

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

Reserved on : 31 October 2018

Date of decision : 12 April 2019

+ OMP (COMM) No. 59/2016

EMPLOYEES' STATE INSURANCE CORPORATIONPetitioner
Through Mr. S. Wasim A. Qadri and Mr. Saeed
Qadri, Advocates.

versus

M/S RAVI ASSOCIATES Respondent
Through Mr. P.R. Ramasesh, Advocate.

+ OMP (COMM) No. 79/2016

M/S RAVI ASSOCIATESPetitioner
Through Mr. P.R. Ramasesh, Advocate.

versus

EMPLOYEES' STATE INSURANCE CORPORATION Respondent
Through Mr. S. Wasim A. Qadri and Mr. Saeed
Qadri, Advocates.

+ OMP (ENF.) (COMM.) 121/2018

M/S. RAVI ASSOCIATES Decree holder
Through: Mr. P.R. Ramasesh, Adv.
versus

EMPLOYEES' STATE INSURANCE
CORPORATION

..... Judgment debtor
Through: Mr. S. Wasim A. Qadri and Mr.
Saeed Qadri, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

OMP (COMM) No. 59/2016 & OMP (COMM) No. 79/2016

1. The captioned petitions seek to assail the Award dated 16 December 2015 passed by the sole Arbitrator by taking recourse to the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 (in short, '1996 Act'). As would be evident, upon perusal of the cause title, OMP (COMM)

No. 59/2016 has been filed by Employees State Insurance Corporation (hereafter referred to as 'ESIC'), while OMP (COMM) No. 79/2016 has been preferred by M/s Ravi Associates (hereafter referred to as 'R.A.').

2. The record shows that R.A. had lodged eight (8) claims with the learned Arbitrator, out of which, claim Nos. 1, 2, 4 and 5 were allowed. On the other hand, ESIC had lodged seven (7) counterclaims, all of which, were rejected by the learned Arbitrator.

3. It is in this background that both sides have approached this Court with their respective petitions to assail the Award.

4. Thus, before I proceed further, the following broad facts are required to be noticed.

4.1 ESIC, which is under the administrative control of the Ministry of Labour, Government of India and is mandated to extend social security services to insured employees by providing them medical aid, medical and cash benefits, intended to set up a medical college and hospital at Paripally, Kollam district in the State of Kerala (hereafter referred to as 'Project').

4.2 In order to execute the Project, ESIC, *inter alia*, needed to engage the services of an architect. Towards this end, R.A. was empanelled on 5 May 2008 for rendering architectural services to ESIC.

4.3 Consequent thereto, via a communication dated 1 August 2008 a work order was issued to R.A. by the Joint Director (PMD). By virtue of this work order, ESIC engaged R.A. as an Architectural Consultant for the Project.

4.4 Evidently, between the date when the work order was issued to R.A. and the date when a formal and comprehensive contract agreement was signed with ESIC, R.A. was required to make presentations, *inter alia*, to the Labour Minister of the State of Kerala and various other officials, such as,

the Additional Secretary to the Government of Kerala and the Director General, ESIC.

4.5 It was only upon final approval of the presentation made to various authorities at different levels that parties could enter into a Contract Agreement on 11 November 2008 (hereafter referred to as 'C.A.'). At this juncture, it would be important to note that the C.A. entered into between the parties had appended to it the General Conditions of Contract (hereafter referred to as 'GCC') as also the Special Conditions of Contract (hereafter referred to as 'SCC').

4.6 It may also be pertinent to note that the entity which was given the contract of executing civil works and other related work, was an entity by the name Hindustan Lifecare Limited ('HLL'). The record shows that ESIC allocated work and hence the role of prime construction agency to HLL only on 29 October 2009. A letter of even date i.e. 29 October 2009 was issued by ESIC to HLL wherein the estimated cost of the Project was pegged at Rs.480,79,74,137/-. There are two other facts, which are required to be noticed in relation to the project.

- (i) That HLL had engaged Larsen & Toubro Limited (in short, L&T) as a sub-contractor. In this behalf, HLL had issued a letter of award on 10 February 2010 in favour of L&T wherein the value of the work was pegged at Rs.292,58,81,489.
- (ii) R.A. had also engaged a sub-consultant by the name M/s Medidys, *albeit*, with the approval of ESIC.

4.7 Importantly, under the C.A., the timeframe provided for completion of the Project was set out as three (3) years. It was thus, in a sense, envisaged that the project would stand completed by 11 November 2011.

4.8 Furthermore, under the C.A., R.A.'s remuneration was pegged at 3% of the final value of work executed (See Clause 6.1 and Appendix B).

4.9 The record also shows that before the tenure of the C.A. could come to an end, ESIC, on 1 February 2010, terminated its agreement with R.A. Beside this, the performance guarantee in the sum of Rs.65 lakhs furnished by R.A., which was scaled down from Rs.75 lakhs because the estimated cost of the Project was reduced from a figure of Rs.500 crores to Rs.433 crores, was also encashed.

5. R.A. being aggrieved with the unilateral termination of the C.A. by ESIC wrote a letter dated 8 February 2010 in that behalf to ESIC. Via this letter R.A., stated, *albeit*, without prejudice to its right to take recourse to legal remedies, that the impugned action was in violation of the principles of natural justice as opportunity had not been given to explain the delay in getting the structural drawings vetted from IIT. Qua this issue, ESIC had relied upon the following decisions:

Aligarh Muslim University and Others versus Mansoor Ali Khan, (2000) 7 SCC 529; *Haryana Financial Corporation and Another versus Kailash Chandra Ahuja*, (2008) 9 SCC 31; *A.S. Motors Private Limited versus Union of India and Others*, (2013) 10 SCC 114; and *Ashok Kumar Sonkar versus Union of India and Others*, (2007) 4 SCC 54.

