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

% Reserved on : 03.03.2025
Pronounced on : 01.07.2025

\+ **O.M.P. (COMM) 278/2017**

M/S LARSEN & TOUBRO LIMITED. ..... Petitioner
Through: Mr. Manu Seshadri, Mr. Siddharth Shekliar, Mr. Rishi Rai Mukherjee, Mr. Sahil Manganani and Ms. Aakriti Gupta, Advocates.

Versus

RAIL VIKAS NIGAM LIMITED ..... Respondent
Through: Mr. Udit Seth, Mr. Anil Seth, Mr. Divyanshu Singh and Mr. Vivek, Advocates

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The present petition has been filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter, the 'A&C Act') seeking setting aside of impugned award dated 31.03.2017 passed by the Arbitral Tribunal comprising of three Arbitrators (hereafter, 'AT') with respect to rejection of Claim No.1 for idling of men, machinery and resources.

2. The impugned award came to be delivered in the context of contract dated 15.12.2011 which came to be executed for the work of "*Construction of viaduct including related works for 5.400 km length excluding station areas from Ch. 20006.60 to Ch. 26394.60 between CBD -1 to Rabindra*

Tirtha in New Garia Airport corridor of Kolkata Metro Railway Line Package- ANV-4" for Rs.199,10,44,060/-. The letter of acceptance was issued to the Petitioner on 21.10.2011. As per the terms of contract, the completion period for work was 30 months from the date of letter of acceptance. The stipulated date for start of work was 21.10.2011 and stipulated date of completion was 20.04.2014. The actual date of completion of work was 30.06.2018.

DISPUTES BEFORE THE ARBITRAL TRIBUNAL

3. The Petitioner approached AT and filed six claims. The AT after taking into consideration the submissions of both the parties, out of 6 claims preferred by the Petitioner, the AT has allowed Claim No. 2, 4 and 5 while rejecting Claim No. l, 3 and 6. The Petitioner filed Claim No.1 for idling of resources and claimed the amount of Rs. 6,52,70,847/-, which was rejected by the AT. In Claim No.2, an amount of Rs. 50,62,312/- was claimed by the Petitioner for pond filing which was partially allowed and the AT awarded an amount of Rs.11,53,756/-. Claim No.3, was seeking an amount of Rs.2,26,40,970/- for the cost incurred due to digging deeper piles which was rejected by the AT. The Petitioner filed Claim No.4, for additional engineering and claimed the amount of Rs. 50,04,723/- which was partly allowed and an amount of Rs. 3,99,507/- was awarded by the AT. In Claim No.5, an amount of Rs. 6,65,600/- was claimed by the Petitioner for use of steel procured from primary producer in enabling steel which was allowed. Claim No.6, pertaining to the interest pendent lite and interest on the award was rejected by the AT.

4. By way of Claim No.1, the Petitioner had contended that on account of delay on the part of Respondent in providing drawings & permissions, change of alignment, arranging GTS mark and providing the requisite land in the time specified, the Petitioner was entitled to the compensation as the delay led to idling of its resources.

5. The Respondent had resisted the claim by relying on clause 2.2 and 8.3 of GCC. It had also contended that the progress achieved by the Petitioner in areas available to them was slow and not up to the mark. The Petitioner was also accused of poor co-ordination with different authorities, leading to delay.

IMPUGNED AWARD

6. The challenge in the present petition is restricted to rejection of the Claim No.1 pertaining to idling of men, machinery and resources. With respect to the amount claimed for idling of resources, AT was of the view that the adjudication of claims could only be done within the framework of subject contract agreement.

7. Clause 2.2 was cited, which states that "… *For any such delay in handling over of site, Contractors will be entitled to only reasonable extension of time and no monetary claims whatsoever shall be paid or entertained on this account*." Clause 8.3 was also relied upon which states that delay by the employer or engineer in handing over the site, necessary notice, drawings, instructions, clarifications, supply of materials, plant and machinery would not entitle the contractor to damages or compensation thereof and the engineer shall extend the time period for completion of contract.

8. The AT while rejecting the said claim observed that the Respondent has provided extension of completion period while taking into account the delay which was not attributable to the Petitioner including not making work sites available and the Respondent had admitted to compensation for price variation during the extended period.

SUBMISSIONS BEFORE THIS COURT

9. The Petitioner primarily submits that the AT erred in rejecting the claim for underutilisation and idling of resources without giving any reasons or considering the merits of the claim by mechanically applying Clause 2.2 and Clause 8.3 of GCC. The case of the Petitioner is that time was of the essence in the contract. It is submitted that despite the categorical finding that the delay was not attributable to the Contractor, AT has failed to consider whether the parties had reciprocal obligations and whether Clause 8.3 GCC could be read to exempt the employer from any claim for losses or damages for a breach or failure to perform its obligations under Section 55 and any claim arising therefrom under Section 73 of the Contract Act. It is contended that Clause 8.3 which disentitles the contractor from losses or damages is inconsistent with the provisions of Section 73 of the Contract Act and therefore contrary to the fundamental policy of Indian law. Reliance in placed on decisions in Simplex Concrete Piles (India) Ltd vs. Union of India[1] and G. Ramachandra Reddy vs. UOI[2], Asian Tech Ltd vs. Union of India,[3] and General Manager, Northern Railway and another vs Sarvesh

[1] 2010 SCC Online Del 821.
[2] (2009) 6 SCC 414.
[3] (2009) 10 SCC 354.

