

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.12.2018

+ **W.P.(C) 9281/2017**

SHAPOORJI PALLONJI & CO. PVT. LTD.

..... Petitioner

versus

UNION OF INDIA

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Manik Dogra, Mr Kabir Chhilwar,
: Ms Sonali Jaitley, Mr Ravi Tyagi,
: Mr Animesh Sinha, Mr Aribaaz Hussain
: and Ms Isha J. Kumar.
For the Respondent : Mr Rajesh Gogna, CGSC with
: Mr Akhilesh Kumar and Ms Liu Gangmei.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning the communications dated 18.08.2017, 05.09.2017, 20.09.2017 and 12.10.2017 (hereafter 'the impugned letters') whereby the petitioner has been called upon to pay a sum of ₹30.80 crores to the respondent. The impugned letters indicate that the said demand has been raised in terms of Clause 29 of the contract entered into between the petitioner and the respondent for construction of the new fixed

tensile membrane roofing over the seating area in the Jawaharlal Nehru Stadium, New Delhi. The petitioner also impugns the Memorandum dated 09.10.2017 (hereafter 'the impugned memorandum') calling upon various Government establishments to withhold a sum of ₹30,46,80,565 from the amounts due and payable to the petitioner company. The petitioner disputes that any amount is payable to the respondent in terms of Clause 29 of the contract in question. It is further pointed out that the disputes relating to the said contract have been referred to arbitration where the respondent has also raised Counter Claims. However, the said counter claims do not include the demand now raised by the respondent by way of the impugned letters or the impugned memorandum. It is contended that the respondent is precluded from raising such demand at this stage or for taking unilateral steps for recovery of the same. It is also the petitioner's case that the action of the respondent seeking recovery of the said amount is arbitrary, unreasonable and contrary to the terms of the contract. According to the petitioner, Clause 29 of the contract is wholly inapplicable to the claim raised by the respondent.

Factual Background

2. The petitioner is a company incorporated under the Companies Act, 1913, *inter alia*, engaged in the business of real estate, construction and infrastructure development. In the year 2003, India's bid to hold the Commonwealth Games 2010 (CWG) in New Delhi was successful. In order to host the said games, it was, *inter alia*, decided to upgrade the existing sport stadia in Delhi.

3. In the year 2007, the respondent (CPWD) invited tenders for upgradation, renovation and new construction within the campus of Jawaharlal Nehru Stadium, Delhi. The petitioner submitted a lump sum bid to construct new fixed tensile membrane roofing over the seating area of the stadium (hereafter 'the Project'). The Project consisted of two parts: (i) Civil Works; and (ii) Electric Works.

4. The petitioner's bid was accepted and by a letter dated 13.12.2007, the petitioner was awarded the contract for executing the Project and carrying out both the Civil as well as Electrical works. Subsequently, an agreement was executed between the parties (hereafter 'the Agreement'). In terms of the Agreement, the project was to be executed for a lump sum amount of ₹3,08,08,46,966/-. Out of the aforesaid amount ₹27,516,71,561/- was for civil works and ₹32,91,75,405/- was for executing electrical works.

5. The Project was to be completed within a period of twenty months commencing from 04.01.2008. Thus, the works were to be completed by 03.09.2009.

6. Admittedly, there were delays in execution of the works. It is the petitioner's case that the same were for reasons not attributable to the petitioner. It is contended that the bulk of the delay was on account of failure on the part of the respondent to comply with its obligations. These included delay in handing over of goods for construction drawings; delay in approval of fabrication drawings and approval of specifications; delay in removal of hindrances at the site, etc. In view

of the above, the petitioner sought extension of time for completion of the milestones, from time to time. The petitioner's request for such extensions was granted by the respondent and time for completion of contract was extended successively from time to time.

7. The Project was finally completed on 26.08.2010. This was beyond the time as extended by the respondent. In the circumstances, the petitioner once again requested for extension of time by a letter dated 18.01.2011. The petitioner's request was accepted and by a letter dated 14.12.2011, the petitioner was informed that the extension of time for completion of the works was granted up to 26.08.2010 (actual date of the completion) without levy of any compensation.

