

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

FAO-CARB-24-2023 (O&M)

Date of decision:31.08.2023

Haryana Vidyut Prasaran Nigam Limited

..... Appellant

Versus

M/s GE T&D Limited

..... Respondent

**CORAM : HON'BLE MR. JUSTICE G.S.SANDHAWALIA
HON'BLE MR. JUSTICE ALOK JAIN**

Present :- Mr.P.S.Rana, Advocate
for the appellant

Mr.Kaustubh Sinha, Advocate and
Mr.Anchit Sharma, Advocate
for the respondent

ALOK JAIN, J. :

CM-82-FCARB-2023

The present application is filed for condonation of delay of 40 days in filing the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

For the reasons recorded in the application, the same is allowed and the delay of 40 days in filing the appeal is condoned.

CM stands disposed of.

FAO-CARB-24-2023 (O&M)

1. The present appeal arises out of a dispute between the parties whereby the appellant-Nigam had granted a contract to the respondent for commissioning and construction of 66KV Sub Station with GIS technology, Sector 43, Gurugram and 66 KV Sub Station with GIS technology, Sector 51, Gurugram and the scope of work was duly detailed therein. After the

completion of commissioning of the project, the payments were made to the respondent-claimant. However, there were deductions on various accounts and respondent-claimant alleged that several illegal and unauthorized deductions have been made from its bills and the payment of additional works has not been done by the appellant-Nigam. This led to the dispute, whereby respondent-claimant invoked the arbitration clause and Arbitral Tribunal was constituted.

2. The Arbitral Tribunal after adhering to the various provisions of law and assessing all the technical aspects passed a detailed impugned Award in the ratio of 2:1, on 18.12.2018 (Annexure A-1) and allowed certain claims of the respondent and disallowed few of them. The relevant part of the impugned Award reads as under:

14.01 *The final position against the claims is as under:*

<i>Sr.No.</i>	<i>Item</i>	<i>Amount payable by the respondent to the claimant Rs.</i>	<i>Amount payable by the claimant to the respondent Rs.</i>
1.	<i>Claim No.1 amount withheld on account of LD (para No.7)</i>	4,74,37,721,00	---
2.	<i>Claim No.2 deductions made by the respondent (para No.8)</i>	89,07,926,00	---
3.	<i>Claim No.3 Additional civil works</i>	--	--
4.	<i>Claim No.4 Expenses towards over run (para 10)</i>	--	--
5.	<i>Claim No.5</i> <i>i. Interest for pre-reference and pendent lite period (para 11.05.01)</i> <i>ii. Cost of arbitration para (11.05.02)</i>	<i>Simple interest @ 8.5 % p.a.</i> 75,000.00	-- --

14.02 *Total amount & interest awarded:*

(i) *The amount awarded is Rs.5,63,45,647/-(Sr.Nos.1 & 2 of table above). This amount is payable by the respondent to the claimant.*

(ii) *Pre-reference & pendent lite simple interest @ 8.5% per annum from 16.01.2010 till the date of award on the amount awarded at (i) above. The amount to be calculated by the respondent & paid to the claimant. (Sr.No.5 (i) of the table above).*

(iii) *Cost of arbitration Rs.75,000/-(Sr.No.5(ii) of the table above) is payable by the respondent to the claimant. No interest is payable on this amount.*

(iv) *The total awarded amount (the sum of (i)(ii) and (iii) above) should be paid within two months from the date of award failing which future interest @ 8.5%p.a.simple interest, on the total awarded amount from the date of award to the date of actual disbursement.*

3. Aggrieved by the said Award, the appellant-Nigam filed an objection petition under Section 34 of the Arbitration and Conciliation Act, 1996, read with Section 151 CPC (hereinafter referred to as 'the Act'), dated 20.05.2020, before the learned Additional District Judge, Panchkula, and the said objection petition also came to be dismissed on 24.03.2023.

4. By virtue of the present appeal, the appellant-Nigam has invoked the provisions of Section 37 of the Act, raising challenge to the Award passed by the Tribunal on 18.12.2018 as well as to the order dated 24.03.2023 passed by the learned Additional District Judge, Panchkula, whereby the objections also came to be dismissed.

