

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

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Reserved on: 30th August, 2019
Decided on: 30th September, 2019

+ **CS(COMM) 198/2017 & I.A. 14017/2018 (u/O 1 R 10 CPC by P.)**

M/S KSS-KSSIPL CONSORTIUM

..... Plaintiff

Represented by: Mr. Arun Kumar Varma, Sr. Adv.
with Mr. Abhay Raj Varma,
Mr. Vishal Nautiyal, Advs.

versus

M/S GAIL INDIA LTD

..... Defendant

Represented by: Mr. Sacchin Puri, Sr. Adv. with
Mr. Yoginder Handoo, Mr. Kamil
Khan, Mr. Navroop Singh,
Mr. Sandeep Kumar, Mr. Dhananjay
Grover, Mr. Dhan Singh, Advs.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

I.A.10585/2017 (u/O 7 R 11 CPC by D)

1. Plaintiff has filed the present suit claiming that it is a consortium of M/S JSC OGCC Kazstroyservices (KSS) as the leader and M/S Kazstroyservices Infrastructure India Pvt. Ltd. as its member. It is the case of the plaintiff that Engineers India Limited, a project management consultant and a Government of India undertaking, was appointed by the defendant as the Engineer in-charge of the project in question i.e. an approximately 1000 km long pipeline project for transportation and distribution of RLNG from Dabhol in the State of Maharashtra to Bidadi in

the State of Karnataka by the defendant. The said tender was floated in June 2010 and the entire work of tender was divided into 10 Spreads 'A' to 'J'. The pipeline was to traverse via 18 National Highways, 382 roads, 20 railway tracks, 11 major rivers and 276 water bodies. The plaintiff participated in the tender and the defendant issued two separate faxes for acceptance both dated 6th October, 2010 based on the rates quoted by the plaintiff for Spread 'D' and Spread 'J' respectively. On 30th December, 2010 the plaintiff sent to the defendant duly signed and executed contract agreement dated 30th December, 2010 independently for Spread 'D' and Spread 'J'.

2. That during the course of execution of work, certain issues were raised by the plaintiff claiming various amounts from the defendant which were refuted. The claims, inter alia, related to extra expenditure incurred by the plaintiff during the extended period of contract beyond 5th February, 2012, the originally stipulated date of completion of project both for Spread 'D' and 'J'. The plaintiff filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 before the Hon'ble Supreme Court and the two petitions being Arbitration (Civil) No. 36/2014 and 38/2014 were decided by a common order dated 12th February, 2015. It is the case of the plaintiff that in so far as disputes/ claims related to the period beyond 5th February, 2012 (i.e. extended stay beyond the contractual period), the Supreme Court held that the same was not an arbitral dispute under the terms and conditions of the contract and therefore could not be referred to arbitration. Hence, the plaintiff filed the present suit limited to its claim on account of various costs, expenses, losses and damages incurred by it during the aforesaid extended stay beyond the contractual period only.

3. By this application under Order VII Rule 11 CPC case of the defendant is that the two petitions before the Supreme Court clearly dealt with the issue and in view of the fact that the plaintiff in its tender documents had not claimed any amount for the extended stay beyond the contractual period noting 'NIL' in the said column, the Supreme Court held that in view of the no claim of the plaintiff on that count, the said purported dispute could not be referred to arbitration. Hence the present suit is not maintainable. To support his arguments that there being no dispute, the suit is liable to be dismissed for want of cause of action, learned counsel for the defendant relies upon the decision of the Supreme Court dated 12th February, 2015 as also the decision reported as AIR 1963 SC 1405 Fateh Chand Vs. Balkishan Dass to claim that the plaintiff cannot even claim compensation under Section 74 of the Contract Act.

