



2024:DHC:5746



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Reserved on: 16.07.2024
Pronounced on: 05.08.2024

+ **CS(OS) 1197/2015**

R S INFRAPROJECTS PVT LTD Plaintiff
Through: Mr.S.K. Maniktala, Mr.Udit
Maniktala, Mr.Mohit Sharma &
Mr.Kritik, Advs.
versus

ZAMIL INFRA PVT LTD & ORS Defendants
Through: Mr.Karan Mehra & Mr.Kunaal
Malhotra, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This suit was filed by the Plaintiff praying for a decree of Declaration, declaring the invocation/encashment of the Plaintiff's Bank Guarantee No.40941GPER003514 dated 05.03.2014 for an amount of Rs.2,00,00,000/- in the name of Defendant No.1, *vide* the Defendant No. 1's communication dated 18.03.2015, as illegal, wrongful, and fraudulent. The Plaintiff also prays for a decree directing the Defendants to pay a sum of Rs.2,50,00,000/-, along with interest at the rate of 18% per annum with effect from 23.03.2015, till the realization of the said amount.

Case of the Plaintiff:

2. It is the case of Plaintiff that *vide* Purchase Order No.ZIS/SUP/MYM/2014/011 dated 17.02.2014, and its subsequent



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amendment dated 24.02.2014, the Defendant No.2 had awarded work for the supply of 199 Nos. of telecommunication towers in Yangon, Myanmar to the Plaintiff herein. The Purchase Order was for USD 3,193,647.00, which is approximately Rs.20,00,00,000/- and was subject to certain terms and conditions as specified therein.

3. The Plaintiff submits that the final delivery schedule for the telecommunication towers was agreed between the parties in the Minutes of Meeting dated 03.03.2014, providing that the towers would be dispatched in instalments, with the last dispatch date being between 10th–15th April, 2014.

4. The Plaintiff further submits that in terms of Clause 4 of the Terms of the Purchase Order dated 17.02.2014, the Plaintiff was entitled to a mobilisation advance of 10% of the value of the Purchase Order from the Defendant No.2, upon the furnishing of a consolidated Performance and Advance Bank Guarantee of an equivalent amount. The Plaintiff, on 06.03.2014, submitted to the Defendant No.2 the aforementioned Bank Guarantee issued by Bank of Baroda, MID Corporate Branch, Sansad Marg, New Delhi, which was initially valid up to 25.11.2014. The Defendants, however, did not release the mobilisation advance payment and delayed the same for over a period of more than 35 days after the submission of the Bank Guarantee. The Plaintiff claims that the delayed release of the mobilisation advance payment, that too, in instalments of short amounts, was not only a breach of contract but also resulted in obvious delays in procuring material for the fabrication of the telecommunication towers. The Plaintiff claims that the mobilisation advance was released to the



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Plaintiff in instalments as under:

<i>Date</i>	<i>Amount (US)</i>	<i>%</i>
<i>11.03.2014</i>	<i>125,000</i>	<i>38%</i>
<i>25.03.2014</i>	<i>50,000</i>	<i>15%</i>
<i>09.04.2014</i>	<i>157,522</i>	<i>47%</i>
<i>TOTAL</i>	<i>332,522</i>	<i>100%</i>

5. The Plaintiff claims that not only did the Defendants delay the release of the mobilisation advance payment, the Defendants also miserably delayed the issuance of the Letter of Credit, which was to be issued in terms of the Purchase Order dated 17.02.2014. Instead of opening one comprehensive Letter of Credit for the full 90% amount of the contract value, the Defendants opened multiple Letters of Credit for small amounts, and that too, after repeated reminders from the Plaintiff for the same.

6. The Plaintiff asserts that it was under no obligation to supply the telecommunication towers without there being a Letter of Credit issued in favour of the Plaintiff.

7. The Plaintiff further claims that it was due to the delay in issuing the Letter of Credit by the Defendants that the last dispatch of telecommunication towers of a value of Rs.2.92 Crores approximately was made on 31.05.2014, that too, without a Letter of Credit in respect thereof being issued by the Defendant No. 2. The said Letter of Credit was, in fact, opened by the Defendants only on 10.06.2014, that is, 10 days after the dispatch of the towers.

8. The Plaintiff claims that the delay in the timely release of the



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mobilisation advance and issuance of the Letter of Credit on the part of the Defendants constituted a fundamental breach of contract, being the Purchase Order, by the Defendants. Consequently, the Defendants not only lost their right to claim performance from the Plaintiff, but also became liable to make good to the Plaintiff any losses occasioned to the Plaintiff owing to such delay/default. The Plaintiff claims that in spite of the above breach, the Plaintiff supplied the telecommunication towers to Defendants.

