



2023:DHC:8563-DB



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

% *Date of Decision: 30th October, 2023*

+ **FAO (COMM) 216/2023**

UNION OF INDIA THROUGH ITS DY CE/C (USBRL
NORTHERN RAILWAY) Appellant

Through: Mr. Ankit Raj, SPC with Mr.
Shashank Shekher & Mr.
Rajnish Kumwar, Advs.

versus

RANI CONSTRUCTIONS PVT LTD THROUGH ITS
DIRECTOR SH G S PRASAD Respondent

Through: Ms. Richa Tiwari & Mr. Manoj
Shete, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

AMIT MAHAJAN, J.

CM APPL. 54515/2023

1. The present application is filed under Section 5 of the Limitation Act read with Section 13(1A) of the Commercial Courts Act, 2015, seeking condonation of delay of 73 days in filing the accompanying appeal challenging the order dated 12.05.2023 passed by the learned District Judge, (Commercial Court)-02, Central District, Tis Hazari Courts, New Delhi in OMP(Comm) No. 92 of 2023 (hereafter '**impugned order**'). By way of the impugned order,



the learned Commercial Court had dismissed the appellant's application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter '**A&C Act**'), challenging the arbitral award dated 01.09.2021 (hereafter '**the impugned award**').

2. In terms of Section 13(1A) of the Commercial Courts Act, any appeal challenging the order passed by the Commercial Court, is to be challenged within a period of sixty days.

3. It is an admitted case that the impugned order was available with the appellant on 31.05.2023. The reason for filing the appeal belatedly is mentioned in the present application and is set out below:

"3. That the certified copy of the Impugned Order dated 12.05.2023 was made available to the Counsel for the Appellant on 31.05.2023. The concerned officer of the Appellant thereafter requested to the counsel of the Petitioner to give the legal opinion about the effect of the Impugned Order, which took some time. Thereafter the file was put up to the competent authority for taking decision on the Impugned order award as to whether it should be challenged before the competent court of law or not. The file when to various table for examining and approval and finally the competent authority approved that the Impugned Order be challenged before the court of law. Accordingly, the concerned officer requested for allotment of an Advocate to prepare, file and pursue the Appeal before this Hon'ble court. All these inter-department steps consumed time and thus, delay has been caused, which is not deliberate."

4. The Hon'ble Apex Court, in **State of Maharashtra v. Borse Bros. Engineers & Contractors (P) Ltd. : (2021) 6 SCC 460**, has overruled the view taken by the Two Judge Bench of the Hon'ble



Apex Court in *N.V. International v. State of Assam* : (2020) 2 SCC 109, wherein the Hon'ble Apex Court had held that the delay in filing the appeal under Section 37 of the A&C Act, cannot be condoned beyond thirty days. However, the Apex Court also emphasised that it is clear from the reading the A&C Act and the Commercial Courts Act as a whole, that the object and context provided is the speedy disposal of the appeals filed under Section 37 of the A&C Act.

5. The Hon'ble Apex Court had interpreted the expression "sufficient cause" in the context of condoning delay in appeals filed under Section 37 of the A&C Act. It was held that the expression "sufficient cause" is not elastic enough to cover long delays beyond the period provided by the appeal provision itself and merely because the Government is involved, a different yardstick for condonation of delay cannot be laid down. Relying upon, the judgment in the case of *Postmaster General v. Living Media India Ltd.* : (2012) 3 SCC 563, the Court held that given the object of speedy disposal sought to be achieved both under the A&C Act and the Commercial Courts Act for the appeals filed under Section 37 of the A&C Act, a delay beyond the statutory period is to be condoned by way of an exception and not by way of a rule. In a given case where the party has otherwise acted *bona fide* and not in a negligent manner, a short delay beyond such period, in the discretion of the Court, can be condoned.

6. In the present case, it is apparent that no specific reason for not filing the appeal in the stipulated time has been pleaded in the present application besides the usual explanation that the file travelled to



various desks before the final decision to file an appeal was taken. The Hon'ble Apex Court has frowned upon following of such exercises by the Government departments. In relation to commercial disputes, it is settled law that the Court has to bear in mind that the opposite party may have acquired both in equity and justice, the rights due to inaction and laches on the part of the Government.