4. Learned counsel for the defendant also contends that the claim of the plaintiff that the decision of the Supreme Court dated 12th February, 2015 has no application to the present suit deserves to be rejected for the reason the plaintiff himself states that the cause of action finally arose when the Supreme Court passed the order dated 12th February, 2015. In case the passing of the order by the Hon'ble Supreme Court does not give rise to a cause of action, the present suit filed by the plaintiff is barred by limitation and liable to be rejected on the said ground itself.

5. During the course of arguments, learned counsel for the defendant also challenged the maintainability of the present suit on the ground that the present suit has been filed by a consortium which is akin to a partnership firm and since the same is an unregistered partnership, the suit was not maintainable. However, in view of the application of the plaintiff I.A.

14017/2018 under Order I Rule 10 CPC, this Court will not be advertent to the said issue in the present application.

6. Learned counsel for the plaintiff contends that the order of the Supreme Court dated 12th February, 2015 merely held that dispute with regard to the extended stay beyond contractual period was not an arbitrable dispute, however the said order does not foreclose the right of the plaintiff to seek its claim by way of filing a civil suit. Further an order passed by the Supreme Court in an application under Section 11 of the Arbitration and Conciliation Act, 1996 does not operate as a res-judicata as the same is not a judgment deciding the lis between the parties. Reliance is placed on the decisions in (2005) 8 SCC 618 SBP & Co. Vs. Patel Engineering Ltd. & Anr., (2015) 1 SCC 32 State of West Bengal & Ors. Vs. Associated Contractors, (2013) 9 SCC 438 Ramji Gupta & Anr. Vs. Gopi Krishan Agrawal (dead) & Ors., (2016) 2 SCC 200 City Municipal Council Bhalki Vs. Gurappa (dead) by LR & Anr. and (2013) 15 SCC 655 Erach Boman Khavar Vs. Tukaram Shridhar Bhat & Anr. Referring to the decision of this Court reported as 2010 (115) DRJ 616 Simplex Concrete Piles (India) Ltd. Vs. Union of India it is contended that rights created under Section 73 and 55 of the Contract Act cannot be waived.

7. Before proceeding further it would be appropriate to note Clause 42 of the Special Conditions of Contract, as applicable to the contract between the parties, which reads as under:

“42.0 COMPENSATION FOR EXTENDED STAY

42.1 The clause No.87(vi) of GCC is modified to the following extent:

42.1.1 *In case the time of completion of work is delayed beyond the time schedule indicated in the bidding document plus a grace period equivalent to 1/5th of the time schedule or 10 weeks whichever is more, due to reasons solely attributable to Employer/ Consultant, the contractor shall be paid extended stay compensation in order to maintain necessary organizational set up and construction tools, tackles, equipments etc. at site of work. The bidder shall mention the rate for such extended stay compensation per month in the 'priced part' which will be considered for evaluation. The period for the purpose of evaluation shall be 1/5th of the time schedule for 1 (one) month whichever is less.*

42.1.2 *In case bidder does not indicate the rate for extended stay compensation as per the proforma in Priced Part, it will be presumed that no extended stay compensation is required to be paid to the contractor.*

42.1.3 *In case the completion of work is delayed beyond a period of one month after the grace period then both the Employer/Consultant and the Contractor shall mutually decide the future course of action including payment of further extended stay compensation.*

42.1.4 *Bidder to note that in case they don't indicate the rate for extended stay compensation as per proforma, provisions of clause No.42.0 will not be applicable for them."*

8. The detailed letter of acceptance dated 30th December, 2010 for Spread 'D' issued by the defendant and duly signed and returned by the plaintiff in respect of summary of prices of Spread 'D' reads as under:

"Name of Work:	Pipeline Laying and Terminal Works for Dabhol – Bangalore Pipeline Project of GAIL (India) Limited
Bidding Document No.	A027/T-170/09-10/RKS/02