9. The Plaintiff further states that various invoices were raised by the Plaintiff for the telecommunication towers supplied to the Defendants from time to time. The payments thereof, though belatedly, were made by the Defendants without any protest, demur, or reservation, whatsoever. The Plaintiff claims that, therefore, not only was there any delay in the supply of the telecommunication towers from the Plaintiff to the Defendants, but also, even assuming that there was a delay, the Defendants after having accepted the telecommunication towers without any protest, demur, or reservation, could not have later alleged breach of contract by the Plaintiff or levied damages on the Plaintiff for the same.

10. The Plaintiff claims that the Defendants *vide* an email dated 24.08.2014, informed the Plaintiff that their Principal Employer has imposed liquidated damages upon the Defendants, for which the Defendants will impose liquidated damages of USD 227,789.81/- upon the Plaintiff. The Defendants, however, also stated that they will impose such liquidated damages on the Plaintiff only if the same are charged by the Principal Employer from them. The Plaintiff further



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claims that the Defendant No.1, by an email dated 27.08.2014, called upon the Plaintiff to extend the validity of the subject Bank Guarantee till 31.03.2015, on the premise that the Defendants were negotiating with their Principal Employer for the waiver of the liquidated damages. The Defendant No.1 had reiterated that the liquidated damages will be imposed on the Plaintiff only in case the Principal Employer of the Defendant No.2 imposes the same upon the Defendant No.2. The Plaintiff claims that the above stipulation was also contrary to the Purchase Order as the Purchase Order did not provide for the Plaintiff to reimburse the Defendant No.2 for any liquidated damages imposed upon the Defendant No.2 by its Principal Employer. Even otherwise, the contract of the Defendant No.2 with its Principal Employer was a far more comprehensive contract, involving many more activities and for a higher value. The liquidated damages, if any, imposed upon the Defendant No.2 by its Principal Employer, therefore, could have been for various other reasons not attributable to the Plaintiff.

11. The Plaintiff states that even otherwise, the calculation of the liquidated damages was incorrect, inasmuch as, instead of taking the dispatch date of the telecommunication towers, as was the condition in the Purchase Order, the Defendant No.2 was imposing the liquidated damages by taking into account the delivery date, for calculating the period of delay and the liquidated damages.

12. The Plaintiff further claims that the Defendants, by an email dated 17.11.2014, again called upon the Plaintiff to extend the subject Bank Guarantee as the same was to expire on 24.11.2014. The



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Plaintiff, under duress, extended the Bank Guarantee till 24.12.2014. The Bank Guarantee was thereafter again extended at the request of the Defendants firstly till 23.01.2015, then till 22.02.2015, and lastly till 21.03.2015. The Plaintiff states that thereafter, the Defendant No.1, without any further communication with the Plaintiff, *vide* letter dated 18.03.2015, invoked the Bank Guarantee of the Plaintiff in a fraudulent manner.

13. The Plaintiff claims that by its earlier email dated 24.08.2014, the Defendant No.2 had stated that it could be imposing liquidated damages of USD227,792.81 which, at the then conversion rate of 1 USD = Rs.60/-, computes to Rs.1,36,67,568/-. The Plaintiff states that, therefore, the full Bank Guarantee even otherwise could not have been invoked by Defendants. The bank of Plaintiff however, issued a Banker's Cheque dated 20.03.2015 in favour of the Defendants, remitting the amount of the Bank Guarantee to the Defendants.

14. The Plaintiff claims that as the Bank Guarantee has been wrongly invoked/encashed by the Defendants, the Defendants are liable to return the amount realised on such invocation.

15. Furthermore, the Plaintiff claims that for the loss of goodwill and reputation, the Defendants are also liable to pay damages for a token amount of Rs.50,00,000/- to the Plaintiff.

16. The Plaintiff also points out that though the Purchase Order was issued by the Defendant No.2 in favour of the Plaintiff, the Bank Guarantee was issued in favour of the Defendant No.1, which is a sister-concern of the Defendant No.2 in India. Furthermore, the Bank Guarantee was also invoked/encashed by the Defendant No.1.



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Therefore, both the Defendant No.1 and the Defendant No.2 are jointly and severally liable to pay the aforementioned amount to the Plaintiff.

Case of the Defendants:

17. The Defendants, in their respective Written Statements, have alleged that there is no cause of action against the Defendant No.1 as there existed no contractual relationship between the Plaintiff and the Defendant No.1.

18. It is also stated that the Defendant No.2, who is the contracting party with the Plaintiff, is constituted in the Kingdom of Bahrain, and the supply of the telecommunication towers was to be made to Myanmar, and therefore, this Court lacks the territorial jurisdiction to entertain the present suit.

19. It is further stated by the Defendants that the Defendant No.2, through one of its group entities, had obtained a huge order of supplying approximately 674 telecommunication towers to Digicel Asian Holdings Pte. Limited/Myanmar Tower Company, a company based in the territory of Myanmar. Pursuant to the same, M/s. Ramboll India Private Limited approached the Defendant No.2 stating that it can get the telecommunication towers manufactured and supplied through three of its Channel/Manufacturing Partners, including the Plaintiff herein. Based on the assurances of M/s Ramboll, the Purchase Orders were placed, including upon the Plaintiff.