5.1 The record shows that R.A. had approached this Court in December 2011 via a petition filed under Section 11 of the 1996 Act. This petition was numbered as Arbitration Petition No. 389/2011. Upon return of notice, which was issued on 7 December 2011, the Court was informed that ESIC

had already appointed an Arbitrator. This led to the petition filed by R.A. being disposed of on 13 March 2012.

5.2 Evidently, ESIC had appointed the sole Arbitrator on 7 March 2012.

5.3 As indicated hereinabove, R.A. lodged before the learned Arbitrator eight (8) claims having a cumulative value of Rs.13,85,17,661.32. ESIC, not to be left behind, as alluded to above, also filed seven (7) counterclaims under various heads before the Arbitrator. The learned Arbitrator, partially, allowed the claims preferred by R.A., which have a cumulative value of Rs.1,74,42,816/-. As noted above, ESIC's counterclaims were rejected in entirety.

6. The learned Arbitrator based on the pleadings and the evidence placed before him, before proceeding to decide the claims and the counterclaims lodged by the parties, proceeded to decide via the same award four issues. These being:

A brief description of the Issues:

Issue No. 1

7. This issue was important as R.A.'s claim for the unpaid fee was dependent on a finding being returned as to what was the estimated value of work at the stage when the C.A. was terminated. The facts set out above would show that the C.A. was terminated by ESIC prior to its three (3) years tenure coming to an end.

Issue No. 2

8. Issue No. 2 pertained to ascertaining the stage till which R.A. had performed the work. A finding on this issue was necessary as in terms of

Appendix-B annexed to the C.A., R.A. was entitled to receipt of monies depending on the stage which it had reached qua the work assigned to it under the C.A.

Issue No. 3

9. Under issue No.3 it was sought to be examined as to whether the delay in performance of obligations, which were placed under the C.A. on R.A., was attributable to R.A.

Issue No. 4

10. Issue No. 4 delved into aspects as to whether the termination of C.A. brought out by ESIC via its communication dated 1 February 2010 was in consonance with the provisions of the C.A.

Findings returned by the Arbitrator

11. The learned Arbitrator in the context of the aforesaid issues, after discussing in detail and appreciating the evidence placed before him, returned the following findings of fact:-

(i) That the project cost was Rs.433 crores. Therefore, that project cost, according to him, would form the basis for calculating the contract price under the C.A. and, in turn, the fees that ought to be paid to R.A.

(ii) R.A. had completed activities up to Stage IV and, therefore, it was entitled to fees pegged at 30 percent of the Contract Price.

(iii) The total period of delay attributable to R.A., which accrued up to the stage of final tender documents (as per item No. 8 of the schedule given at the end of the Appendix-A to the C.A.), was a period of 200 days.

(iv) Lastly, the termination of C.A. by ESIC vide its letter dated 1 February 2010 was not in accordance with provisions of the agreement obtaining between the parties.

12. With these findings of fact on the four issues detailed out above, the learned Arbitrator adjudicated upon the claims and counterclaims lodged before him.

13. Given the aforesaid prefatory facts, arguments before me on behalf of ESIC were advanced by Mr. S. Wasim A. Qadri, while those on behalf of R.A. have been advanced by Mr. P.R. Ramasesh. The basic thrust of Mr. Qadri's submission is that even though the learned Arbitrator had found that 200 days' delay was attributable to R.A., the learned Arbitrator rejected all its counterclaims, including counterclaim No. 2, which pertained to liquidated damages.

13.1 The learned counsel emphasized the fact that the delay caused by R.A. also had an impact on other aspects of the matter related to the project, which included escalation of the project cost; cost incurred in referring insured employees to other hospitals as the project could not be completed in time; and loss of reputation. In respect of these aspects, ESIC had lodged counterclaim Nos. 1, 3 and 5.

13.2 Besides this, ESIC also suffered a loss on account of the failure on the part of R.A. to give necessary information as required under clause 3.1.1 of the GCC.

13.3 As regards inadequacy of groundwater available at the project site, according to the learned counsel, the claim on this score was made under counterclaim No. 4.

13.4 As regards the remaining two claims, i.e., claim Nos. 6 and 7, learned counsel submitted that the learned Arbitrator had wrongly rejected these claims. Insofar as claim No. 6 was concerned, it was Mr. Qadri's submission that via claim No. 6, ESIC only sought a refund of the sum of Rs.65 lakhs, which was wrongly paid to R.A. after the bank guarantee had been encashed by ESIC. Counterclaim No. 7, which was a claim for interest, according to Mr. Qadri, ought to have been ordered in favour of ESIC as counterclaim Nos. 1 to 6 had been wrongly rejected by the learned Arbitrator.

13.5 Mr. Qadri, during the course of the submissions, thus, laid great emphasis on the letters that ESIC had written to R.A. with regard to its failure to perform the work in accordance with the provisions of the C.A. In this behalf, reference was made by Mr. Qadri to letters dated 27 August 2009, 2 September 2009, 8 September 2009, 30 September 2009, 30 October 2009 and 30 November 2009. In effect, the submission of Mr. Qadri was that the termination of the C.A. was valid as enough notice had been given to R.A. with regard to its failure to perform the allocated work in consonance with the provisions of the C.A.