Chopra[4], Tarapore & Co. v. Cochin Shipyard Ltd[5], [6], DMRC Ltd. v. J. Kumar-CRTG JV[7], MBL Infrastructures Ltd. v. DMRC[8], Union of India v. Vishva Shanti Builders (India) (P) Ltd.[9]

10. It is next contended that the delay in completion of work is solely attributable to the Respondent due to the failure in providing work fronts within the scheduled timeline. The Petitioner's case is that the work of piling was delayed due to Respondent not making available the complete stretch of land within the agreed upon timeline. Reliance is placed on various letters dated 17.05.2012, 22.06.2012, 09.08.2012, 31.08.2012, 22.11.2012, 06.05.2013, 03.05.2013 & 22.06.2013 to contend that the delay was attributable to the Respondent. It is next submitted that Clause 17.1 of the GCC, is widely worded and the said clause empowers the AT to consider the claim for compensation liable to be paid due to extension of time and additional payment, if any, considering the evidence. Additionally, reliance has been placed on the decisions in Ambica Quarry Works v. State of Gujarat[10], Giriraj Garg v. Coal India Ltd.[11], NHAI v. M. Hakeem[12], OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions India (P) Ltd.[13], State of Kerala v. M.A. Mathai[14] and Secunderabad Club v.

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[4] (2002) 4 SCC 45.
[5] (1984) 2 SCC 680.
[6] (2009) 6 SCC 414.
[7] 2022 SCC OnLine Del 1210.
[8] 2023 SCC OnLine Del 8044.
[9] 2024 SCC OnLine Del 5018.
[10] (1987) 1 SCC 213.
[11] (2019) 5 SCC 192.
[12] (2021) 9 SCC 1.
[13] 2024 SCC OnLine SC 2600.

Commissioner of Income-tax[15].

11. *Per Contra*, learned counsel for the Respondent submits that the AT has rightly rejected the claim for idling of resources and the reasoning employed does not merit any interference. It is submitted that the AT has reasonably interpreted Clauses 2.2 and 8.3 of the GCC and the award has been passed after due application of mind. With respect to the Petitioner's argument that Clauses 2.2 and 8.3 of the GCC are invalid and contrary to public policy, the Respondent submitted that neither the said argument was canvassed before the AT, nor the judgement of Simplex Concrete (Supra) was placed before it for consideration and therefore the said objection cannot be raised at a later stage in Section 34 proceedings. Reliance in this regard is placed upon the judgement of Hindustan Construction Co. Ltd, v. NHAI[16]**,** Vishva Shanti Builders (Supra)**.** It is further submitted that the decision in Simplex Concrete (Supra) was challenged by the Respondent therein under section 37 of the Act in UOI v. Simplex Concrete Piles (1) Ltd.[17], wherein leave was granted. It is further submitted that the said judgement was distinguished by the Division Bench of this Court in PLUS91 Security Solutions v. NEC Corpn. India (P) Ltd.[18], wherein it has been clarified that the contractual bargains between the parties have to be given effect to. However, it is submitted that the challenge to the decision in PLUS91 Security Solutions (Supra) is pending.

12. The next contention raised by the Respondent is with respect to the

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[14] (2007) 10 SCC 195.
[15] 2023 SCC OnLine SC 1004.
[16] (2024) 2 SCC 613.
[17] FAO(OS) No. 348/2010.
[18] 2024 SCC OnLine Del 5114.

applicability of Section 55 of the Indian Contract Act. It is submitted that the Petitioner did not intimate its intention to seek compensation when the letter dated 25.02.2013 was issued by the Petitioner seeking extension of time. It is submitted that in the case of Asian Tech (supra), the employer therein had assured the contractor of settling revised rates, however no such assurance exists in the present case and thus the decision is distinguishable on facts. Reliance in this regard is placed upon the judgment of State of Gujarat v. Kothari & Associates[19] and Northern Railway v Sarvesh Chopra (Supra)**.** It is further contended by the Respondent that the clauses worded similarly to Clause 2.2 and 8.3 of the GCC was upheld by the Supreme Court in K.Marappan v. TBPHLC[20].

13. In rejoinder, it is submitted that in another dispute between the parties, vide award dated 30.12.2023, the AT had awarded idling claim on basis of delay by the Respondent in providing drawings. It is submitted that this award was accepted by the Respondent and has attained finality. It is submitted that letters dated 12.05.2012, 22.06.2012 and 09.08.2012 would show that Petitioner had reserved the right to costs and that it was conveyed to the Respondent that there would be cost implications. PLUS91 Security Solutions (Supra) is sought to be distinguished by contending that the same deals with consequential damages and not direct damages. K.Marappan(supra) is stated to be not dealing with Section 55 of the Contract Act and was not in relation to time related claims.