20. The Defendant No.2 asserts that in terms of the Purchase Order dated 17.02.2014 and the amendment thereto on 24.02.2014, the



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Plaintiff was to immediately submit the Bank Guarantee. However, the Plaintiff took almost 10 days to submit the same, due to which the Defendant No.2 could not release the advance money. In the meantime, the Plaintiff informed the Defendant No.2 that its bank was refusing to give the Bank Guarantee in favour of the Defendant No.2 as it was a foreign entity. While this reason appeared to be incorrect, nonetheless, the Defendant No.2 agreed to take the Bank Guarantee in the name of the Defendant No.1.

21. The Defendant No.2 states that even though the Plaintiff was under the obligation to take raw material into production immediately upon the placing of the Purchase Order and commence the dispatches in the Month of February, 2014, the Plaintiff failed to do so. Later, in a meeting dated 03.03.2014, after mutual discussions, the Plaintiff stated that it would complete a majority of the dispatches by the end of March, 2014, and the few remaining ones, latest by 15.04.2014. The Defendant No.2, having no option, agreed to the same as it had made commitments to its Principal Employer.

22. The Defendant No.2 asserts that the revised delivery schedule was accepted by the Plaintiff whilst being aware of the fact that as the Plaintiff had still not furnished the Bank Guarantee to the Defendant No. 2, the same may result in a delay in giving of the mobilisation advance payment. Therefore, the Plaintiff was aware that the delivery schedule is not subject to the payment of the mobilisation advance, as in any case, the Plaintiff was to immediately take the raw material into production as per the Terms of the Purchase Order.

23. The Defendant No.2 states that the Plaintiff was to submit a



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Proforma Invoice for the 90% amount of the Purchase Order value for the purpose of opening a Letter of Credit, however, the Plaintiff failed to do so and, therefore, the Defendant No.2 was left with no option but to open the Letter of Credit only to the extent of the value of the Proforma Invoice submitted by Plaintiff.

24. The Defendant No.2 further submits that as the Plaintiff kept delaying the supply of the telecommunication towers, the Defendant No.2 was even compelled to designate its representatives to be permanently present in the factory of the Plaintiff, and also ensure that as soon as any commitment is received from the Plaintiff regarding the production against the Purchase Order, or a Proforma Invoice is issued by them, immediately a Letter of Credit is opened in favour of the Plaintiff to the extent of the Proforma Invoice. The Plaintiff, however, failed to meet the delivery schedule in spite of the revision of the delivery commitments.

25. The defendants assert that in the meantime, the Principal Employer of the Defendant No.2 cancelled the contract of the Defendant No.2, and only revived the same on the reassurances of the Defendant No.2 to make timely supplies. The Principal Employer also carried out an audit of the Plaintiff's factory on 18.04.2014, in the presence of the representatives of the Defendant No.2 and M/s Ramboll India Private Limited. The Plaintiff, however, failed to cooperate during the said audit.

26. The defendants assert that M/s Ramboll India Private Limited, *vide* an email dated 08.05.2014, apologised to the Defendant No.2 on behalf of its manufacturing partners for causing the inordinate delay in



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the supply of the telecommunication towers, and once again gave the revised written commitment on the planned dispatches of the telecommunication towers by its partners, including the Plaintiff. Some of the reasons assigned by M/s Ramboll India Private Limited for such delays were that in the months of April and May, 30 to 40 percent of the staff goes home to help out with harvesting, causing the manufacturing units to suffer from manpower issues; that there were space constraints in the factories of the Plaintiff; and, that there was a work accident in the factory of the Plaintiff which resulted in four days of no work. Later, *vide* an email dated 13.05.2014, the Defendant No.2 was also informed that the Plaintiff had decided to release Mr.Sanjeev Goel, the then Managing Director of its Telecom Department, and replace him with Mr.Manoj Goel and Mr.Anand Goel to ensure enough manpower to focus 100% on the Telecom customers.

27. The Defendant No.2 states it was only due to the goodwill and reputation of Defendant No.2 that the Principal Employer did not cancel the order for the telecommunication towers.

28. The Defendant No.2 claims that due to the delay in supplying the telecommunication towers, the Defendant No.2 and the entire group of companies suffered a loss of reputation, goodwill, and business with a number of international companies, who refused to place any purchase orders on the Defendant No.2 due to its failure in Myanmar. The Defendant No.2 claims that it became impossible for the Defendant No.2 to obtain further purchase orders in the territory of Myanmar. Furthermore, the Principal Employer threatened to not only



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impose liquidated damages but also to withhold substantial payments against the supply of the telecommunication towers.