13.6 Thus, in effect, Mr. Qadri sought to assail the finding returned by the Arbitral Tribunal that the termination of the C.A. vide letter dated 1 February 2010 was bad in law as a mandatory notice of 60 days had not been given in terms of the provisions of the C.A.

13.7 Learned counsel relied upon several judgments to which I will make a reference hereafter to emphasise the point that termination of the C.A. could not have been held as invalid, assuming without admitting, that there was a

failure to give mandatory notice unless in addition thereto R.A. would have been able to demonstrate prejudice.

13.8 I must also indicate, at this stage, that it was, in fact, Mr. Qadri's submission, to which I have alluded to above, that the communication which emanate from ESIC to R.A. prior to the termination letter dated 1 February 2010 itself constituted notice though it did not advert to clause 2.9.1 of the GCC.

13.9 Learned counsel cited *State of Sikkim versus Dorjee Tshering Bhutia and Others*, (1991) 4 SCC 243; *Ram Sunder Ram versus Union of India and Others*, (2007) 13 SCC 255 and *N. Mani versus Sangeetha Theatare and Others*, (2004) 12 SCC 278 for the proposition that merely because the source of power is not identified as long as power vests in the entity exercising such power, in this case, the power to terminate the C.A., the notice of termination is not rendered invalid.

14. In addition to the above, Mr. Qadri submitted that rejection of its claim for liquidated damages (i.e. claim No. 2), to which I have referred to above, broadly, constituted a patent illegality in view of the Arbitral Tribunal having come to the conclusion that 200 days' delay was attributable to R.A. Learned counsel submitted that the rejection of this claim flew in the face of the judgment rendered by the Supreme Court in *Oil and Natural Gas Corporation Limited versus Saw Pipes Limited*, (2003) 5 SCC 705.

14.1 In support of its counterclaims lodged, Mr. Qadri laid great emphasis on the following communications sent to R.A., which demonstrated a deficiency in services rendered by it. These being: letters dated 27 August

2009, 8 September 2009, 2 September 2009, 30 October 2009, 5 January 2010 and 19 January 2010.

14.2 Besides this, in support of this plea, reference was also made to e-mails dated 30 September 2009 and 1 October 2009. Learned counsel submitted that there was not only a defect in the design relating to civil work but also R.A. had failed to submit the design for the lab furniture.

14.3 It was sought to be highlighted by Mr. Qadri that the feasibility of adequacy of water was an obligation, which was cast upon R.A. Submission was also sought to be made that the electric sub-station had a faulty design.

14.4 In sum, according to Mr. Qadri, it was the defects in design and deficiency in work, which led to the termination of the C.A. contrary to the conclusions reached by the learned Arbitrator.

14.5 It was also the endeavour of Mr. Qadri to establish that the escalation of cost was an aspect which was brought to the notice of the learned Arbitrator and that on this score ESIC had paid a sum of Rs.13,55,34,652/- to HLL. Mr. Qadri submitted that HLL had triggered arbitration proceedings vis-à-vis ESIC wherein it had claimed a further amount of Rs.28 crores. The aforesaid submission was made by Mr. Qadri to justify its counterclaim for escalation made under counterclaim No. 1.

14.6 Learned counsel submitted that the learned Arbitrator ought not to have directed refund of money on account of bank guarantee encashed along with interest as on the date of filing statement of accounts, i.e., 29 March 2010, the sum of Rs.65 lakhs, which was the value of the bank guarantee was refunded to R.A. after adjusting excess payment of Rs.36,67,066/-. Learned counsel further submitted that since the amount had not been retained

by ESIC for a period of more than one month, which was the leeway given under the C.A., ESIC could not have been burdened with interest.

15. On the other hand, Mr. Ramasesh emphasised the fact that the counterclaims preferred by ESIC were in a sense counterblast to the claims lodged by R.A. Learned counsel stressed upon the fact that the counterclaim was lodged by ESIC only on 1 January 2013, which was three years after the termination of the C.A.

15.1 In other words, it was sought to be emphasized that if ESIC had in fact suffered damages on account of alleged delay, it would have brought the same to the notice of R.A.

15.2 The contention of the learned counsel, thus, was that time was not of the essence of the contract given the nature of work that R.A. had to perform. It was submitted that consequently there was a lot of back and forth on the aspect of design, etc. Learned counsel contended that the time schedule set out in Appendix-A did not factor in the time taken by municipal authorities to grant approval and the time taken by ESIC in accepting reports and suggesting modifications and changes in the designs and drawings submitted by R.A.

15.3 Mr. Ramasesh further submitted that since the C.A. was terminated before it came to an end by efflux of time, the period of delay and the attribution of delay to it could not have been made and, more particularly, R.A. could not have been penalized based on vague allegations of delay allegedly caused by it. It was emphasized since the project is not completed even as of today, the consequence of the entire delay, caused at the intermediate stage, cannot be attributed to R.A. unless the allegation was supported by robust evidence.

15.4 Learned counsel stressed the fact that there was no evidence placed on record by ESIC to back its claim for escalation of cost. The reliance by ESIC on a chart pertaining to the escalation of cost around the world in different countries as estimated by an agency relied upon by ESIC cannot be accepted as evidence in support of the said claim. It was contended that a general study made by think tank cannot be relied upon by ESIC to sustain its claim.