5. At this stage, both the counsels have stated that the factual matrix as detailed in the Award are not disputed and hence the same are not being reiterated for the sake of brevity.

6. Learned counsel for the appellant-Nigam after taking this Court through the same has submitted that the deductions made by the appellant on account of delay in execution of the contract and commission of the sub stations was an admitted fact and hence, as per the contract, it was well within its rights to impose liquidated damages (LD). He further submits that the learned Arbitral Tribunal as well as the Appellate Court has failed to appreciate the same. Learned counsel for the appellant has argued that the first appellate Court has failed to record reasons for dismissing the objection petition and hence the same deserves to be set aside.

7. *Per contra*, learned counsel for the respondent-claimant has apprised this Court that in fact, the award as well as the order passed by the learned Additional District Judge, Panchkula, is absolutely clear and deals with every aspect of the matter. He further asserts that the order passed by the learned Additional District Judge, is absolutely valid and reasoned. More so, at the outset, he submits that the purview of this Court under Section 37 of the Act is extremely limited.

8. Learned counsel while reserving his argument qua the purview of Section 37 of the Act, has submitted that the Tribunal as well as the First Appellate Court has looked into all the 11 issues/claims, which have been clearly dealt with and primarily the issue is with regard to delay in execution of the project.

9. The Tribunal has considered the issues and the same are demonstrated by summarizing in the chart below:

(Only For the purpose of this Chart, the parties are referred to as they were nominated before the Tribunal).

Issue	Findings by Tribunal:
Delay in issuance of General Electric layout Drawing (GELO)	These changes are important & have definite impact on procurement of material, execution of civil works, and also resulting into delay in erection of sub-station equipment. The Tribunal is of the view that the GELO drawing supplied by the respondent was inadequate for proper execution of the project. 7.01.11Conclusion The respondent is responsible for delay in providing the GELO. Delay of 70days (09.01 2008 to 20.03.2008) is attributed to the respondent. The delay of 14 days has already been condoned by the respondent in respect of Sector 43 substation. Hence the delay on the part of the respondent is as under: Sector 43.....70 days (22.01.2008 to 20.03.2008). Sector51.....70 days (09.01.2008 to 20.03.2008).
7.02 Delay in issuance and final approval of Electric Control Room Building (CRB) Drawing.	The total delay in approval of CRB drawings of both sub-stations is as under: Sector 43 228 days Sector 51 322days The Tribunal has concluded that both claimant and respondent are equally responsible for approval of control room and GIS building drawings. The delay on the part of the respondent is as under:- Sector 43 114 days (09.01.2008 to 02.05.2008) Sector 51 161 days (09.01.2008 to 18.06.2008)
7.03 Delay in issuance of Formation Ground Level (FGL) for the site.	As per the approval procedure laid down in the contract, the respondent was to approve the topographical survey sheets and provide FGL two weeks after the resubmission i.e. by 17.03.2008. The approval was conveyed on 02.04.2008. Conclusion: The respondent is responsible for the delay of 15 days (17.03.2008 to 02.04.2008) for conveying approval of FGL.
7.04 Delay in approval of equipment drawings.	From the perusal of the above abstract, it is concluded that the maximum delay on the part of the respondent for approval of drawing of 66 KV CVT is 74 days. The claimant has attributed delay of 67 days (11.04.2008 to 19.06.2008) on the part of the respondent on this account. The same is allowed by the Tribunal.