29. The Defendants assert that while the Defendant No.2 was trying to resolve the matter with the Principal Employer, it was shocked to learn, through an email dated 05.09.2014 from M/s Ramboll India Private Limited, that the Plaintiff had received a direct Purchase Order from the Principal Employer for the missing parts of telecommunication towers that were supplied, and that the said Purchase Order had been accepted by the Plaintiff without even informing M/s Ramboll India Private Limited. On the assurances of M/s Ramboll India Private Limited that going forward none of its partners will accept any direct purchase orders from the Principal Employer, the Defendant No.2 allowed the Plaintiff to carry out the Purchase Order directly placed by the Principal Employer on it, as a matter of exception. However, taking undue advantage of the same, the Plaintiff in connivance with M/s Ramboll India Private Limited, directly approached the Principal Employer and offered competitive rates for the supply of telecommunication towers with a view to get direct purchase orders from the Principal Employer by bypassing the Defendant No.2 and also its own partner, M/s Ramboll India Private Limited.

30. The Defendants assert that despite the best efforts of the Defendant No.2, the Principal Employer withheld the payment to be made to the Defendant No.2 for a long time and also did not place any purchase orders on the Defendant No.2, in view of its failure to deliver the telecommunication towers on time, and in view of the fact that the



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Plaintiff had obtained direct Purchase Orders from the Principal Employer by offering competitive rates.

31. The Defendants assert that since the Plaintiff failed to compensate the Defendant No.2 for its loss of money, loss of business, and loss of reputation, the Defendant No.2 was compelled to encash the Bank Guarantee submitted by the Plaintiff in terms of the Purchase Order dated 17.02.2014. The Defendant No.2 claims that the invocation/encashment of the Bank Guarantee was justified and legal, since the entire default in the timely completion of the Purchase Order was on the Plaintiff, which also resulted in the Principal Employer withholding the legitimate dues of the Defendant No.2. Therefore, the suit is liable to fail and consequently be dismissed.

Proceedings in the Suit:

32. Upon completion of the pleadings, the following issues were framed on 26.10.2016:

“(i) Whether this Court has no territorial jurisdiction to entertain and try the present suit?” **OPD**

“(ii) Whether the plaintiff is entitled to a decree of Rs.2,50,00,000/- from the defendant(s)?”

OPP

“(iii) Whether the plaintiff is entitled to interest from the defendants? If so, on what amount, at what rate and for what period?” **OPP**

“(iv) Whether the suit of the plaintiff is liable to be dismissed for mis-joinder of defendant no. 1?” **OPD**

“(v) Whether the plaintiff was in breach of the terms of the purchase order?” **OPD-2**

“(vi) Relief.”

33. In support of its case, the Plaintiff examined Mr.Sanjeev Goel,



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one of its directors, as PW-1. The Defendants chose not to lead any evidence in support of their case.

Submissions of the learned Counsel for the Plaintiff:

34. The learned counsel for the Plaintiff, while reiterating the above factual background, submits that it was the Defendant No.2 who had failed to release the mobilisation advance in a timely manner. It had also delayed the issuance of the Letter of Credit, which was then opened in parts. He further submits that even the delivery schedule was changed without reserving any right with the Defendant No.2 to impose any damages on the Plaintiff. He submits that the Defendants, having themselves defaulted in adhering to the time schedule, cannot insist the same upon the Plaintiff. Even otherwise, the delivery schedule having been changed and the telecommunication towers accepted by the defendant no. 2, without reserving any rights to impose damages thereafter, the Defendant No.2 cannot lawfully impose any damages on the Plaintiff for the alleged delay in making the supply.

35. He further submits that the Defendants have also failed to show any loss or damages suffered by them due to the alleged delay in making the supplies by the Plaintiff. He submits that in the absence of any proof of damages suffered by the Defendants, damages, including liquidated damages, are not recoverable from the Plaintiff. He submits that, therefore, the Defendants were not entitled to invoke/encash the Bank Guarantee submitted by the Plaintiff.



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Submissions of the learned counsel for the defendants:

36. On the other hand, the learned counsel for the Defendants submits that there are admitted defaults on the part of the Plaintiff not only in the timely submission of the Bank Guarantee but also in the supply of the telecommunication towers. He submits that the reasons for such delays were explained by M/s Ramboll India Private Limited in its email dated 08.05.2014, which has not been denied by the Plaintiff. He submits that by March, 2014, only 45 telecommunication towers had been supplied by the Plaintiff, which too, were defective with certain vital parts missing. He submits that merely because the Defendant No.2, having no other option, had to revise the delivery schedule in order to save the contract with its Principal Employer, it cannot be said that the Defendant No.2 had lost its right to claim damages from the Plaintiff.