15.5 Likewise, with respect to the claim lodged with regard to purported cost incurred by ESIC on account of insured employees having to be referred to other hospitals, Mr. Ramasesh submitted that this claim was legally untenable as it was not relatable to any alleged deficiency in the work carried out by R.A. In effect, the argument was that it was remote and indirect loss, which was, to say the least not backed by any evidence.

15.6 Insofar as the claim lodged with respect to the alleged failure on the part of R.A. to determine the availability of groundwater was concerned, Mr. Ramasesh argued that the same was completely baseless as no such obligation under the C.A. was placed on R.A. Learned counsel submitted that the error committed by ESIC in identifying the geographical location of the project without due assessment could not be laid at the doorstep of R.A.

15.7 As regards the remaining aspects were concerned, Mr. Ramasesh relied upon the findings returned in the award, in particular, with regard to claim Nos. 1, 2,4 and 5.

Analysis and Reasons

16. I have heard learned counsel for the parties and perused the record. What emerges from the record and qua which there can hardly be any dispute is as follows:-

16.1 Initially the estimated cost of the project was pegged at Rs.500 crores. This cost was reviewed and scaled down to Rs.433 crores. The sanctioned estimated cost of the project was slightly more, i.e., Rs.433,15,08,231/-. This is indicated in ESIC's letters dated 29 October 2009 and 31 December 2009.

16.2 Since, the sanctioned estimated cost had been pegged at Rs.433,15,08,231/-, R.A. was called upon to revalidate the performance guarantee, which was required to have a value equivalent to five (5) percent of the Contract Price. Since, the original estimated cost of the project was Rs.500 crores and, consequently, R.A. was expected to receive consultancy fee equivalent to three (3) percent of the Contract Price, it was at the relevant point in time asked to furnish a performance bank guarantee equivalent to five (5) percent of Contract Price i.e. Rs.15 crores.

16.3 R.A., admittedly, had, thus furnished a bank guarantee equivalent to Rs. 75 lakhs, which upon its expiry on 10 November 2009 was renewed, *albeit*, at the say-so of ESIC, for a lower sum of Rs.65 lakhs as the sanctioned estimated Project cost had been scaled down from Rs.500 crores to Rs.433,15,08,231/-. Therefore, if the Project had been completed, R.A. could expect to receive three (3) percent of Rs.433,15,08,231/-, which would be a sum of Rs.12.99 crores.

16.4 Thus, the sum of Rs.12.99 crores was the Contract Price which formed the basis for determining the amount of fee that was payable to R.A. bearing in mind the stage which it had reached on the date when the C.A. was terminated by ESIC.

16.5 The fact that HLL vide letter dated 10 February 2010 had sub-contracted the work to L&T for a sum of Rs.292,58,81,489/-, though found on record, could not form the basis of calculating the Contract Price under the C.A. and thus, the fee payable to R.A. as the scope and ambit of the work awarded by HLL to L&T remained unknown.

16.6 The termination of C.A. was brought out by ESIC vide letter dated 1 February 2010. The termination under the C.A. was plausible only under Clause 2.9.1 of the GCC. Before the learned Arbitrator, ESIC claimed to have exercised the power of termination (though not indicated in its letter dated 1 February 2010), under sub-clause (g) of Clause 2.9.1. Pertinently, even though this clause required issuance of prior notice of 60 days, none was given to R.A.

16.7 R.A. failed to adhere to the schedule given in Appendix-A for submission of reports and documents. The Appendix-A sets out several timelines relatable to the Project. In other words, it not only gives the total duration of the C.A. which was three years, but also provides timelines for pre construction phase and those which were required to be adhered during the execution of the Project.

16.8 Therefore, the period of delay, which has been attributed to R.A., upto the stage of final tender of documents has been taken to be 200 days with several caveats including the fact that the nature of the contract required R.A. to interface with persons involved in the execution of the Project as

also the fact that the C.A. was terminated 21 months prior to its stipulated tenure of three years.

17. Given the aforesaid aspects, I would like to examine as to whether submissions made by counsel for the parties would have been hold that the conclusions reached by the learned Arbitrator suffered from patent illegality or that they fell within the realm of plausible view. I would, therefore, be examining the award in the light of the aforesaid parameters.

Claim No. 1:

18. Under this claim, the learned Arbitrator has awarded a sum of Rs.61,37,066/- to R.A. towards balance fees claimed for work completed till Stage IV of the Project. There is no dispute that ESIC had already paid a sum of Rs.3,28,32,934/- to R.A.

18.1 R.A., on the other hand, claimed the balance sum, to which I have made a reference above, based on the Contract Price of the C.A. pegged at Rs.12.99 crores. As discussed above, the Contract Price of Rs.12.99 crores was, in turn, calculated based on the sanctioned estimated cost of Rs.433,15,08,231/-. According to R.A., three (3) percent of Rs.433,15,08,231/- would lead to the contract's price being pegged at Rs.12,99,00,000/-, and that, thirty (30) percent of this figure, which R.A. claims it is entitled to as it had reached Stage IV of the project, would be a sum of Rs.3,89,70,000/-.