8. After completion of the Project, the petitioner raised the final bill for a sum of ₹4,70,36,46,836/-. As against the final bill, the respondent paid a sum of ₹3,42,79,54,918/-.

9. It was also the petitioner's case that it has suffered damages on account of delay in the completion of the Project, which was attributable to the respondent. Since the respondent did not accept the claim made by the petitioner, the resultant disputes were referred to arbitration.

10. Before the Arbitral Tribunal, the petitioner filed a statement of claim claiming a sum of ₹1,23,19,78,944.80/-, which included (i) Claim of ₹13,34,92,032.05/- on account of variation in the quantity of civil and electrical works; (ii) sum of ₹68,54,59,519.86/- on account of extra items of civil and electrical works remaining unpaid; (iii) sum of

₹72,76,049/- as reimbursement of service tax; (iv) sum of ₹38,89,68,431.89/- on account of loss and damages allegedly suffered by the petitioner on account of delay in completion of the project; (v) sum of ₹1,67,82,912/- being the amounts withheld by the respondent as per the certified final bill; (vi) interest; and (vii) costs.

11. The respondent filed a Statement of Defence disputing the claims made by the petitioner. In addition, the respondent has also made counter claims for a sum of ₹1,62,77,856/- on account of alleged excess payment and a sum of ₹58,56,480/- on account of arbitration fee.

12. This Court is informed that the arbitral proceedings are pending and have not been concluded as yet. The respondent states that in the meantime, the Office of the Comptroller and Auditor General of India (CAG) inspected the works executed by CPWD from 2008 onwards and various memos were issued. The CAG's report was also considered by the Public Accounts Committee. It is stated that the Public Accounts Committee (hereafter 'PAC') called upon the respondent (CPWD) to explain as to why compensation for delay in execution of the works was not levied. It was the CPWD's case before the PAC that the delay was caused for various reasons, which were not attributable to the contractor and, therefore, no compensation was levied. The CPWD also claimed that genuine hindrances were recorded properly and CPWD had taken action according to the terms and conditions of the Agreement. According to CPWD, the extension

of time was sanctioned after considering various types of hindrances encountered during the execution of the works.

13. The PAC did not accept the contentions of CPWD and observed that there were certain delays attributable to the lapses on the part of the petitioner as well. The PAC further observed that “it was inappropriate on the part of CPWD to say that the Contractor was not liable for recovery of compensation up to maximum of ₹30.80 crores”. The PAC recommended that CPWD recover the compensation from the contractor at the earliest.

14. Thereafter, CPWD issued the impugned letters demanding the compensation of ₹30.80 crores from the petitioner.

Reasons and Conclusion

15. At the outset, it would be relevant to observe that the impugned letters refer to Clause 29 of the Agreement as the contractual provision in terms of which the demand is stated to be made. It would, thus, be relevant to refer to the provisions of Clause 29 of the General Conditions of the Contract (GCC) as included as a part of the Agreement. The said Clause is set out below:-

“CLAUSE 29

- i) Whenever any claim or claims for payment of a sum of money arises out of or under the contract or against the contractor, the Engineer-in-Charge or the Government shall be entitled to withhold and also have a lien to retain such sum or sum in whole or in part from the security, if any deposited by the

contractor and for the purpose aforesaid, the Engineer-in-Charge or the Government shall be entitled to withhold the security deposit, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Engineer-in-Charge or the Government shall be entitled to withhold and have a lien to retain to the extent of such claimed amount or amounts referred to above, from any sum or sums found payable or which may at any time thereafter become payable to the contractor under the same contract or any other contract with the Engineer-in-Charge of the Government or any contracting person through the Engineer-in-Charge pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above by the Engineer-in-Charge or Government will be kept withheld or retained as such by the Engineer-in-Charge or Government till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration Clause) by the competent court, as the case may be and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the Engineer-in-Charge or the Government shall be entitled to withhold and also have a lien to retain towards such claim amount or amounts in whole or in part from any sum found

payable to any partner/limited company as the case may be, whether in his individual capacity or otherwise.