Analysis and findings:

37. I have considered the submissions made by the learned counsels for the parties.

38. The Purchase Order dated 17.02.2014 placed by the Defendant No.2 on the Plaintiff, had the following important terms and conditions for determining the issues raised in the present suit:

<u>Terms and Conditions</u>	
xxx	xxx
(3) <i>Delivery Terms & Schedule:</i>	<i>CIF- MIIT Yangon Port- Myanmar. Progressive dispatches shall commence FEB 2014 from your Factory and shall finished latest by 31st MAR 2014, However delivery schedule will be discuss and freeze mutully. Validity of</i>



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	<i>this order is subject to proto inspection & clearance from end client.</i>
<i>(4) Payment Terms:</i>	<i>a)10% advance of PO value against equivalent amount BG. b) 90% through irrecoverable LC up to 120 days usance period from the date of BL, with 30 days interest to RS Infra account. c)You will issue the PBG of 10% PO value and Nine (9) month validity. d)Rate of Interest for the usance period shall be on mutually agreed terms between both parties. Note: Seller is free to provide single BG i.e. ABG & PBG for the sake of convince.</i>
<i>(5) Responsibility Matrix</i>	<i>RS Infra immediately upon issue of this Purchase Order, shall take the material into production & offer for inspection with in the stipulated delivery schedule.</i>
xxx	xxxx
<i>(7) Documents after PO receipt:</i>	<i>RS Infra shall submit commercially clear Performa Invoice with complete bank details on receipt of order, Commercial invoices, Challan, Packing List and associated material test & inspection reports at the time of dispatch.</i>
xxx	xxx
<i>(9) Liquidate Damage:</i>	<i>Any delay in supply beyond schedule date mentioned above shall subject to penalty @ 2% per week to max 10%. RS Infra shall ensure to rectify/replenish any shortage found in supplies or quality related issues noticed at site reported by Zamil with in 7 days of receipt. For LD purpose, one week grace period to be considered for respective dispatches.</i>
xxx	xxx
<i>(13) Jurisdiction:</i>	<i>This PO shall be governed by and interpreted in accordance with the laws of India, and the courts at Delhi shall</i>



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	<i>have the exclusive jurisdiction to decide all matters arising out of this PO and/or directly/impliedly concerning this PO.</i>
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39. From the above terms, it is apparent that the telecommunication towers were to be supplied in a progressive manner by the Plaintiff to the Defendant No.2, commencing from February, 2014 “*from your factory*” till 31.03.2014. However, the final delivery schedule was to be discussed and settled later. Therefore, the delivery schedule was not final in the Purchase Order. Furthermore, as per Clause 4, the Plaintiff was to also receive an advance of 10% of the Purchase Order value against a Performance Bank Guarantee of an equivalent amount. The remaining 90% of the amount was to be paid through an irrecoverable Letter of Credit. Clause 9 of the Purchase Order stipulated for the levy of the liquidated damages for any delay in supply beyond the scheduled date, at the rate of 2% per week to a maximum of 10%. It was stipulated that for the purposes of liquidated damages, a one-week grace period was to be considered for the respective dispatches. As per Clause 13, the jurisdiction to adjudicate upon any dispute arising from the Purchase Order was conferred on the Courts at Delhi.

40. The above Purchase Order was amended by an email dated 24.02.2014, addressed by the Defendant No.2 to the Plaintiff, which was only confined to change in the weight of the telecommunication towers.

41. As far as the delivery schedule was concerned, the same was settled in a meeting dated 03.03.2014 between the Defendant No.2 and



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the Plaintiff. The same was duly recorded in the Minutes of Meeting dated 03.03.2014, as under:

“MOM (Minutes of Meeting)

**Minutes of Meeting held between M/s Zamil Infra SPC and
M/s RS Infraprojects Pvt Ltd on 3rd March 2014**

Present Persons:-

From Zamil Infra SPC From RS Infraprojects Pvt Ltd.

*Mr. Munish Jindal
Mr. Susheel Singh
Ms. Deepa*

*Mr. Vinod Tandon
Mr. Ashish Sharma*

Agenda:- *To Freeze the Delivery schedule of Tubular Tower for Myanmar Project.*

Zamil has given two Purchase Order ZIS/SUP/MYM/2014/009 and ZIS/SUP/MYM/2014/011 to RS Infra for supply of Tubular tower for Myanmar Project. Below delivery schedule has been discussed and agreed between both parties for supply of the material against above Purchase Orders.

Delivery Schedule:-

<u>Material Description</u>	<u>Dispatch Date</u>
<i>1. 137 Sets CIP ready for dispatch</i>	<i>6th to 7th March 2014</i>
<i>2. 52 Sets of CIP ready for dispatch</i>	<i>12th March 2014</i>
<i>3. GFT12A 45mtr Tower (38 Sets)</i>	<i>20th to 31st March 2014</i>
<i>4. GFT12A 60mtr Tower (75 Sets)</i>	<i>20th to 31st March 2014</i>
<i>5. GFT08A 45mtr Tower(30 Sets)</i>	<i>3rd to 7th April 2014</i>
<i>6. GFT11A 60mtr Tower (56 Sets)</i>	<i>10th to 15th April 2014”</i>

42. Therefore, in terms of the revised delivery schedule, the



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telecommunication towers were to be dispatched in instalments, starting from 6th-7th March, 2014 till 10th-15th April, 2014. The earlier dispatch dates as stipulated in the Purchase Order, therefore, stood amended by mutual consent of the parties and without any reservation by the Defendant No. 2.