18.2 It is based on this calculation that R.A. claims the balance sum of Rs.61,37,006/- which is the difference between Rs.3,89,70,000/- and Rs.3,28,32,934/-. As noticed above, ESIC claims that since HLL had sub-contracted the work to L&T for a sum of Rs.292,58,81,849/-, the Contract

Price would be three (3) percent of this figure and that if at all R.A. could claim thirty (30) percent of the Contract Price calculated by taking into account the value for which work was sub-contracted to L&T.

18.3 To my mind, in view of the finding of fact returned by the learned Arbitrator that no material was placed before him to demonstrate what was the scope of the work, the only rational basis which could have been adopted was the sanctioned estimated cost. As noticed above, the sanctioned estimated cost, even according to the ESIC, was a sum of Rs.433,15,08,231/-. Notably, Mr. Qadri, during the course of the arguments, was not able to dislodge this finding of fact and, therefore, I have no difficulty in sustaining the conclusion reached by the learned Arbitrator as regards claim No. 1.

Claim No. 2:

19. Claim No. 2 pertains to two aspects: (i) reimbursement of cost for fifteen copies of final tender document/tender drawings/BOQ/price BOQ, etc. and (ii) towards costs incurred with regard to soil testing.

19.1 Insofar as the claim for reimbursement of tender documents is concerned, R.A. had claimed a total sum of Rs.3 lakhs based on the stand that it had supplied fifteen sets of tender document to HLL. This stand is founded on the letter dated 3 December 2009 issued by HLL to ESIC and letter dated 28 November 2009 issued by R.A. to ESIC.

19.2 Since, qua the quantum of the claim no dispute was raised, the Arbitral Tribunal found the cost claimed towards fifteen (15) sets of the tender documents to be reasonable. Insofar as reimbursement of Rs.80,960/- towards soil investigation was concerned, the learned Arbitrator did not find

the same sustainable as nothing was brought on record to show that the soil investigation was actually carried out by R.A.

19.3 In my view, given the material placed before the Arbitral Tribunal, the award of only a sum of Rs.3 lakhs qua reimbursement of the cost of fifteen tender documents appears to be in order, and thus, requires no interference.

Claim No. 3:

20. Claim No. 3 raised by R.A. was rejected as it was not supported by requisite evidence. This was a claim for a sum of Rs.24 lakhs. Under this claim, R.A. had sought reimbursement of costs for setting up of office and engaging employees, engineers, site supervisors, draftsman, etc. to meet its obligation under the C.A., which had a tenure of three years. Mr. Ramasesh had not been able to draw my attention to any material which would have me hold a view contrary to the one held by the Arbitral Tribunal.

Claim No. 4:

21. Under claim No. 4, R.A. claimed a refund of Rs.65 lakhs along with interest equivalent to Rs.48,750/- per month from the date of encashment of the performance bank guarantee till the date of payment.

21.1 The learned Arbitrator took into account the fact that the performance bank guarantee was furnished in pursuance of Clause 2.2 of the GCC in the form of performance security.

21.2 Furthermore, learned Arbitrator also took into account Clause 3.1.1 of the GCC which dealt with liquidated damages and the liability of R.A. to indemnify ESIC in respect of any direct loss or damage accrued or likely to accrue due to a deficiency in service.

21.3 The fact that this claim was resisted on account of purported damage caused to the ESIC on account of delay and alleged deficiency in services rendered by R.A. was considered by the learned Arbitrator. Furthermore, the fact that ESIC had encashed the performance bank guarantee on 23 February 2010 after it had terminated the C.A. on 1 February 2010, has also been noted by the learned Arbitrator.

21.4 With regard to the date of termination of the C.A., there is no dispute. There is also no dispute, at least none was raised before me by Mr. Qadri, that the performance bank guarantee was encashed on 23 February 2010.

21.5 The question, therefore, is as to whether on account of delay alone ESIC could seek rejection of claim No. 4. The record shows that despite the fact that the timelines were fixed for various activities under Appendix-A, ESIC continued to accept the performance without putting R.A. to notice that it would be claiming liquidated damages. As a matter of fact, the claim for liquidated damages came in the form of counterclaim No. 2 for the first time on 1 January 2013, when, the counterclaims were lodged with the learned Arbitrator. Under counterclaim No. 6, ESIC sought a refund of the sum of Rs.65 lakhs which it had purportedly, *albeit*, inadvertently, refunded to R.A.

21.6 The Arbitral Tribunal, to my mind, has given plausible reasoning as to why claim No. 4 is sustainable. The relevant observations made in that behalf read as follows:-

“G. Clause 2.2 Performance Security:

The Consultant shall provide security for his performance of the contract to the Employer within 28 days after the signing of the contract Agreement. The Performance Security shall

be in the form of an unconditional bank guarantee acceptable to the client, from any nationalised bank or scheduled bank in India valid up to 12 months from the date of signing of the agreement initially and extendable up to a suitable period as desired by the client or at the specified in the Special Condition. (Emphasis supplied)

The amount of the bank guarantee shall be 5% (five percent) of the Contract Price. The same shall be furnished to the ESIC in the proforma acceptable to ESIC."

