IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on: 25.03.2022*

\+ **O.M.P. (COMM) 273/2021 and IA Nos. 11808/2021 & 11810/2021**

IRCON INTERNATIONAL LIMITED ..... Petitioner

versus

GPT-RAHEE JV ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Suman K. Doval, Advocate
For the Respondent : Mr Gourab Banerji, Senior Advocate with Mr Anshuman Pande, Ms Gaurika Mohan and Ms Vishalakshi Singh, Advocates

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter **"Ircon"**) has filed the present petition impugning the Arbitral Award dated 19.12.2020 (hereafter the **"impugned award"**) passed by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter the **"Arbitral Tribunal"**).

Factual Background

2. On 10.02.2009, the East Central Railways under the Ministry of Railways through its Tender No. 22 of 2008-2009 awarded Ircon the

project of "*Construction of Steel Superstructure and Other Ancillary Works of Rail-cum-road Bridge Across River Ganga at Patna*" (hereafter the "**Project**").

3. Ircon, in turn, issued a Notice Inviting Tender (NIT) on 27.06.2008, in respect of works pertaining to "*Fabrication of 17 x 123 m + 2 x 64m triangulated steel bridge girders for new rail-cum-road bridge over river Ganges (Ganga) at Patna by setting up of field workshop on the Dighaghat end (South End) of river Ganges including leading of structural steel from Fatuha Stockyard, shop painting and trail assemble of one span of each type in the shop as a complete job*", arising out of the aforesaid Project.

4. The respondent was declared as the lowest bidder and accordingly, Ircon issued a Letter of Award (LoA) dated 22.08.2008 in favour of the respondent for execution of the aforesaid works, for a total contract value of ₹135.39 crores.

5. Subsequently, on 22.01.2009, the parties entered into a Contract bearing number IRCON/2044/Ganga Bridge/05 for "*Fabrication of 17 x 123 m + 2 x 64m span triangulated steel bridge girders for new rail-cum-road bridge over river Ganges (Ganga) at Patna"* (hereafter the **"Fabrication Contract"**).

6. Thereafter, on 27.03.2009, the parties also entered into a Contract bearing number IRCON/2044/Ganga Bridge/07 for "*Assemble, Erection/Launching of 18 x 123 m + 1 x 64m span triangulated steel girders for new Rail-Cum-Road bridge across river Ganga at Patna*

from Digha Ghat end (South End) including transportation of fabricated components of (17 X 123 m + 1 X 64m)" (hereafter the **"Erection Contract"**) for a total contract value of ₹107.08 crores.

7. The Fabrication Contract and the Erection Contract are hereafter collectively referred to as the **"Contracts"**.

8. In terms of the Fabrication Contract, the works were to commence on 22.08.2008 and were to be completed within a period of forty-two months, that is, on or before 21.02.2012. Admittedly, the respondent completed the said works on 30.09.2015.

9. In respect of the Erection Contract, the works were to commence on 18.02.2009 and were to be completed within a period of forty-five months, that is, on or before 17.11.2012. However, works in respect of the Erection Contract were completed by the respondent after a period of eighty-six months from the date of commencement of the said Contract, that is, on 30.04.2016.

10. The respondent claimed that there was a delay in completion of the works under the Contracts for reasons attributable to Ircon as a result of which, it had suffered financial hardships and incurred heavy losses. Ircon, on the other hand, claimed that the respondent was responsible for the delay in performance of the Contracts.

11. In view of the disputes between the parties, a meeting was held on 10.09.2015 and certain issues were settled as recorded in the Minutes of the Meeting dated 10.09.2015.

12. On 13.12.2016, the respondent executed a No Claim Certificate (hereafter **"NCC"**). Ircon states that in *lieu* of the NCC, all claims of the respondent were settled and thus, the respondent was precluded from raising any further claims.

13. However, the respondent by its letter dated 25.01.2018 raised additional claims for losses suffered by it due to Ircon's failure of performing its obligations in a timely manner under the Contracts. The respondent received no response to the aforesaid letter by Ircon. Thereafter, by a letter dated 27.03.2018, the respondent invoked the Arbitration Agreement and sought reference of the disputes to arbitration. The respondent claimed an amount of ₹50,95,18,949/- in respect of the Fabrication Contract and an amount of ₹35,26,10,345/- under the Erection Contract.