- ii) Government shall have the right to cause and audit and technical examination of the works and final bills of the Contractor including all supporting vouchers, abstract, etc. to be made after payment of the final bill and if as a result of such audit and technical examination any sum is found to have been over paid in respect of any work done by the contractor under the contract or any work claimed to have been done by him under the contract and found not to have been executed, the contractor shall be liable to refund the amount of over payment and it shall be lawful for Government to recover the same from him in the manner prescribed in sub-clause (i) of this Clause or in any other manner legally permissible and if it is found that the contractor was paid less than what was due to him under the contract in respect of any works executed by him under it, the amount of such under payment shall be duly paid by Government to the contractor without any interest thereon whatsoever.

Provided the Government shall not be entitled to recover any sum overpaid nor the contractor shall be entitled to payment of any sum paid short where such payment has been agreed upon between the Superintending Engineer or Executive Engineer on one hand and the contractor on the other under any term of the contract permitting payment for work after assessment by the Superintending Engineer or the Executive Engineer.”

16. Mr Gogna, learned counsel appearing for the respondent referred to Sub-clause (ii) of Clause 29 of the GCC and contended that the Government had the right to audit works in question, and in terms

of Clause 29(ii) of the GCC, the petitioner was liable to repay the amounts as found due. He contended that notwithstanding that the Project was completed and accepted, the respondent could, nonetheless, raise the demand pursuant to any audit objection. He earnestly contended that the PAC was a constitutional body and its findings were binding.

17. The aforesaid contentions are unmerited. A plain reading of Sub-clause (ii) of Clause 29 of the GCC indicates that the Government has the right to cause an audit and technical examination of the works and final bills of the contractor. If, as a result of such audit and technical examination, any sum was found to be paid in respect of the work done or any work claimed to have been done, the contractor is liable to refund the same. In the present case, the audit has not found that any sum has been overpaid in respect of the works executed by the petitioner. The respondent is not claiming refund of any overpaid amount. The claim made by the respondent is for compensation for the alleged breach of the contract on the part of the petitioner in delaying the execution of the works. This is, essentially, a claim for damages and is, clearly, not covered under Clause 29(ii) of the GCC.

18. In the present case, the disputes relating to the contract are pending adjudication before the Arbitral Tribunal. It is relevant to note that although the petitioner has raised the claim of loss for delay in completion of the works, the respondent has not raised any counter claim in this regard. Sub-clause (i) of Clause 29 of the GCC, enables the Government to withhold sums due and payable to the contractor

on account of any claim pending adjudication of such claims. In the present case, the respondent has not taken any steps for adjudication of its claim and, therefore, it could not have recourse to Sub-clause (i) of Clause 29 of the GCC for recovering any such sum.

19. Mr Gogna had contended that the levy of compensation was excepted matter and, therefore, could not be referred to arbitration. He further submitted that the report of PAC was received by the CPWD on 12.04.2017 and the disputes relating to the contract had been referred to the Arbitral Tribunal much earlier. He submitted that, therefore, the said disputes could not be referred to arbitration.

20. The said contentions are also unpersuasive. The import of Sub-clause (i) of Clause 29 of the GCC is to enable the Government to withhold sums due to a contractor pending adjudication of a claim for such sums. It is clearly incumbent on the Government to take steps for adjudication of such claims and in the absence of taking any such steps the question of invoking Clause 29(i) of the GCC for withholding any amount would not arise. Notwithstanding that the respondent had received the report of the PAC after the reference of disputes to arbitration, it was still necessary for the respondent to take steps for adjudication of such claim. The claim made by the respondent is in the nature of damages for breach of contract which is disputed by the petitioner. Plainly, neither the PAC report nor the communications sent by the respondent are binding on the petitioner and it would be necessary for the respondent to take steps for adjudication of its claim.

21. The contention that the claim raised by the respondent is not an excepted matter and thus not arbitrable, is also *ex facie* erroneous. According to the respondent, the said claim for compensation is in terms of Clause 2 of the GCC. The said Clause is set out below:-

“CLAUSE 2

Compensation for Delay

If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F' (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete.

This will also apply to items or group of items for which a separate period of completion has been specified.