- H. The Clause 2.2 as reproduced above is non-speaking as to when and under what circumstances the bank guarantee can be encashed by Respondent. Only the first line of this clause reading "Consultant shall provide security for his performance of the contract" does however state that this is a Security for the performance of the Contract by the Consultant. Whether it could be encashed in case of any delay in performance will be examined a bit later after considering the relevant provisions in the Contract specifically for delays.*
- I. The Contract has a Clause 3.1.1, titled "Standard of Performance:" dealing with the issue of delays in performance. It has a middle para with a title 'Action for Deficiencies in Services', which reads "Liquidated Damages shall be imposed on the consultants for [the] delay in performance of the services under his scope by the Consultant beyond the contract period or extended time granted by the client. The LD shall be 1% of the contract price per week of delay subject to [a] maximum of 10% of the contract price." It further states "Consultants liability towards the Client: Consultant shall be liable to indemnify the client for any direct loss or damage accrued or likely to accrue due to [a] deficiency in service rendered by him."*
- J. Thus the Contract has specific provisions for the action to be taken by Client (Respondent) with regard to the delays by Claimant that provide for [the]imposition of Liquidated*

Damages for delay in performance of the services beyond the contract period (emphasis supplied).

- K. However in the instant matter the Contract was terminated by Respondent on 01.02.2010, while the contract period as stipulated was to end on 10.11.2011, i.e. more than 21 months of the contract period was still remaining on the date of termination. The Clause 3.1.1 thus provides for action beyond the contract period and not for any delay at an intermediate stage. This is logical as the delays at an intermediate stage have the possibility of being made good during the remaining period.*
- L. Considering the second part of the Clause 3.1.1, namely, that the Consultant is liable to indemnify the Client for any direct loss or damage accrued or likely to accrue due to deficiency in service, it is noted that the Respondent never pointed out any deficiency other than the delays till the invocation of Arbitration by Claimant. Even with regard to delays, the Respondent never informed the Claimant of any losses or showed any intention of imposing any liquidated damages. Thus neither the question of imposition of any liquidated damages arose nor did the Respondent ever issue any order of imposition of any such liquidated damages.*
- M. Coming back to the [sic] Clause 2.2 regarding Performance Security, it states that the Consultant shall provide security for his performance of the contract, which however was prematurely terminated by Respondent. The [sic] Clause 2.2 does not provide for any action for delays, for which a separate provision exists in the Contract. Therefore, it is my considered view that the Respondent did not have a right under the contract to forfeit the Performance Security merely on account of an intermediate delay and consequent termination of the contract by Respondent itself.*
- N. Thus under the terms of the contract with the due reference to the facts of matter as well as on the basis of the 'Termination of the Contract' by Respondent vide its letter dated 01.02.2010 having been held as not being in accordance with the contract, either way the action of*

Respondent to forfeit the Performance Security is considered to be contractually invalid.

O. In view of the foregoing the Claimant is justified in claiming the refund of Performance Security of Rs. 65 lakh, as forfeited by Respondent, and the Claim of Claimant is duly upheld.

P. As regards the claim of interest of Rs. 48,750/- per month as demanded by Claimant, which works out to a rate of interest of 9% p.a., the same is not considered to be unreasonable. Therefore, the Claimant is duly considered entitled to simple interest @ 9% per annum from the date of encashment of the Bank Guarantee of Rs. 65 lakh, i.e. 23.02.2010 and till the date of award. The amount of interest for this period of 5 years, 9 months and 24 days works [sic: works] out to Rs. 34,02,750/-.

Q. The Claimant is thus entitled to an amount of Rs.99,02,750/- after including interest.”

21.7. To my mind, the reason that this is a plausible view, is that, Clause 2.2 of the GCC did not specifically empower ESIC to encash the performance bank guarantee, which was the security for R.A.’s performance of the C.A. This power could have been exercised by ESIC by taking recourse to Clause 3.1.1 of GCC if the delay was beyond the contract period or extended time granted by ESIC. The fact that the C.A. was terminated 21 months prior to the expiry of the normal tenure of the C.A. and that too without sixty days’ prior notice as contemplated under Clause 2.9.1, ESIC could not have encashed the performance bank guarantee towards performance security.

21.8 Therefore, the conclusion of the learned Arbitrator that R.A. was entitled to refund of performance security of Rs.65 lakhs, in my opinion, is a plausible view in the facts and circumstances obtaining in the case.

21.9 For the very same reason, I find no error in the learned Arbitrator sustaining the claim for interest which works out to a simple rate of interest of nine (9) percent per annum and spans the period between the time when the performance bank guarantee was encashed, i.e., 23 February 2010 and the date of the award.

Claim No. 5:

22. R.A. under this claim had sought payment of a sum of Rs.27 lakhs towards monies expended for having the structural drawings vetted by IIT, Madras, and fees paid to, one, Mr. Ramesh and the sub-consultant. The learned Arbitrator in respect of this claim has awarded a sum of Rs.11,03,000/- as against Rs.27 lakhs claimed by R.A. The amount awarded under claim No. 5 is based on proof of actual sum paid qua which two letters of even date 19 January 2010 have been issued by IIT, Madras. Mr. Qadri did not put forth any challenge to this claim and, therefore, the same is sustained.

Claim No. 6:

23. Insofar as claim No. 6 is concerned, R.A. had claimed a sum of Rs.15 lakhs on account of expenses incurred to obtain statutory approval of Project, Mr. Ramasesh was not able to dislodge the finding returned by the learned Arbitrator that there was neither any pleading nor any basis for laying claim qua the said amount. Claim No. 6, to my mind, was, thus, rightly rejected.