DISCUSSION AND CONCLUSION

14. I have considered the pleadings and submissions made by both the

[19] (2016) 14 SCC 761.

[20] (2020) 15 SCC 401.

parties.

15. The sole issue which arises for consideration in the present petition is whether the decision of AT in disallowing the claim for idling of men, machinery and resources suffers from any of the shortcomings elucidated in Section 34 of the A&C Act.

16. The AT, while disallowing the claim, has rightly held that the adjudication of claims has to be done within the framework of the contract between the parties. This is the leitmotif of judicial pronouncements on the subject. The AT interpreted Clauses 2.2 and 8.3 of the GCC to reject the Petitioner's contention. A brief analysis of these clauses is necessary to trace the AT's reasoning.

17. Clause 2.2 specifically deals with 'access to and possession of the site' and provides for the consequences of delay in providing the work site to the contractor. Under this clause, the contractor is supposed to give notice to the Engineer within 28 days of such failure in delivery of the site. On this basis, the Engineer determines the duration of the extended time frame and communicates the same to the contractor. It is further explicitly mentioned that such delay entitles the contractor only to Extension of Time ("EoT") and specifically bars any corresponding monetary claims by the contractor.

18. Similarly, Clause 8.3 of the GCC, which is titled as 'delay', reiterates the rule denying the contractor any right to claim monetary compensation due to delay on the part of the Employer or Engineer in handing over the site, issuing the necessary notice to commence work, providing required drawings, instructions, or clarifications, or supplying materials, plant, or machinery for which the Employer is responsible. The Clause emphatically

clarifies that the delay on account of the above would not effect, vitiate or alter the character of the contract and the Contractor would not be entitled to claim damages or compensation, but would only be entitled to EoT.

19. However, this Clause 8.3, in so far as delay attributable to the contractor is concerned, lays down strikingly different consequences and makes the contractor liable to pay liquidated damages and any other compensation for damages suffered by the Employer due to the delay.

20. Evidently, parties have consciously and willingly - in the absence of any challenge to the disparity in the said clause of the consequences for the parties due to delay, agreed to such contractual arrangement. Parties chose to restrict the provision of LD to delays on behalf of the contractor and did not extend the same to delay on part of the Employer. As stated above, there was no challenge to the said clause before the AT or any time earlier at the time of the signing of the contract, during its execution, or thereafter. It is not open to the Petitioner to fault the arbitral award under Section 34 by way of oblique references to the legality of Clause 8.3.

21. In fact, the conduct of the Petitioner would show that it was conscious of the absence of a right to claim compensation, as is evident from the letter dated 25.02.2013 where the Petitioner, while seeking extension of time, though attributing the delay to lack of requisite approvals and site availability, never sought any compensation for such delay. The EoT was granted by the Respondent vide letter dated 21.03.2013, and it was specified that the said extension was without any penalty. The Petitioner sought compensation for the delay at a later point in time vide letter dated 22.06.2013. However, the same was denied by the Respondent on 09.07.2013 citing Clause 2.2 of GCC.

22. There is no ambiguity in law with respect to the AT being the best judge of the facts, and the parties cannot ask the Court to re-appreciate evidence under a Section 34 petition. The AT has the power to interpret the provisions of a contract and accordingly give a decision on the prevalent factual matrix. According to this Court, it will be legally impermissible for it to interfere with the award on the interpretative differences of the contract clauses. The Supreme Court in Union of India v. Susaka (P) Ltd.[21] also noted that if a plea was not raised before the AT, the same amounts to clear case of waiver and / or abandonment of a plea at the initial stage. It made the following observations:-

> *"25. In the light of the aforementioned factual scenario emerging from the record of the case, we cannot grant any indulgence to the appellant (Union of India) to raise such plea for the first time here. In our view, it is a clear case of waiver or/and abandonment of a plea at the initial stage itself.*
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> *26. Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Cuilibet licet renuntiare juri pro se introducto. (See Maxwell on The Interpretation of Statutes, 12th Edn. at p. 328)*
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> *27. If a plea is available, whether on facts or law, it has to be raised by the party at an appropriate stage in accordance with law. If not raised or/and given up with consent, the party would be precluded from raising such plea at a later stage of the proceedings on the principle of waiver. If permitted to raise, it causes prejudice to other party. In our opinion, this principle applies to this case."*

23. Since, the AT was never seized of any challenge to Clauses 2.2 and 8.3 of the GCC, it never had the opportunity to give any finding in respect of their validity. In such a scenario, this Court would refrain from entering into

[21] (2018) 2 SCC 182.

a detailed exercise into the claim of the Petitioner as to the validity of these clauses. Reliance on a different award between the parties would also be of no avail to the Petitioner, as each case has to be dealt with within its own factual matrix and the said award was in any case, subsequently passed.

24. In view of the aforesaid position of law and facts, this Court is not inclined to interfere with the Arbitral Award. Accordingly, the present petition is dismissed.

MANOJ KUMAR OHRI
(JUDGE)

JULY 01, 2025
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