- | | | |
|-----|-----------------------------------|---|
| (i) | Compensation
for delay of work | @ 1.5% per month of
delay to be computed
on per day basis |
|-----|-----------------------------------|---|

Provided always that the total amount of compensation for delay to be paid under this Condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set-off against any sum payable to the contractor under this or any other contract with the Government. In case, the

contractor does not achieve a particular milestone mentioned in schedule F, or the re-scheduled milestone(s), in terms of Clause 5.4, the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied at the final grant of Extension of Time. With-holding of this amount on failure to achieve a milestone, shall be automatic without any notice to be contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld. However, no interest, whatsoever, shall be payable on such withheld amount.”

22. A plain reading of the aforesaid Clause indicates that insofar as the quantum of compensation is concerned, the decision of the competent authority is binding. However, the question whether there is any breach on the part of the contractor, warranting the levy of such damages, is not an excepted matter. In ***J.G. Engineers (P) Ltd. v. Union of India & Anr.: (2011) 5 SCC 758***, the Supreme Court had analyzed the provisions of Clause 2 of the contract therein and had concluded that, what is made final in terms of Clause 2 was the decision of the Superintending Engineer (the competent authority specified in that case) in regard to the percentage of compensation payable by the contractor. However, Engineer’s decision as to who was responsible for such delay was not final. The relevant extract of the said decision is set out below:-

“17. Clauses (2) and (3) of the contract relied upon by the respondents no doubt make certain decisions by the

Superintending Engineer and Engineer-in-charge final/final and binding/final and conclusive, in regard to certain matters. But the question is whether Clauses (2) and (3) of the agreement stipulate that the decision of any authority is final in regard to the responsibility for the delay in execution and consequential breach and therefore exclude those issues from being the subject-matter of arbitration. We will refer to and analyse each of the “excepted matters” in Clauses (2) and (3) of the agreement to find their true scope and ambit:

(i) Clause (2) provides that if the work remains uncommenced or unfinished after proper dates, the contractor shall pay as compensation for every day's delay an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work as shown in the tender. *What is made final is only the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for every day's delay, that is, whether it should be 1% or lesser. His decision is not made final in regard to the question as to why the work was not commenced on the due date or remained unfinished by the due date of completion and who was responsible for such delay.*

(ii) Clause (2) also provides that if the contractor fails to ensure progress as per the time schedule submitted by the contractor, he shall be liable to pay as compensation an amount equal to 1% or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work for every day the due quantity of the work remains incomplete, subject to a ceiling of ten per cent. *This provision makes the decision of the Superintending Engineer final only in regard to the percentage of compensation (that is, the quantum) to be levied and*

not on the question as to whether the contractor had failed to complete the work or the portion of the work within the agreed time schedule, whether the contractor was prevented by any reasons beyond its control or by the acts or omissions of the respondents, and who is responsible for the delay.

(iii) The first part of Clause (3) provides that if the contractor delays or suspends the execution of the work so that either in the judgment of the Engineer-in-charge (which shall be final and binding), he will be unable to secure the completion of the work by the date of completion or he has already failed to complete the work by that date, certain consequences as stated therein, will follow. *What is made final by this provision is the decision of the Engineer-in-charge as to whether the contractor will be able to secure the completion of the work by the due date of completion, which could lead to the termination of the contract or other consequences. The question whether such failure to complete the work was due to reasons for which the contractor was responsible or the Department was responsible, or the question whether the contractor was justified in suspending the execution of the work, are not matters in regard to which the decision of the Engineer-in-charge is made final.*

23. It is also relevant to mention that in the present case, the competent authority had granted extension of time for completion of the work from time to time. The final extension of time was granted after works had been completed and it was expressly provided that such extension was without levy of compensation by the competent authority. The letter dated 14.12.2011 as set out below:-

“M/s. Shapoorji Pallonji & Co. Ltd.

5th Floor, Deen Dayal Bldg.
7-E Jhandewalan Extn.
Rani Jhansi Road,
New Delhi-110 055.