7. In the commercial disputes, each party has to be vigilant in exercising its statutory rights. It is not the case of the appellant that the officers concerned were not aware of the prescribed period of limitation for taking up the matter in appeal.

8. The Hon'ble Apex Court, in the case of ***Postmaster General v. Living Media India Ltd.*** (*supra*), had held that the Government cannot claim to have a separate period of limitation when the Department is possessed with competent persons familiar with court proceedings. The delay cannot be condoned mechanically merely because the Government or a wing of the Government is a party before the Court. The Hon'ble Apex Court had rejected the claim on account of impersonal machinery and bureaucratic methodology of making several notes in view of the modern technologies being used and available.

9. Therefore, unless a reasonable and acceptable explanation for the delay is provided, the same cannot be accepted. As held by the Hon'ble Apex Court, the Government departments are under such



obligation to ensure that they perform their duties with diligence and commitment.

10. Clearly, there is a long delay of seventy three days, which is beyond the period of sixty days provided for filing an appeal and there is no worthy explanation for the same.

11. The application is, therefore, unmerited and is dismissed.

FAO (COMM) 216/2023 & 54516/2023, 54517/2023 & 54518/2023

12. In view of the above, it is not necessary for us to examine the merits of the case, however, since submissions were advanced by counsel on merits, we have briefly examined the same.

Brief Facts

13. The respondent is private limited company incorporated in 1983 and is *inter alia*, engaged in providing the services of a contractor for the completion of projects. On 19.05.1987 a tender was published *vide* Tender Notice No. 74-W/8/47/WA (hereafter '**the tender**'), inviting bids for the sanction of the work titled "Earthwork in filling / cutting in formation, diversion of nallah, trolley refuges, construction of arch bridges No. 43 & 43A retaining walls, including protection works in zone No. E-9 from Km 11.755 to km. 12.045 on Jammu-Udhampur Rail Link Project" (hereafter '**the project**'). The respondent thereafter, submitted its bid on 02.07.1987 and on 18.12.1987 the respondent's bid was accepted.



14. The parties commenced the work on the project thereafter by entering into a Contract Agreement dated 03.03.1988 (hereafter '**the Contract Agreement**'). In terms of Clause 8 of the tender the project was to be completed within a period of 15 months. As per the Contract Agreement and its addendum dated 30.05.1991 the cost of the project was initially valued at ₹56,62,795/-, which was subsequently increased to ₹63,89,966/-. Clause 6 of the tender set out that the General Conditions of Contract Regulations and Instructions for Tenderers and standard forms of contract, 1971(hereafter '**the GCC, 1971**') were stated to be applicable to the project.

15. The present dispute arises, *inter alia*, out of the conduct of the respondents leading to a delay of 33 months that the appellant claims had taken place over and above the original 15 month as per the terms of the tender. The appellant claims that despite five extensions being given and provisions being made by the addendum dated 30.05.1991 wherein the value of the project was increased, the respondent was still unable to complete the project. The extensions granted were as follows:

1. First extension granted on 05.06.1989 to 30.11.1989;
2. Second extension granted on 30.12.1989 to 30.06.1990;
3. Third extension granted on 03.08.1990 to 31.12.1990;
4. Fourth extension granted upto 30.06.1991;
5. Fifth extension granted upto 31.12.1991;



16. It is claimed that the general conduct of the respondent during the term of the contract was not appropriate as incidents such as the procurement of a labour license in a timely manner was not done; work was being delayed *ab initio*; there was a delay in the submission of the Bar Chart as per Clause 19(3) of the GCC, 1971, which laid out the modalities of execution of the project and the general demeanor of the respondent wherein there was an insufficiency of machinery and work force at the project site and the respondent's absence on key dates such as the date of final measurement on 20.02.1992 etc had taken place.

