce evidence to either to prove the ownership or the value of the material lying on the site. The award of claim no.8 is in absence of evidence and without basis is patently illegal.

15. The claim for loss due to non-completion of work consequent to the breach of contract by the petitioner was the claim no.9.

16. Before proceeding with the issue it would be fruitful to reproduce the para of the judgement of the Supreme Court in ***Unibros v. All India Radio 2023 SCC OnLine SC 1366*** which held as under:

> "18. Hudson's formula, while attained acceptability and is well understood in trade, does not, however, apply in a vacuum. Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profit, do not directly measure the contractor's exact costs. Instead, they provide an estimate of the losses the contractor may have suffered. While these formulae are helpful when needed, they alone cannot prove the contractor's loss of profit. They are useful in assessing losses, but only if the contractor has shown with evidence the loss of profits and opportunities it suffered owing to the prolongation.
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> 19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one

would be required to establish the following conditions : first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case."

(emphasis supplied)

17. The legal position is that the party claiming loss due to breach of contract is required to prove the breach; that the delay was not attributable to the party claiming loss; that the party was engaged in substantial projects; and lastly cogent evidence substantiating the claim of loss.

18. The respondent quantified the claim for loss under claim no.9 relying upon the Hudson formula. The Supreme Court in ***Unibros*** (supra) held that applying the Hudson formula cannot dispense with the requirement of proving the damages. In the case in hand the needful was not done.

19. The tribunal after holding the petitioner responsible for breach of contract, compensated the respondent for the claim for loss made under claim no.9 and once again relied upon personal experience and trade usage for quantifying the damages at 7.5% of the balance contract value. The relevant paragraphs of the award are reproduced below:

"14.7.15 The law is very clear that the claim of loss of

> profit on unexecuted work is payable to the contractor if the employer commits breach of contract and do not allow him to execute and complete the whole work which happened in the present case. Accordingly, I decide that the Claimant is entitled to this claim for the loss of profit @7.5% of the balance contract value. The rate being adopted by me is on the basis of my experience and also trade usage.
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> 14.7.16 The Claimant has worked out the amount of his claim with Hudson formula as Rs.5,22,04,901/- and then by considering the principle of mitigation of losses he has received the claimed amount by 50% and claims as sum of Rs.2,61,02,451/-. Although I am not inclined to disagree with the formula adopted by the Claimant but the at the same time, the duration considered by him is not convincing on me."

20. The personal knowledge and expertise of the tribunal cannot be the basis for awarding of the claim and it shall not discharge the onus of the respondent to prove the claim for loss. The trade practice relied upon was not proved. The claim awarded is patently illegal and is liable to be set aside.

21. The reliance of the respondent on the decision of ***State of West Bengal v. M/s. S.K. Maji*** (supra) is misplaced. In that case, the tribunal recorded reasons for declining the percentage of profit claimed and for granting profit at a lower percentage, the approach adopted was found to be plausible. The present case stand materially on a different footing, the tribunal has relied upon personal experience and unproven trade practise to award the claims.

22. In view of the above discussion the petition is allowed, the impugned award and the additional award are set aside. Pending application is also disposed of.

AVNEESH JHINGAN, J

SEPTEMBER 10, 2026
'JK'

Reportable: Yes