NAME of contractor

M/S KSS-KSSIPL CONSORTIUM

S.No.	Description	Price in Indian Rupees (INR)	
		In figure	In words
1.	Total of quoted price for EGP & Corrosion Monitoring system	63,17,946.00	Sixty Three Lakh Seventeen Thousand Nine Hundred Forty Six Only.
2.	Total of quoted price for Mechanical Eqpt Works	2,60,000.00	Two Lakh Sixty Thousand only
3.	Total of quoted price for General Civil Works	4,42,73,511.00	Four Crore Forty Two Lakh Seventy Three Thousand Five Hundred Eleven Only.
4.	Total of quoted price for structural works	4,81,06,650.00	Four Crore Eighty One Lakh Six Thousand Six Hundred Fifty Only.
5.	Total of quoted price for Architecture Works	1,49,54,310.00	One Crore Forty Nine Lakh Fifty Four Thousand Three Hundred Ten Only.
6.	Total of quoted price for Electrical works	1,39,95,855.00	One Crore Thirty Nine Lakh Ninety Five Thousand Eight Hundred Fifty Five Only.
7.	Total of quoted price for Instrumentation Works	1,48,43,910.00	One Crore Forty Eight Lakh Forty Three Thousand Nine Hundred Ten only.
8.	Total of quoted price for Pipelines Works (including optional items)	64,01,98,261.00	Sixty Four Crore One Lakh Ninety Eight Thousand Two Hundred Sixty One only.
8a.	Total price for Optional Items	28,13,000.00	Twenty Eight Lakh Thirteen Thousand only.
9.	Gross total amount of all above (inclusive of all Taxes, duties & levies except service tax and optional items (Sr. No. 1+2+3+4+5+6+7+8+8a)	78,01,37,443.00	Seventy Eight Crore One Lakh Thirty Seven Thousand Four Hundred Forty Three only.
10.	Rebate offered on total of quoted price (Sr.No.9) above (which will be applicable on each item of Schedule of Rates)	NIL	
11.	Amount of Rebate as per Sr. No. 10 above	NIL	
12.	Net Total price (9-11) (After considering rebate indicated at Sr. No.10)	78,01,37,443.00	Seventy Eight Crore One Lakh Thirty Seven Thousand Four Hundred Forty Three only.
13.	Amount of service tax under composite scheme @ 4.12%	3,21,41,662.65	Three Crore Twenty One Lakh Forty One

	<i>(including cess) (presently applicable rate) on the net total price indicated at Sl.No.12 above</i>		<i>Thousand Six Hundred Sixty Two & Paise Sixty Five only.</i>
14.	<i>Gross Total price for Spread D (Sl.No. 12 + 13 above)</i>	81,22,79,105.65	<i>Eighty One Crore Twenty Two Lakh Seventy Nine Thousand One Hundred Five & Paise Sixty Five only.</i>
15.	<i>Amount of service tax under composite scheme @ 4.12% (including cess) (Presently applicable rate) on free issue material of amount INR 1086.60 Million</i>	4,47,67,920.00	<i>Four Crore Forty Seven Lakh Sixty Seven Thousand Nine Hundred Twenty only.</i>

”

9. Further the agreement qua the extended stay compensation for Spread ‘D’ in the detailed letter of acceptance dated 30th December, 2010 notes as under:

“Name of Work: Pipeline Laying and Terminal Works for
Dabhol – Bangalore Pipeline Project of
GAIL (India) Limited
Bidding Document No. A027/T-170/09-10/RKS/02
NAME of contractor M/S KSS-KSSIPL CONSORTIUM

<i>S.No.</i>	<i>Description</i>	<i>RATE</i>
1.0	<i>Rate of Extended stay compensation per Month beyond the Time Schedule and grace period mentioned in Bidding Document for reasons solely attributable to Employer.</i>	NIL

”

10. Though in the plaint, plaintiff has made out that the project related to various Sections bifurcated as Spreads ‘A’ to ‘J’, however as noted above, the summary of prices agreed and the extended stay compensation now claimed both relate to the Spread ‘D’. Further, the rate of extended stay compensation per month beyond the time schedule and grace period mentioned in bidding document for reasons solely attributable to employer was noted as ‘NIL’.