17. The appellant rescinded the Contract Agreement on 04.02.1992 due to the aforementioned incidents occurring during the period within which the project was to be completed. As mentioned hereinabove, the respondent failed to appear at the site of the project on 20.02.1992 when a final measurement was taken. In terms of Sub-clause (a), (b) and (e) of Clause 62(1) of the GCC, 1971 a fresh tender inviting bids was published for the completion of the remainder of the project.

18. By a letter dated 15.05.1992, the respondent invoked its right to refer the present dispute to arbitration. This Court by its order dated 27.09.2005 directed the appellant to appoint an arbitrator in the matter. Both the appellant and the respondent thereafter submitted its respective statements of claims/ counterclaims. The composition of the Arbitral Tribunal was altered on multiple occasions. Finally concluding in Sh. Neeraj Jain being appointed as the learned Sole Arbitrator in the matter.



The Arbitral Proceedings

19. By way of its Statement of Claims the respondent sought five claims. First, the figure arising out of the final bill, amounting to ₹4,97,040/-. Second, escalation charges amounting to ₹18,26,972/-. Third, the respondent prayed for the release of the security deposit held by the appellant amounting to ₹1,50,000/-. Fourth, the respondent claimed the amounts it had to borrow at high rates of interest from banks and private money lenders, the respondent prayed for the award of Interest (Past, Pendente lite and Future) at the rate of 24% p.a. Fifth, the respondent claimed that ₹50,000 be awarded in its favour towards the costs incurred for the arbitral proceedings.

20. The respondent submitted that the delay in completing the project was not attributable to it. It claimed that the site conditions were entirely different than anticipated at the time of the bid for the tender; that there was a law an order issue in the state of Jammu and Kashmir and the curfews enforced due to that caused many hurdles in the project; there was no availability of borrow area; permission was not granted for the transfer of machines to Delhi for overhauling; drainage problems for bridges and delays in payments of RA Bills, escalation and the Final bill etc.

21. By way of its Counter Claim, the appellant prayed for the award of ₹23,96,491/- in its favour, taking into account that the tender for the project had to be rescinded which forced the appellant to invite bids for the project once again.



The Arbitral Award

22. Upon examining the Statement of Claim and Counter Claim of both the respondent and appellant respectively, the Arbitral Tribunal framed the following three issues to be decided:

- “a) Whether there were actually prevailing abnormal circumstances in the relevant period of time which could not have been anticipated by the contractor.
- b) Whether there was sufficient ground for the Railway to terminate the contract
- c) Whether the Railway are right in imposing Liquidated Damages based on ‘Risk and Cost’ on the contractor.”

23. The Arbitral Tribunal on the first issue analyzed that the reasons cited by the respondent namely unseasonal rains, roads getting slippery, silting up of the project site, and the law and order situation in the state of Jammu and Kashmir. The Arbitral Tribunal was of the view that given the original period within which the project was to be completed (15 months), the issue of unseasonal rain and the roads being slippery, could be sustained for a period of one year, however as the delay was over 48 months, rains should have been regarded as a recurring phenomenon. However, the Arbitral Tribunal did hold that the aspect of the law and order situation was one that could not be pre-meditated and hence were open to accept this as one of the



unforeseeable reasons for delay out of the four cited by the respondent.

24. On the second issue, the Arbitral Tribunal observed that there was in fact delay attributable to the respondent, however there were also irregularities with the grant of extensions given to the respondent by the appellant. In particular the respondent applied for an extension on 20.07.1991, and the extension was granted on 17.12.1991 for a period up to 31.12.1991. Thus holding that the appellant would be well within its rights to terminate the contract within the period of the fourth extension granted (before 30/06/1991), however their method and timing was not just.

25. On the third issue, the Arbitral Tribunal referred to Clause 62 of the GCC, 1971 which sets out the remedies available to the appellant in the case of 'Determination of contract owing to the default of the Contractor'. The remedies are two-fold, first, the appellant would be entitled to forfeit the security deposit either whole or in part as it considers fit and, second, the appellant was entitled to recover from the respondent the cost of carrying out the work in excess of the sum which would have been payable according to the certificates of the Engineer to the respondent under the terms of the contract agreement. Provided however that such recoveries shall be made only when the cost incurred is more than the security deposit proposed to be forfeited and is to be limited to the amount by which the cost incurred in excess exceeds the security deposit proposed to be forfeited.