14. By the impugned award, the Arbitral Tribunal partly allowed the claims of the respondent. A tabular statement of the claims allowed by the Arbitral Tribunal under the Fabrication Contract and Erection Contract is set out below:

Fabrication Contract	
Claim No. 7 – Claim for idling costs incurred and extra works done by the claimant till the revised zero date i.e. 01.02.2010	₹1,78,00,000/-

Claim No. 8 – Claim for additional overheads due to prolongation	₹22,89,000/- [Modified to ₹2,41,37,864/- by the Arbitral Tribunal under Section 33 of the A&C Act]
Claim No. 10 – Claim for excessive interest recovered on mobilization advance	₹2,36,27,000/-
Claim No. 11 – Claim for costs of extension of bank guarantees	₹39,02,000/-

Erection Contract	
Claim No. 2 – Claim for unjustified recovery made on rectification of riveting work	₹18,50,000/- along with interest at the rate of 6% per annum from the date of the Final Bill.
Claim No. 7 – Claim for additional overheads due to prolongation	₹2,11,37,000/-
Claim No. 9 – Claim for refund of excess interest recovered on mobilization advance	₹1,49,35,750/-

Claim No. 10 – Claim for excess cost incurred by the Claimant in extension of bank guarantees	Nil [Modified to ₹35,59,764/- by the Arbitral Tribunal under Section 33 of the A&C Act]

Submissions

15. Mr. Doval, learned counsel appearing for Ircon has confined the challenge to the impugned award on three grounds. First, he submitted that the Arbitral Tribunal's decision to accept the NCC submitted by the respondent as conditional and not binding, is patently illegal. He submitted that the Arbitral Tribunal had grossly erred in not appreciating that the NCC was issued at a time when bulk of the payments had already been made. He submitted that almost 99.65% of the amounts payable under the Fabrication Contract were paid until 13.12.2016. Similarly, approximately 99.47% of the payments in respect of the Erection Contract were made by 13.12.2016. Thus, less than 1% of the total amount remained outstanding on the date on which the respondent had furnished the NCC. He contended that this clearly indicated that no economic pressure was exerted on the respondent by withholding the admitted amounts.

16. He further contended that even though the Arbitral Tribunal had concluded that the respondent was in need of funds, Ircon was not responsible for the respondent's financial condition. Therefore, the

Arbitral Tribunal's conclusion that the respondent was not precluded from agitating its claims notwithstanding the execution of the NCC, is manifestly erroneous.

17. Second, he submitted that the Arbitral Tribunal had grossly erred in awarding the claims regarding prolongation of work merely on the basis of a Certificate issued by a Chartered Accountant. The Certificate of the Chartered Accountant [Annexure C(F)-A-35] was denied by Ircon and therefore, it was necessary for the respondent to prove its contents. Additionally, the author of the said Certificate (Chartered Accountant) was not examined and therefore, the quantification of the claims awarded to the respondent on the basis of the said Certificate is without evidence. He submitted that the Arbitral Tribunal had also erred in not observing that Ircon had challenged the said Certificate. He stated that on the contrary, Ircon had not only denied the Certificate of the Chartered Accountant but denied the contents of the said Certificate as well.

18. Third, he submitted that the Arbitral Tribunal had grossly erred in awarding claims, which were premised on the basis of delay in completion of the works as the Arbitral Tribunal had concluded that both parties were responsible for the delay. He submitted that having found that the respondent was also responsible for delay in completion of the works, there is no question of awarding the respondent any compensation on account of such delay.

19. Mr. Gaurab Banerji, learned senior counsel appearing for the respondent countered the aforesaid submissions. He submitted that the covering letter under which the NCC was furnished to Ircon, clearly indicated that the respondent had executed the NCC involuntarily and, the same was not unconditional.

20. Next, he submitted that the Certificate of the Chartered Accountant was supported with voluminous documents including bills and vouchers establishing quantification of the amounts as reflected in the Certificate of the Chartered Accountant. He submitted that the said documents have not been filed by Ircon before this court but were part of the said Certificate [Annexure C(F)-A-35].