7.05 Delay in inspection, dispatch instruction and issuance of road permits.	<i>The delay of 3 days (24.10.2008 to 27.10.2008)on the part of the respondent in inspection of proto is allowed.</i>
7.06 Delay arising due to site land dispute at Sector 43, Gurgaon.	<i>The respondent gave clear instructions on 11.06.2008 (R-22) for deferment of work of construction of boundary wall & capacitor bank in the disputed portion of the land & the claimant is satisfied with this. The claimant has attributed delay of 45 days to the respondent & the same is allowed by the Tribunal.</i> 7.06.09 Conclusions <i>Delay of 45 days ie (15.01.08 to 01.03.2008) is on the part of the respondent.</i>
7.07 Delay in availability of power supply at site by the respondent.	<i>The Tribunal concludes availability of power supply at Sector 51 as 08.07 2011 & commissioning of Transformers T2 & T1 as 13.07.2011 & 18.07.2011 respectively. Accordingly there is delay 871 (16.02.2009 to 08.07.2011) days by the respondent for making available the power supply. Both the transformers were commissioned by the claimant within 16 days of availability of supply.</i> <i>Since there was inordinate delay in the part of the respondent to make available 66KV power to the claimant at sector 51 substation, the respondent has issued deemed taking over certificate on 15.01.2010. There is no term as deemed taking over certificate in the contract The respondent had no alternative but to take over the sub-station without commissioning of the transformers. The claimant has agreed to the deemed taking over of the substation & attributed delay of 312 days (08.03.2009 to 15.01.2010) to the respondent. The Tribunal allows 312 days delay for making available power supply at Sector 51 substation.</i> <i>7.07.10 Delay on the part of respondent to make available the power supply at Substation 43.....262 days Substation 51.....312 days</i>

7.08 Levy of liquidity damages	<i>From the above table it is concluded that keeping aside the delay due to non availability of power at the sub-stations, the maximum delay on the part of the respondent is in approval of drawings of the CRB at both the substations. The matter is further discussed as under:</i> <i>(a) In respect of sector 43 substation, 114 days delay is maximum delay on the part of the respondent for approval of drawings for CRB. The other delays get included in the aforesaid major delay. Approval of CRB drawing is important as construction of CRB takes maximum time and without finalization of CRB the contractor cannot install indoor equipment resulting into delay in cabling & termination work The other delays viz approval of GELO, FGL issuance of Di site clearances etc get submerged into the said maximum delay of 114 days & have no cascading affect. The Tribunal allows benefit of 114 days to the claimant for completion of the substation sector-43. The contractual completion date of sector 43 substation is 08 03.09. Allowing benefit of 114 days to the claimant, the scheduled completion date of sector 43 substation works out to be 01.07.2009. The claimant, in the detailed project schedule, has indicated 3 days for handing over of substation Accordingly, the transformers should have been, commissioned by 28.06.2009. The power should have been made available by the respondent at least 10 days before i.e by 12.06 2009 as per detailed project schedule where as the supply was made available at 43 substation on 05.11.09. On the availability of power on 05.11.2009 the contractor should have commissioned the transformers within 16 days i.e by 21.11.2009 whereas the transformers T1 &T2 were commissioned on 26.11.2009 Thus there is delay of 5 days on the part of the claimant in the contractual completion of sector 43 substation. As per clause 14 of GCC, liquidity damages @ 0.5% are payable by the claimant to the respondent.</i> <i>(b) In respect of sector 51 substation also, the maximum delay is of 161 days on the part of the respondent for approval of drawings of the CRB. As discussed at (a) above, allowing 161 days delay on the part of the respondent, the contractual completion date of this substation works out to be 17.08.2009. The transformers should have been commissioned by 14 08.2009 & supply should have been made available at this substation latest by 29.07 2009. However the supply was made</i>
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	<i>available by the respondent on 08.07.2011 The transformers T2 & T1 were commissioned by the claimant on 13.07.2011 & 18.07.2011 respectively, within 16 days of availability of supply. As such there is no delay in scheduled commissioning of the substation & hence, no liquidity damages are payable by the claimant to the respondent.</i> 7.08.06 Conclusions <i>There is delay of 5 days on the part of the claimant for completion of sector 43 only. As per clause 14 of GCC read with clause 14 of SCC, the claimant is liable to pay LD @0.5% of contract price to the respondent. The respondent has deducted LD @10% amounting Rs.4,75,56,613/- from the bills of the claimant for both the stations whereas only Rs.1,18,892/- should have been deducted for Sector 43 Substation. The respondent is to refund Rs.4,74,37,721/- to the claimant.</i>
8.00 Claim No.2: Deductions made by the respondent 8.01: Deduction of Rs.53,40,926/- on account of size reduction of control room buildings at both the sites.	<i>The deductions of Rs.53,40,926/- made by the respondent from the bills of the claimant on account of reduction in area of the CRB & GIS block is not allowed.</i>
8.02 Deduction of Rs.27,67,000/- towards aluminum cladding on control room buildings.	<i>The deduction of Rs 27,67 000/- made by the respondent from the bills of the claimant on account of non provision of aluminum cladding is unjustified.</i>
8.03 Deduction of Rs.8,00,000/- against railing and other misc.items.	<i>The deductions of Rs.8,00,000/- made by the respondent from the bills of the claimant for non provision of the railing & fire protection wall are unjustified.</i>
<i>The claims qua additional civil work, expenses incurred by the claimant due to over run of the project and the cost of arbitration all were disallowed by the Tribunal.</i>	