43. It is also not disputed that the Plaintiff submitted the subject Bank Guarantee in favour of the Defendant No.1 on 06.03.2014. There was no protest on the same by the Defendants on the account of delay in the submission of the Bank Guarantee.

44. In terms of the Purchase Order, the Defendant No.2 was to release the mobilisation advance to the Plaintiff. The same was released in instalments, as has been alleged by the Plaintiff and not denied by Defendants, as under:

<i>Date</i>	<i>Amount (US)</i>	<i>%</i>
<i>11.03.2014</i>	<i>125,000</i>	<i>38%</i>
<i>25.03.2014</i>	<i>50,000</i>	<i>15%</i>
<i>09.04.2014</i>	<i>157,522</i>	<i>47%</i>
<i>TOTAL</i>	<i>332,522</i>	<i>100%</i>

45. The Plaintiff also alleges that there was a delay in the issuance of the Letter of Credit against the Proforma Invoices issued by the plaintiff to the Defendant No.2. The same is explained in the form of a table by PW-1, Mr.Sanjeev Goel, in his evidence by way of affidavit, as under:

<i>S.No</i>	<i>PI No.</i>	<i>PI Sent Date</i>	<i>LC No.</i>	<i>LC Date</i>	<i>LC Amount (USD)</i>	<i>Delay (Days)</i>
<i>1.</i>	<i>130</i>	<i>24.02.2014</i>	<i>6171IMPLC0004514</i>	<i>03.03.2014</i>	<i>512,963</i>	<i>7</i>



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	& 131					
2.	1	01.04.2014	6171IMPLC0007114	02.04.2014	699,485	0
3.	3	16.04.2014	6171IMPLC0007914	21.04.2014	458,579	5
4.	5	14.05.2014	6171IMPLC0011814	22.05.2014	483,695	8
5.	6	22.05.2014	6171IMPLC0012514	27.05.2014	445,807	5
6.	7	28.05.2014	6171IMPLC0014214	10.06.2014	486041	12
				Total USD	3,086,570	

46. Clearly, therefore, the Defendant No.2 also delayed the performance of its obligations under the Purchase Order inasmuch as it defaulted in releasing the mobilisation advance and issuing the Letters of Credit on the Purchase Order in a timely manner. Having itself defaulted in complying with the conditions of the Purchase Order in a timely manner, the Defendant No.2 cannot insist upon the Plaintiff to comply with its reciprocal promise of making the supplies in a timely manner.

47. Sections 51, 52 and 54 of the Indian Contract Act, 1872 would be applicable to the facts of the present case, and are reproduced hereinbelow:

“51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

52. Order of performance of reciprocal promises.—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.



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54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.—When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.”

48. The Purchase Order, contained reciprocal promises of the Plaintiff making the supplies against the Letter of Credit issued by the Defendant No.2. The Defendant No.2, having itself delayed not only the release of the mobilisation advance but also the issuance of the Letter of Credit, cannot insist upon the Plaintiff to adhere to the time schedule for making the supplies as stipulated in the Purchase Order and as amended in the meeting dated 03.03.2014.

49. The plea of the Defendants that the delay in making the supplies was due to reasons attributable only to the Plaintiff is based primarily on an email dated 08.05.2014 addressed by M/s Ramboll India Private Limited to the Defendant No.2. Apart from the fact that the said email was not addressed to the Plaintiff and has also been denied by the Plaintiff, and that the Defendants have thereafter not proved the said email by leading any evidence thereon, even otherwise, for reasons stated hereinabove and those that shall be elaborated hereinafter, the said email cannot come to the aid of the Defendants in justifying the invocation/encashment of the Bank Guarantee submitted by the



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Plaintiff.

50. As the entire case of Defendants is based on the premise that the time of supply of the telecommunication towers by the Plaintiff was the essence of the contract, and having defaulted in the same, the Plaintiff must pay damages, Section 55 of The Indian Contract Act, 1872 would be relevant and is reproduced herein below:

“55. Effect of failure to perform at fixed time, in contract in which time is essential.—*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*

Effect of such failure when time is not essential.—*If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.*

Effect of acceptance of performance at time other than that agreed upon.—*If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.”*

51. To determine whether time was of the essence of the contract



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between the parties and whether the Plaintiff adhered to the same, reference to an email dated 25.05.2014 would be relevant. By the said email dated 25.05.2014, addressed by the Defendant No.2 to the Plaintiff, the Defendant No.2 while complaining of the delays caused by the Plaintiff in making the timely supplies, revised the schedule for dispatches as under:

*“R.S. Infra: Total tower pending for dispatch:
60mtr/160 KMPH - GFT 12A= 50 Nos. in 30
containers*

Dispatch Plan given by RS Infra management

24.05.2014	3 Containers
25.05.2014	3 Containers
26.05.2014	4 Containers
27.05.2014	4 Containers
28.05.2014	4 Containers
29.05.2014	4 Containers
30.05.2014	4 Containers
31.05.2014	4 Containers

”

52. Therefore, the Defendant No.2 itself revised the delivery schedule from the last dispatch from between 10th-15th April, 2014, as stipulated in the Minutes of Meeting dated 03.03.2014, to 31.05.2014. There was no stipulation in this email dated 25.05.2014 that this extension is subject to the Plaintiff paying any damages for the delay, nor did it give any notice to the Plaintiff that, at a later stage, damages can be levied upon the Plaintiff for the delay caused.