26. The Arbitral Tribunal noted that the contract was terminated on 04.02.1992. The final measurements were recorded on 21.02.92 and the award of the tender for the residual works had taken place after a long delay of 30 months. The Arbitral Tribunal noted that there was no segregation of work as such and the additional work was not apparent, thus holding that the invocation of risk and cost provisions on the respondent is not justified or warranted.

27. The Arbitral Tribunal proceeded to award ₹3,00,567/- against the claim for the final bill amounting to ₹4,97,040/-, in keeping with the accepted quantities recorded by the appellant, duly nullifying the deductions due to income tax, and the amount deducted for desilting, for which there was no authentic basis. In terms of the claim over escalation charges and the price variation clause (PVC), the learned Arbitral Tribunal noted the language used in the grant of the extensions provided was ambiguous, finding that a grant of two extensions with PVC, then one extension without PVC and then another two extensions with PVC were unusual, furthermore, the implications of how the PVC is to be calculated in case of an interim period wherein no PVC is allowed were not spelt out in the contract, or the GCC, 1971. It was noted that Clause 17(4) of the GCC, 1971 lays down that invocation of the PVC unavoidably invokes a penalty either token or quantified. In the present matter no extension was granted with a penalty attached hence the Arbitral Tribunal held that there is a reasonable assumption that the appellant did not invoke Clause 17(4) of the GCC, 1971. Thus, the price escalation was



applicable for all extensions, to this effect, the learned Arbitral Tribunal awarded a sum of ₹2,04,189/- in favour of the respondent.

28. In terms of the claim of the security deposit, the learned Arbitral Tribunal held that the right for forfeiture of the security deposit was vested with the appellant. In terms of the claim of interest, the Arbitral Tribunal held that the appellant did not have a legitimate *lien* on the amounts due to the respondent barring the Earnest Money paid.

29. The learned Arbitral Tribunal thus, awarded the following amounts under the following heads:

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Cl. No.	Description	Amt Claimed Rs.	Amt Awarded Rs.
1	Final Bill	4,97,040	300567
2	Escalation Charges	18,26,972	204189
3	Release of Securities	1,50,000	0
4	Interest Past, Pendent lite and future	29,40,074	1133168
5	Cost of Arbitration	2,00,000	200000
Total award to Claimant			1837924
counter claims of the Railways		23,96,491	0
nett amount awarded of Claimant			1837924



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Findings

30. We have heard the learned counsel for the appellant at some length and have also perused the impugned award as well as the impugned judgment passed by the learned Commercial Court, thereby dismissing the application filed by the respondent under Section 34 of the A&C Act and we find no merit in the contentions raised by the appellant.

31. As noted above, the learned Arbitrator has identified and framed three issues in regard to the claims and counter claims raised by the parties.

32. The learned Arbitrator, after going through the evidence and the documents on record and also relying upon the provisions of GCC, 1971, had passed the impugned award in favour of the respondent.

33. In regard to the Claim for final bill, even though the claimant had made a claim for a sum of ₹4,97,040/-, the learned Arbitrator had awarded a sum of ₹2,78,750/- + ₹787/- being the Income Tax deducted and, + ₹13,946/- being the deduction made by Railway for desilting. Thus, a total sum of ₹3,00,557/- was awarded.

34. Even though the claimant had raised a grievance with regard to the *ex parte* measurements, the learned Arbitrator, however, accepted the measurements admitted by the Railways and awarded the same accordingly. The award, in that context, is based on the appreciation of evidence and has rightly not been interfered by the learned



Commercial Court.

35. In regard to the claim for escalation charges, the learned Arbitrator held that that the Price Variation Clause (PVC) is to be allowed during the period of extension. The learned Arbitrator considered the terms of grant of extension. It was noted that out of five extensions, the first two extensions were granted with PVC, then one extension without PVC and then the last two extensions were granted with PVC.