10. The key issue involved in this appeal is only with regard to as to how much was the delay in completion and commissioning of the project and who is to be held responsible for the same.

11. This Court has gone through all the issues and conclusions arrived at by the Tribunal. Learned counsel for the appellant has not been able to demonstrate in any manner to controvert the finding of the Tribunal especially on account of the findings in para 7.07.10 of the impugned Award qua the delay of 312 days on account of not making available the power supply at the sub stations and the delay had been clearly attributed upon the appellant in the award. There is no accountability of the government officials who have acted in such a manner whereby the person who has to execute the contract has been deprived of his rightful claim for years together and ultimately the taxpayers' money is wasted in paying the interest to the contractor.

12. After considering the entire matter in detail, the Tribunal drew a conclusion that on most of the accounts, the delay occurred either due to the appellant and/or on few occasions, jointly attributable to the appellant as well as the respondent. However, the maximum delay which has occurred is on account of non commissioning of the project, which has been held to be attributable upon the appellant which is 312 days due to non supply of the power for 312 days. The Tribunal concluded that the delay to provide the power supply for commission of the sub station and its towers was 262 days for sub station in Sector 43 and 312 days for the sub station in Sector 51.

13. Learned counsel for the appellant has failed to controvert the said finding on any account, rather the Tribunal went on to hold the relevant dates to be admitted by both the sides. The only ground taken by the appellant is

that the respondent was given a deemed taking over certificate, however, counsel could not controvert that there is no such provision in the contract nor could deny the fact that the power supply had not been made available. Therefore, in the light of the above, the delay has been rightly attributed upon the appellant.

14. It is imperative to hold that the delay of 312 days on account of not making available the power supply at the sub stations, qua which the appellant has been held responsible has been proved beyond doubt. In the light of the delay of 312 days on this account, all other works and delays submerged in this issue only and have rather become inconsequential. Once it has been established and proved that the appellant itself did not adhere to the timelines, as stipulated in the contract and the cause of delay was due to their own act and conduct, the appellant was not within its rights to impose any liquidated damages for delay in completion of the project.

15. It is also important to record here that timely completion is essence of the contract but it has become a trend, visible in most of the government contracts that there is an inordinate delay despite the fact that the said contracts are by and large for the welfare of the people of the country. The delay as established is on account of the lapse of the appellant in the present case and subsequent deduction of liquidated damages is without any notice or without any cogent proof that the appellant suffered any loss, which has rightly been held to be illegal. Rather the government authorities need to introspect their own systems, as to who should be held accountable for the delay caused at the first instance and why the competent authorities did not abide by the procedure of law before deducting liquidated damages. It is the taxpayers' money that is to be paid to the respondent to which it is legally

entitled to, but the same being delayed and denied is causing further loss on account of interest to the State exchequer.

16. The Court while deciding the application under Section 34 of the Act noticed that the Managing Director had decided the issue of the design alteration, which was against the contractual provision and the fact that the machines could only be installed after the approval of the drawings. It also noticed that a physical visit was also conducted by the members of the Tribunal to come to the conclusion that there was no space provided for the additional items and the limitations of the Court to enter into the arena of technical specifications under the provisions of the Arbitration Act, in view of the fact that there was no perversity in the Award in question.

17. In view of the above, we do not find any merit in the present appeal and the same is hereby dismissed.

(G.S.SANDHAWALIA)
JUDGE

(ALOK JAIN)
JUDGE

AUGUST 31, 2023
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Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No