Claim No. 7:

24. Insofar as claim No. 7 was concerned, R.A. had sought payment of a sum of Rs.1 crore on account of mental agony and harassment to assail termination of the C.A. No arguments were advanced by Mr. Ramasesh qua rejection of this claim. Therefore, I need not dwell on this aspect any further. In any event, since this was a non-pecuniary claim, R.A. should have, in the very least, put relevant material before the learned Arbitrator.

Claim No. 8:

25. This was a claim made by R.A. for royalty qua usage of its documents and designs etc. supplied to ESIC. R.A. based its claim, which is in the sum of Rs.6,49,50,000/-, on the ground that the contract was illegally terminated and that, therefore, it was entitled to the amount claimed. The Arbitral Tribunal, however, rejected the claim on the ground that R.A. had completed the work only till Stage IV and, therefore, was entitled to only thirty (30) percent of the Contract Price; R.A. could not lay claim to the balance fee which was equivalent to seventy percent of the Contract Price on the ground that the same could have been claimed only if it had invested time and effort in that behalf; R.A. having failed to make the necessary investment in the activities could not lay claim to the balance fee; and lastly, that R.A. in its letter dated 1 February 2010 which was addressed to HLL had expressed difficulties in carrying out the work assigned to it.

25.1 I must indicate that, though, at the time when notice was issued R.A.'s Section 34 petition, rejection of claim No. 8 formed the basis for the same. I must indicate that Mr. Ramasesh has not been able to articulate as to how R.A. would lay claim to the monies in the form of royalty.

25.2 The argument both at the time of issuance of notice by this Court and before the learned Arbitrator appears to proceed on the basis that since the C.A. was illegally terminated, R.A. was entitled to claim the balance fee equivalent to seventy (70) percent of the Contract Price.

25.3 To my mind, the claim obviously was not in sync with the arguments advanced both before the learned Arbitrator and this Court at the stage of notice. Clause 3.9 of the C.A. clearly provides that all plans and drawings, specifications, designs, reports, etc. prepared by R.A. for ESIC under the C.A. would become and would remain the property of ESIC and that R.A. was not, upon termination or expiration of the C.A., entitled to seek delivery of such documents. By virtue of this clause, all drawings and designs despite termination became the property of ESIC and, therefore, there was no question of R.A. claiming any royalty. As noticed above, though the claim was for royalty what was put forth before the Arbitrator was a claim for payment of balance fee on account of illegal termination of the contract. To my mind, R.A. cannot be allowed to argue contrary to the claim lodged before the learned Arbitrator.

25.4 That being said, the reasoning provided by the learned Arbitrator to deny this claim in the given facts and circumstances of the case cannot be interfered with. Termination of C.A. has been held to be illegal, solely, on the ground that the mandate of Clause 2.9.1, which required giving sixty (60) days prior notice was not adhered to by ESIC. As to whether this would automatically entitle R.A. to claim balance fee had to be examined in the light of facts obtaining in the case. The learned Arbitrator based on the material placed before him has come to the conclusion that no further money is payable to the R.A. In my opinion, this view need not be interfered with

as the learned Arbitrator has come to a conclusion based on his appreciation of the material placed before him.

Counterclaims:

26. This brings me to the counterclaims filed on behalf of ESIC.

Counterclaim No.1:

27. Counterclaim No. 1 pertains to escalation cost on account of delay in execution of the Project. The amount claimed under this head by ESIC was a sum of Rs.58.50 crores. The material placed before the Arbitral Tribunal was worldwide inflation data. Based on this data, it was sought to have contended on behalf of ESIC that there was inflation in the cost of more than ten (10) percent between 2010-11 and 2011-12.

27.1 In support of this claim, Mr. Qadri sought to stress that Rs.13,55,34,652/- has been paid towards escalation to HLL. These claims are based on the amounts claimed by HLL.

27.2 Clearly, no one from HLL was produced to prove any of the details given by ESIC which purportedly formed part of its written submissions tendered to the learned Arbitrator.

27.3 The argument before the learned Arbitrator appeared to veer only around the world inflation data between the period 2010-2012 placed on record on behalf of ESIC.

27.4 Therefore, in my view, the counterclaim for escalation on account of delay in the project could not have been claimed from R.A. based on what was placed on record before the learned Arbitrator. ESIC was required to prove before the learned Arbitrator, even if one were to assume that monies

towards escalation were paid to HLL, as to what part was attributable to the delay caused by R.A. Failure to do so, would put the claim under this head in the category of remote and indirect loss.

Counterclaim No. 2:

28. This counterclaim pertains to liquidated damages. Mr. Qadri, in support of this counterclaim, as noted above, submitted that once the learned Arbitrator has found that 200 days delay was attributable to R.A., then, liquidated damages had to follow as day follows night. The learned Arbitrator, as adverted to hereinabove, after taking into account the wordings of Clause 3.1.1 of the GCC came to the conclusion that ESIC could impose liquidated damages only if the delay was beyond the contractual period. The learned Arbitrator has gone on to hold that since the C.A., in this case, was terminated twenty-one (21) months prior to the stipulated end date, ESIC, could not have taken recourse to the clause as delay caused was at the intermediate stage. In other words, according to the learned Arbitrator, the delay caused at an intermediate stage could always be made up during the remaining tenure of a contract. As observed above, while discussing claim No. 4 filed by R.A., according to me, this is a plausible view and, therefore, no interference is called for with the conclusion reached by the learned Arbitrator with regard to counterclaim No. 2.

Counterclaim No. 3:

29. Under this head, ESIC claimed a sum of Rs.1.24 crores towards medical treatment of insured employees for the years 2010-2011 and 2011-2012 on account of non-completion of Project within the stipulated time frame.