53. The Plaintiff claims that the last dispatch from its end was made on 31.05.2014. The same has not been denied by the Defendants.



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Therefore, there was no delay on the part of the Plaintiff in making the timely supplies of the telecommunication towers to the Defendant No.2.

54. In any case, in terms of the paragraph 3 of Section 55 of the Contract Act, having accepted the telecommunication towers from the Plaintiff, without giving notice to the Plaintiff that the Defendants may claim compensation for any loss occasioned by the alleged delay in performance of the contract by the Plaintiff, the Defendants cannot claim any such compensation/damages from the Plaintiff. Reference in this regard can be made to the judgment of the Supreme Court in ***General Manager, Northern Railway & Anr. v. Sarvesh Chopra***, (2002) 4 SCC 45, wherein it was held as under:

“15. ... So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is “of the essence” of an obligation, Chitty on Contracts (28th Edn., 1999, at p. 1106, para 22-015) states

“a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract (‘a breach going to the root of the contract’) depriving the innocent party of the benefit of the contract (‘damages for loss of the whole transaction’)”.

If, instead of avoiding the contract, the contractor accepts the belated performance of



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reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, “unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so”. Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.”

55. In light of the above, since it is evident that the Defendants did not repudiate the contract under Section 55 of the Contract Act, nor did the Defendants give any notice to the Plaintiff that they may claim compensation for any loss occasioned by the alleged delay in performance of the contract by the Plaintiff, and rather it was the Defendant No.2 who itself revised the delivery schedule by their email dated 25.04.2014 without stipulating therein that such extension is subject to the Plaintiff paying any damages at a later stage, and thereafter, also accepted the deliveries/supplies without any protest, demur, or reservation whatsoever, therefore, the Defendants cannot



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claim any damages from the Plaintiff for any delay caused.

56. In addition to the above, and even assuming that there was a delay in the performance of the contract by the Plaintiff, the Defendants, in order to claim damages, have to prove that they suffered any damages on account of the delay in performance of the contract by the plaintiff, and if so, the amount of such damages. Though the Purchase Order stipulates liquidated damages, it cannot be claimed without proof of any damages having been suffered by the Defendants.

57. In ***Kailash Nath Associates v. DDA & Anr.***, (2015) 4 SCC 136, the Supreme Court summarised the principles applicable to Section 74 of the Contract Act, as under:

“43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a



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breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. *The section applies whether a person is a plaintiff or a defendant in a suit.*

43.5. *The sum spoken of may already be paid or be payable in future.*

43.6. *The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

43.7. *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”*

58. Therefore, it is trite law that where a sum is named in a contract as liquidated damages, the party complaining of a breach can receive, as reasonable compensation, such liquidated amount only if the damage or loss suffered by it is proved. Damage or loss is a *sine qua non* for the claim of damages under Section 74 of the Contract Act. It has been held that the expression “*whether or not actual damage or loss is proved to have been caused thereby*” means that where it is possible to prove actual damage or loss, such proof is not to be dispensed with. It is only in cases where the damage or loss is difficult or impossible to prove that the liquidated amount named in the contract if it is a genuine pre-estimate of damage or loss, can be awarded.

59. In this regard, reference can also be made to the judgment of the



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Supreme Court in *M/s Unibros v. All India Radio*, 2023 SCC OnLine SC 1366; and of this Court in *Technofab Engineering Ltd. v. Tesla Transformers Ltd.*, 2021 SCC OnLine Del 5813; *Vivek Khanna v. OYO Apartments Investments LLP.*, 2023 SCC OnLine Del 5792; *Egon Zhender International Pvt. Ltd. v. Namgayal Institute for Research on Ladakhi Art & Culture (Nirlac) & Ors.*, 2013 SCC OnLine Del 4288; *Maa Harsiddhi Infra Developers Pvt. Ltd. v. Mahavir Transmission Ltd.*, 2022 SCC OnLine Del 1388; *Central Government Employees Welfare Housing Organisation v. M/s Labh Construction & Industries Ltd.*, 2019 SCC OnLine Del 8238; and, *Sudershan Kumar Bhayana (Deceased) Thr. Lrs. V. Vinod Seth (Deceased) Thr. Lrs.* 2023 SCC OnLine Del 6097.