11. As per the case of the plaintiff itself after disputes arose between the plaintiff and defendant it filed two petitions before the Hon'ble Supreme Court in respect of its different claims which were decided by the common order dated 12th February, 2015. Relevant Paras of the order dated 12th February, 2015 passed by the Hon'ble Supreme Court in Arbitration Case No. 36/2014 and 38/2014 arising from two separate agreements between the parties, are as under:

“6. According to the petitioner, on account of the delays due to the aforesaid reasons, the petitioner became entitled for extended stay compensation in terms of Clause 42 of the SCC read with clause 12 of the detailed letter of acceptance. Apart from extended stay compensation, the petitioner claims to be entitled for payment for additional works undertaken during the course of execution of contracts. On 4th January, 2013 and 5th July, 2013, the petitioner submitted its claim to the respondent for ₹34,70,11,907/- (Rupees Thirty Four Crore Seventy Lacs Eleven thousand Nine Hundred and seven only) [In Arbitration Petition (Civil) No.36 of 2014] and for ₹1,79,23,83,208/- (Rupees one Arab Seventy Nine Crore Twenty Three Lacs Eighty Three thousand Two hundred and Eight only) [In Arbitration Petition (Civil) No.38 of 2014] respectively. The petitioner alleges that the respondent rejected the said claims which was not acceptable to the petitioner. The petitioner, thereafter, invoked clause 40.2 of the General Conditions of Contract which provides for conciliation. As the petitioner's proposal for conciliation was rejected by the respondent, the petitioner had no option but to invoke the Arbitration Clause (Clause 59) and seek appointment of a sole arbitrator in respect of the disputes arising from each of the two agreements. The said demand was repeated in several communications which were not responded to. The petitioner, therefore, has lodged the present applications under Section 11(6) of the Arbitration Act for the reliefs earlier noticed.

7. The claims made by the petitioner have been resisted by the respondent by filing separate counter affidavits in both the cases. A reading of the affidavits filed by the respondent indicate that insofar as the claim for extended stay compensation is concerned, the respondent contend that the said claim does not give rise to any arbitrable issue inasmuch as under 42.1.1 the bidder is required to mention the rate for extended stay compensation per month in the "Priced Part". Under Clause 42.1.2 in case the bidder did not indicate such rate it is to be presumed that no extended stay compensation is required to be paid. Under Clause 42.1.4 it was expressly mentioned that "Bidder to note that in case they don't indicate the rate for extended stay compensation as per proforma, provisions of clause No.42.0 will not be applicable to them". According to the respondent in the relevant proforma relating to "Compensation for Extended stay", the petitioner had mentioned/ quoted "NIL". Thus, according to the clauses 42.1.2 and 42.1.4, no extended stay compensation is required to be paid to the petitioner. The above position was also expressly stated in clause 12 of the detailed Letter of acceptance dated 13th December, 2010, which is in the following terms:

"12.0 COMPENSATION FOR EXTENDED STAY

*Extended stay compensation is
not applicable and shall not be
payable to the Contractor as per
clause No.42.0 of Special
Conditions of Contract.*

8. According to the respondent, the aforesaid clause was further amplified in Annexure-1 to the said detailed letter of acceptance which was not placed before the Court though the detailed letter of acceptance dated 13th December, 2010 formed a part of the petitions filed by the petitioner.

9. Insofar as the claim of payments for additional works is concerned, according to the respondent, clause 91.0 of the GCC deals with such claims. Clause 91.1 and 91.2 contemplate that such claims will be verified by the Engineer-in-charge whose decision will be final. The respondent further states that the

claims made by the petitioner for additional costs had been rejected by the Engineer-in-charge and in terms of clause 91.2 of the GCC such a decision(s) must be construed to be final and binding between the parties and therefore would stand excluded from arbitration.