29.1 In the Award, the learned Arbitrator has returned a finding of fact that ESIC had given details of expenses incurred only for 2011-2012 and, that too, cost required for treatment from a super specialty or a specialty hospital.

29.2 The learned Arbitrator has also returned a finding of fact that no evidence was placed before him, which was suggestive of the fact that the hospital which was to be built pursuant to the C.A. was to be a super specialty or a specialty hospital. Accordingly, the learned Arbitrator considering these and other reasons given declined the claim as there was no way of knowing as to whether the reference to such hospitals was inevitable.

29.3 Besides this, the Arbitral Tribunal notes that in the normal course the C.A. would have come to an end on 10 November 2011 and since the C.A. was terminated on 1 February 2010, as rightly concluded by the learned Arbitrator, expenses could not have been claimed by ESIC for the Financial Year 2010-2011. The learned Arbitrator, as observed above, held that the termination of C.A. on 1 February 2010 was illegal and/or invalid. Furthermore, the Arbitral Tribunal held that the delay attributable to R.A. was only 200 days, i.e., 6 ½ months and, therefore, the loss claimed for a period of two years was not sustainable. In my view, given the findings recorded by the learned Arbitrator and reasoning, no interference is called for the rejection of Counterclaim No. 3.

Counterclaim No. 4:

30. Under this Counterclaim, ESIC sought payment of Rs.13 crores for failure on the part of R.A. to conduct a proper test at the project site to ascertain the availability of adequate groundwater. The learned Arbitrator returned a finding of fact that ESIC had not placed on record anything to

show that it had served a notice upon R.A. for failure to carry out any such test.

30.1 Mr. Qadri was unable to show me any document which would have me conclude that this finding of fact was erroneous. Accordingly, no interference is called for with regard to this Counterclaim as well.

Counterclaim No. 5:

31. Under this head, ESIC claimed damages on account of the loss of goodwill. The amount claimed was a sum of Rs.1 crore. This claim was also rejected, inter alia, on the ground of failure on the part of ESIC to show the basis for lodgment of the said claim concerning the loss of goodwill. To my mind, once again, no interference is called for in view the finding returned by the learned Arbitrator.

Counterclaim No. 6:

32. To my mind, Counterclaim No. 6 has been rightly rejected. The reasoning given by the learned Arbitrator qua Counterclaim No. 6 is set out hereafter:-

“A. While deciding Claim No. 4, it has already been held that the action of Respondent to encash the Bank Guarantee amounting to Rs.65 lakh was contractually not valid.

B. The calculations presented by Respondent are not in order. While discussing the Issue No. 1 of Contract Price, it has already been established that the Contract Price was Rs.12,99,00,000/- and accordingly the 30% of the same as due up to Stage-IV came to Rs.3,89,70,000/- and not the one shown by Respondent as Rs.2,63,32,934/-. The difference of Rs.1,26,37,066/- is payable in favour of Claimant. This amount is made up of Rs.65,00,000/- and Rs.61,37,066/-, as have been awarded against Claim No. 4 & Claim No. 1 respectively.”

32.1 Having regard to the discussion in the foregoing paragraphs, I am of the view that the learned Arbitrator has come to the correct conclusion with regard to counterclaim No. 6 and thus rejected the claim for refund of Rs.65 lakhs made by ESIC.

Counterclaim No. 7:

33. Counterclaim No. 7 is a consequential claim for interest with regard to amounts sought for under Counterclaim Nos. 1 to 6. Since the learned Arbitrator rejected those claims, he rightly rejected Counterclaim No. 7 for interest.

34. Before I conclude, I must emphasize that ESIC's case that the delay caused by R.A. in not completing various activities within the timeline stipulated in Appendix-A had, according to it, resulted in a cascading loss, was an aspect, which was not backed by adequate proof. As noticed by the learned Arbitrator, at no stage prior to termination of the C.A. did ESIC inform R.A. that there was a deficiency in the work performed by it. Insofar as the aspect of the delay was concerned, while there is some correspondence on record to show that though ESIC wanted R.A. to expedite the process it accepted the work performed by R.A. under the C.A. without ever putting it to notice that the acceptance of the work was subject to the imposition of liquidated damages. On the other hand, the learned Arbitrator proceeded on the basis that since consultancy was a creative vocation which required R.A. to interface with various stakeholders, strict adherence to timelines given the nature of the contract, was an unreal expectation. The Arbitrator being the master of facts and, in particular, with regard to appreciation of the evidence, this cannot be a good enough reason for the Court to interfere with the Award.

35. Thus, for the foregoing reasons, I find no merit in both petitions. Accordingly, OMP (COMM) No. 59/2016 and OMP (COMM) NO. 79/2016 are dismissed. There shall, however, be no order as to costs.

OMP (Enf.)(Comm)No. 121/2018:

36. In view of the fact that I have dismissed the petitions filed under Section 34 of the 1996 Act preferred by both parties, the judgment debtor i.e. ESIC, will deposit the up-to-date decretal amount with the Registry of this Court within a period of six (6) weeks from today. In the event the decretal amount is deposited, the Registry will invest the same in an interest-bearing fixed deposit, maintained with a nationalized bank.

37. List the Enforcement Petition on 23 .7.2019

(RAJIV SHAKDHER)
JUDGE

April 12, 2019
VKR