36. The learned Arbitrator noted that Section 17(4) of GCC, 1971 specifically provides that extension under the said Section can be granted with imposition of penalty. The learned Arbitrator also took note of the language of the letters granting extension to the respondent. It was noted that the extensions were granted specifically mentioning that the same was done without imposing any penalty and, thus, the same could not be held to have been granted in terms of Section 17(4) of the GCC, 1971.

37. We find no fault in the reasoning given by the learned Arbitrator. The interpretation of the contract falls with the realm of the learned Arbitrator.

38. The Court, while exercising jurisdiction under Section 34 / 37 of the A&C Act, is not to interfere with the award so long as construction / interpretation of the contract is a plausible one. The same is not to be interfered with for the reason that a different view could have been taken. Even otherwise, we agree with the view taken by the learned Arbitrator that the extension was not granted in terms of Section 17(4) of the GCC, 1971.



39. We agree that the extension given to respondent specifically provided that the price adjustment would be applicable for the extension of time except where extensions are granted under Clause 17(4) of GCC, 1971 and the claim for escalation could not have been rejected.

40. As noted above, the extensions were held to be not in terms of Clause 17(4) of GCC, 1971 and even though, the third extension did not specifically mention price variation during the extended period, the same was, however, held to be payable in terms of the provisions of the contract. The PVC was, therefore, held to be applicable for the full period of contract including the extensions.

41. The learned Arbitrator obtained the calculations from the claimant as well as the petitioner and awarded a sum of ₹2,04,189/-. The same, in our opinion, cannot be interfered with under Section 34 of the A&C Act.

42. In regard to the claim for the cost of arbitration, the learned Arbitrator noted that the claimant has revised the claim for cost from original ₹50,000/- to ₹2 Lakhs.

43. It was contended on behalf of the claimant that a sum of ₹50,000/- was claimed way back in the year 2006, however, due to delay in conclusion of the arbitration which was essentially on account of delay caused by the Railways, it was entitled for an enhanced claim.

44. The learned Arbitrator noted that there is no agreement between the parties which bars the amendment of the claim. The learned Arbitrator found the amendment sought by the claimant to be reasonable, considering that the proceedings had been protracted



largely due to the default and omission on part of the Railways.

45. The impugned award is supported by the reasons given by the learned Arbitrator. The view of the Arbitral Tribunal is a plausible one and cannot be interfered with. The cost of ₹2 Lakhs for a protracted litigation, which went on for almost 30 years is not unreasonable.

46. The counter claim raised by the Railways was rejected by the learned Arbitrator. The Railways had claimed a sum of ₹23,96,491/- as damages quantified on the basis on subsequent tender awarded by them to another agency to finish the work.

47. The learned Arbitrator refused to pass any award in that regard for more than one reason. It was noted that the work was awarded to another agency almost after two and a half years of terminating the claimant's contract; no notice was being given to the claimant about the risk and cost tender on this account; no separate schedule was kept for risk and cost works; the scope of fresh tender was larger than the balance work left over by the claimant.

48. The learned Arbitrator further found that the Railways' calculation for the risk and cost amount have been calculated on the basis on non-escalated rates of terminated contract whereas the calculation should have been based on the rates escalated up to the date of awarding a fresh contract.

49. The view taken by the learned Arbitrator cannot be within scope of Section 34 of A&C Act.

50. The dismissal of claim raised by the Railways cannot be held to be patently illegal or against the public policy. The appellant has not been able to point out any ground, which could lead to a conclusion



2023:DHC:8563-DB



that the view taken by learned Arbitrator was not a plausible view.

51. It is well settled that the Court, while exercising power under Section 34 / 37 of the A&C Act, does not sit in appeal to re-appreciate the evidence or substitute a view only for the reason that a different view could have been taken (In Re: *Associate Builders v. DDA*, (2015) 3 SCC 49; *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131; & *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.* (2022) 1 SCC 131.)

52. In view of the above, we find no merit in the present appeal.

53. The appeal is dismissed both on the ground of limitation as well as on merits.

AMIT MAHAJAN, J

VIBHU BAKHRU, J

OCTOBER 30, 2023

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