10. There can be no manner of doubt that before exercising the power under Section 11(6) of the Arbitration Act to make appointment of an arbitrator the Court will have to decide on the existence of an arbitrable dispute/ enforceable claim by and between the parties to the contract. The existence of a claim and denial thereof giving rise to a dispute is required to be determined on the basis of what the parties had agreed upon as embodied in the terms of the contract and only for the purpose of a decision on the question of arbitrability and nothing beyond. It is from the aforesaid standpoint that the issues raised in the present proceedings will have to be considered.

11. Clause 42.0 deals with "Compensation for extended stay". Under clause 42.1.1 the contractor is required to mention the rate for extended stay of compensation in the event the contract is to be prolonged/extended beyond the contemplated date of completion. Clause 42.1.2 and 42.1.4 of the SCC contemplate that in the event the contractor/bidder does not indicate the rate of extended stay, it will be presumed that no extended stay compensation is required to be paid. In the present case, admittedly, the petitioner had quoted "NIL" against compensation for extended stay in its bid. If that is so, it must be understood that the petitioner had agreed to forego its claim to extended stay compensation in the event the period of performance of the contract is to be extended as had happened in the present case. This position was conveyed to the petitioner by the letter of acceptance dated 13th December, 2010. The petitioner did not raise any objection on the aforesaid score. If the petitioner had voluntarily and consciously agreed to the above situation, it will be difficult to accept the contrary position that has sought to be now adopted by seeking to claim extended stay compensation which was earlier agreed to be foregone. It must therefore be held that the claim against the aforesaid 'Head' i.e. 'extended stay

compensation' does not give rise to an arbitrable dispute so as to permit/require reference to arbitration under clause 59. "

12. A bare perusal of the decision of the Supreme Court reveals that the plaintiff having claimed 'NIL' compensation for "the extended stay compensation", Supreme Court held that the same was not a dispute and could not be referred to arbitration. Noting that before exercising power under Section 11(6) of the Arbitration Act to make appointment of an arbitrator, the Court has to decide on the existence of an arbitrable dispute/enforceable claim by and between the parties to the contracts and in the light of the plaintiff quoting 'NIL' against compensation for extended stay in its bid, it must be understood that the plaintiff had agreed to forego its claim to the extended stay compensation in the event period of performance of contract was to be extended, as had happened in the present case. This position having been conveyed to the plaintiff by the letter of acceptance dated 30th December, 2010 and the plaintiff having not raised any objection on the said score and had voluntarily and consciously agreed to the said situation, it would be difficult to accept the contrary position that was sought to be adopted by seeking a claim of extended stay compensation which was earlier agreed to be foregone. It was on these findings that the Supreme Court held that it was not an arbitrable dispute and no arbitration on that count was required.

13. Learned counsel for the plaintiff has laid great emphasis on the fact that the finding of the Supreme Court in its order dated 12th February, 2015 would neither be binding nor operate as res-judicata. In SBP and company (supra) the Constitution Bench laid down the scope of decision in an

application under Section 11 of the Arbitration Act. It was held that the power exercised by the Chief Justice of India or the Chief Justice of the High Court under Section 11(6) of the Act is not an administrative power but a judicial power. It is not disputed that the parties before the Supreme Court were same. The lis between the parties was reference of the disputes between the parties to the arbitration. The contract in question was also the one before this Court and on the basis thereof the Supreme Court held that as the plaintiff had quoted 'NIL' against "compensation for extended stay" in its bid, it must be understood that the plaintiff has agreed to forego its claim to extended stay compensation in the event the period of performance of the contract is to be extended as has happened in the present case. Decision of the Supreme Court dated 12th February, 2015 to the extent of existence of disputes between the parties would operate as res-judicata as it satisfies all the tests for applicability of the principles of res-judicata.