Name of Work: Up-gradation renovation and new
construction for Commonwealth
Games-2010 in JN Stadium, Sports
Complex, New Delhi
Agreement No.: 01/EE/CPGD-II/2007-08

Dear Sir,

Extension of time for completion of the
above mentioned work is granted upto 26.08.2010 (actual
date of completion) without levy of compensation by the
Competent Authority.

Provided that notwithstanding the extension
hereby granted, time is and shall still continue to be the
essence of the said agreement.

Yours faithfully
Sd/-

Superintending Engineer
C.W.G. Divn.-II, CPWD,
J.N. Stadium, New Delhi.

For and on behalf of the President of India”

24. It is relevant to state that the aforesaid letter has not been withdrawn or cancelled. It is doubtful whether it is open for the respondent to now resile from its agreement to extend time without levy of compensation. However, it is not necessary to examine the said issue in any detail, as this Court is not called upon to decide the merits of the claim now sought to be raised by the respondent. However, suffice it to state that it is not debt due from the petitioner,

as the question whether the petitioner is responsible for the delay in completion of the works has not been adjudicated.

25. The Supreme Court in the case of ***Union of India v. Raman Iron Foundry: (1974) 2 SCC 231*** had examined the contractual clause, which read as under:-

“18. *Recovery of sums due.*—Whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realise securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary, if such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance remaining due.”

26. The Supreme Court had held that a sum which was neither due nor payable could not be made subject matter of the aforesaid Clause. In that case, the Supreme Court had referred to the decision of the Bombay High Court in ***Iron and Hardware India (Co.) v. Shyam Lal and Bros.: AIR 1954 Bom. 423***. The relevant observations made by the Supreme Court are set out below:-

“11. ... The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed Sheikh v. Taher Mallik* [*Jabed Sheikh v. Taher Mallik*, 1941 SCC OnLine Cal 36 : AIR 1941 Cal 639] , *S. Milkha Singh v. N.K. Gopala Krishna Mudaliar* [*S. Milkha Singh v. N.K. Gopala Krishna Mudaliar*, 1956 SCC OnLine P&H 76 : AIR 1956 P&H 174] and *Iron and Hardware (India) Co. v. Shamlal and Bros.* [*Iron and Hardware (India) Co. v. Shamlal and Bros.*, 1954 SCC OnLine Bom 5 : AIR 1954 Bom 423] Chagla, C.J. in the last mentioned case, stated the law in these terms:

‘... In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a court of law and recover damages. Now, damages are the compensation which a court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the court. Therefore, no pecuniary liability arises till the court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the court is doing is ascertaining a pecuniary liability which already existed. The court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.’

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of Clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.

12. We accordingly dismiss the appeals. The appellant in each appeal will pay the costs of the respondent all throughout.”

27. The aforesaid passage was also quoted by the Supreme Court in a later decision in ***Gangotri Enterprises Ltd. v. Union of India: (2016) 11 SCC 720.***

28. In view of the aforesaid decision, the demand raised by the respondent cannot be stated to be a debt due. The impugned memorandum (dated 09.10.2017), which directs recovery of the claim made by the respondent from amounts due to the petitioner and other contracts, is unsustainable.

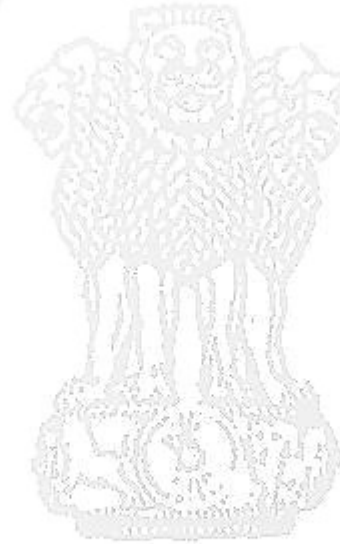
29. The impugned memorandum is, accordingly, set aside. The impugned letters calling upon the petitioner to pay a sum of ₹30.80 crores is also set aside leaving it open for the respondent to initiate such proceedings for adjudication of its claim as may be available in accordance with law.

30. The petition is disposed of in the aforesaid terms.

DECEMBER 13, 2018

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VIBHU BAKHRU, J



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