60. In the present case, the Defendants have not pleaded, and even otherwise, it cannot be said that it was impossible for the Defendants to have proved the actual damage or loss caused by the Plaintiff. In fact, as noticed hereinabove, the Defendants made no endeavour whatsoever to prove any such damage or loss, leave alone the quantum thereof. Apart from stating that it has suffered loss of goodwill and reputation and has failed to obtain future orders from its Principal Employer and others, no evidence in this regard has been led by the Defendant No. 2. In fact, as noted hereinabove, the Defendants have led no oral evidence whatsoever in support of their case. There is also no documentary evidence to support the said assertion. Therefore, in view of the judgment in *Kailash Nath Associates* (Supra) and other judgments referred hereinabove, the Defendants are not entitled to claim damages from the Plaintiff, much less liquidated damages. In



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the absence of any evidence regarding any loss or damages suffered by the Defendants due to the alleged delay in performance of the contract by the Plaintiff, the Defendants could not have levied liquidated damages on the Plaintiff.

61. I may herein also take note of the fact that the Defendant No.2, while requesting the Plaintiff to extend the Bank Guarantee, had by an email dated 24.08.2014, informed the Plaintiff that it would impose liquidated damages on the Plaintiff only in case the same is charged to the Defendant No.2 by its Principal Employer. This was reiterated by the Defendant No.2 *vide* emails dated 27.08.2014 and 17.11.2014. The Defendants have, however, placed no document on record, leave alone any proof, to show that any damages were imposed/recovered from the Defendants by the Principal Employer for the alleged delay in the performance of the contract by the Plaintiff. They are, therefore, even otherwise, estopped from claiming any damages in this regard from the Plaintiff.

62. The Bank Guarantee in question was submitted by the Plaintiff to the Defendant No.1 to guarantee the performance of the contract. The contract stood performed by the Plaintiff and there is no dispute regarding the same. The Defendants were merely pleading that there was a delay in the performance of the contract because of which they suffered damages and were entitled to invoke/encash the Bank Guarantee. The Defendants, however, have failed to prove any damages suffered by them from the alleged delay in the performance of the contract by the Plaintiff and, even otherwise, this Court has come to the conclusion that the Plaintiff cannot be stated to have been



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in default in relation to the timely performance of the contract. The Defendants were, therefore, not entitled to invoke/encash the Bank Guarantee of the Plaintiff, and are liable to refund the amount received by them due to such invocation/encashment.

Findings on the Issues:

Issue (i)

63. Clause 13 of the Purchase Order dated 17.02.2014, as amended on 24.02.2014, vests the jurisdiction to adjudicate any dispute arising out of the Purchase Order with the Courts at Delhi and, therefore, this Court. Even otherwise, a part of the cause of action has arisen within the jurisdiction of this Court. The Purchase Order is stated to have been placed at Delhi; the subject Bank Guarantee has been issued from a bank at Delhi; and has been encashed at Delhi. Therefore, Issue (i) is decided in favour of the Plaintiff and against the Defendant Nos. 1 and 2.

Issues (ii) and (iii)

64. In view of findings of the Court hereinabove on the issue of delay in performance of the contract and the claim of the defendants for damages, it is held that the Plaintiff is entitled to recover a sum of Rs.2,00,00,000/- (Rupees two crores) from Defendant Nos. 1 and 2, jointly and severally, as the Defendants could not have invoked/encashed the Bank Guarantee for the alleged default in the due performance of the Plaintiff's obligations under the Purchase Order.



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65. As far as the claim of the Plaintiff for damages of Rs.50,00,000/- (Rupees fifty lacs) is concerned, the Plaintiff has led no evidence with respect to the same and, therefore, the claim is rejected.

66. The contract in question being a commercial contract, the Plaintiff would be entitled to interest at the rate of 9% per annum from 20.03.2015, that is, the date when the amount under the Bank Guarantee was remitted by the bank of Plaintiff to the Defendant No.1, till its realisation by the Plaintiff.

67. Issues (ii) and (iii) are answered accordingly.

Issue (iv)

68. The Bank Guarantee submitted by the Plaintiff was in the name of the Defendant No.1. It has been invoked by the Defendant No.1, which is a group company of the Defendant No.2. Therefore, the Defendant No.1 was a necessary and proper party to the suit. Issue (iv) is, therefore, decided in favour of the Plaintiff and against the Defendant Nos. 1 and 2.

Issue (v)

69. In view of the findings hereinabove, it is held that the Plaintiff was not in breach of the Terms of the Purchase Order. The issue is answered accordingly.

Relief:

70. In view of the findings rendered hereinabove, a decree is passed in favour of the Plaintiff and against the Defendant Nos. 1 and 2, directing the Defendant Nos. 1 and 2 to pay a sum of Rs.2,00,00,000/- (Rupees Two Crores) along with interest at the rate of 9% per annum



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from 20.03.2015 till the date of such payment, jointly and severally, to the Plaintiff. The Defendant Nos. 1 and 2 shall also pay the costs of the present suit to the Plaintiff.

71. The suit is decreed in the above terms.

NAVIN CHAWLA, J

AUGUST 5, 2024/Arya/SJ/AS

Click here to check corrigendum, if any