14. Further, the plaintiff in its cause of action seeks extended period of limitation based on the fact that the cause of action last arose on 12th February, 2015 when the Hon'ble Supreme Court ordered that the claim raised by the plaintiff was not capable of being adjudicated in arbitration under the contract between the parties. In case the decision of the Supreme Court has no relevance and the plaintiff was entitled to seek compensation for breach of contract, then the present suit has been instituted beyond the period of limitation.

15. Learned counsel for the plaintiff in the alternative claims that de-hors the finding of the Supreme Court, the plaintiff is entitled to lay a claim against the defendant for the extended stay compensation under Section 73 and 55 of the Contract Act and liable to prove the same in a civil suit. He

relies upon the decision of this Court in Simplex Concrete Piles (supra) in this regard.

16. Sections 55 and 73 of the Contract Act read as under:

“55. Effect of failure to perform at a 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.

73. Compensation for loss or damage caused by breach of contract. —When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract. —When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract. ”

17. The precursor for application of Section 73 of the Contract Act is a breach of contract. As noted above, in the contract between the parties the plaintiff while bidding did not claim any compensation on the said count. Hence there cannot be any breach of contract between the parties on that count permitting compensation under Section 73 of the Contract Act. Section 55 of the Contract Act also provides that in a contingency where the contract has to be performed in a fixed time and on failure to perform in the fixed time, when the time is essential, the claimant would be entitled to sue for the same.

18. In Simplex Concrete Piles relied upon by the counsel this Court was dealing with issue whether a contract clause can disentitle a person from claiming damages which a person is otherwise entitled to under law. In the said decision this Court considered the two decisions of the Supreme Court in Ramnath International Construction (P) Ltd. Vs. Union of India (2007) 2 SCC 453 and Asian Techs Limited Vs. Union of India and Others (2009) 10 SCC 354. In Simplex concrete Piles (supra) this Court was dealing with Clauses 11(a) to 11(c) of the Contract therein which provided that if time was essence of the contract and was specified in the contract document or any individual work order and there is a delay on account of force majeure, abnormal weather, serious loss or damage by fire, civil commotion etc. or

due to the non-availability of the Government source or breakdown of government tools and plants etc. no claim in respect of compensation or otherwise for extension of time would be granted. Interpreting these clauses, the learned Single Judge of this Court held that a contract which can be broken at will, will destroy the very edifice of the Contract Act and it therefore is a matter of public policy that the sanctity of the contracts and the bindingness thereof should be given precedence over the entitlement to breach the same by virtue of contractual clauses with no remedy to the aggrieved party.

19. In Simplex Concrete (supra) this Court clarified that if there is a public policy or public interest element involved, then the rights under Section 73 and 55 of the Contract Act cannot be exercised. In the present case if the plaintiff had claimed compensation on account of extended stay compensation, the same would have impacted the financial bid inter-se the parties and having tried to take advantage on that count, the plaintiff cannot now turn around and ask for compensation on the said count.

20. As noted above, the claim sought by the plaintiff is not in breach of the contract, the plaintiff on its own volition having given up its claim on the said count. Further as noted above, based on the contract between the parties wherein the plaintiff agreed 'NIL' compensation on the extended stay, Supreme Court has already held that the said dispute could not be referred to arbitration as the plaintiff had voluntarily and consciously agreed to the said situation and cannot be now permitted to adopt a contrary position seeking to claim extended stay compensation.

21. In view of the discussion aforesaid, this Court is clearly of the opinion that the present suit is liable to be rejected for want of cause of action. Accordingly, the application is allowed and the plaint is rejected.

CS(COMM) 198/2017

Plaint having been rejected in terms of the decision in I.A.10585/2017 (u/O 7 R 11 CPC by D), the Suit is dismissed.

I.A. 14017/2018 (u/O 1 R 10 CPC by P.)

Dismissed as infructuous.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 30, 2019
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