21. Lastly, he submitted that the Arbitral Tribunal had examined the question of compensation payable for delay in execution of the Contracts and had used the principle of apportionment. He stated that the same is permissible in law and therefore, the impugned award cannot be assailed on this ground.

Reasons and Conclusion

22. At the outset, it is relevant to note that although it is averred in the petition that the impugned award is contrary to the provisions of the Contracts; Mr. Doval did not advance any submissions in this regard. He confined the challenge to the impugned award to the three grounds as stated above.

23. Clause 49.5 of the GCC provides that in the event of any delay on the part of Ircon or the Engineer, the time for completing the Contracts would be reasonably extended but no damages would be payable to the respondent. Before the Arbitral Tribunal, it was contended on behalf of Ircon that no compensation on account of delay is payable to the respondent in view of the said Clause.

24. The interpretation of the said clause was debated before the Arbitral Tribunal. The respondent had relied on the decision of the Supreme Court in ***Asian Techs Ltd. v. Union of India & Ors.: (2009) 10 SCC 354*** in support of the contention that the exclusionary clause was required to be read in a restrictive manner and would not be applicable in case of a loss resulting due to an unreasonable delay. The respondent had also relied on the decision of the Supreme Court in ***Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age: (1996) 1 SCC 516*** and contended that such exclusionary clause would only bind the department and not the Arbitrator. Ircon had also relied upon certain decisions including the decision of the Supreme Court in ***Syed Israr Masood, Forest Contractor, Ret Ghat, Bhopal v. State of Madhya Pradesh: (1981) 4 SCC 289*** and ***Associated Engineering Co. v. Govt. of Andhra Pradesh & Anr.: (1991) 4 SCC 93***.

25. The Arbitral Tribunal had considered the aforesaid decisions and in addition also referred to other decisions including a decision of this Court in ***Simplex Concrete Piles (India) Ltd. v. Union of India: 2010 (115) DRJ 616*** wherein this Court had examined the validity of such

clauses in the context of Section 23 of the Indian Contract Act, 1872. After considering the controversy, the Arbitral Tribunal had concluded that Clause 49.5 of the GCC did not prohibit the Arbitrator from entertaining a claim in regard to compensation. The Arbitral Tribunal held that Clause 49.5 of the GCC would be applicable only in cases of reasonable delay. The Arbitral Tribunal held that the said clause would not be applicable where the delay is unreasonable and of a long duration. The Arbitral Tribunal held that in the present case, the delay was abnormal and therefore, the exclusionary clause (Clause 49.5 of the GCC) would not preclude the respondent from raising a claim for compensation. The Arbitral Tribunal was of the view that a 'Business Efficacy Test' was required to be applied while considering the exclusionary clause. In this regard, the Arbitral Tribunal drew strength from the decision of the Supreme Court in ***Nabha Power Ltd. v. Punjab State Power Corporation Limited & Anr.: (2018) 11 SCC 508.***

26. It is well settled that the question as to interpretation of a clause of a contract falls within the jurisdiction of an arbitral tribunal. The decision of the arbitral tribunal cannot be interfered with unless the same is found to be patently illegal or in conflict with the Public Policy of India.

27. In the instance case, the view expressed by the Arbitral Tribunal is a plausible one. It was accepted on behalf of Ircon that Courts have taken divergent views in respect of applicability and interpretation of exclusionary clauses. Clearly, the decision of the Arbitral Tribunal, accepting one view, cannot be construed as implausible or one that no

reasonable person can by any stretch of imagination consider to be implausible or one that no reasonable person would hold. Mr Doval has thus fairly not assailed the impugned award as contrary to the terms of the Contracts.

28. The contention that the impugned award is vitiated by patent illegality as the Arbitral Tribunal had accepted Ircon's contention that the Contracts were discharged by accord and satisfaction is unmerited. It was the respondent's case that the NCC was issued by it under economic duress and not voluntarily. Thus, one of the principal questions that fell for consideration before the Arbitral Tribunal was whether the respondent had furnished the NCC under duress or voluntarily.

29. Ircon had filed an application under Section 16 of the A&C Act on the ground that the Contracts were discharged by accord and satisfaction. The respondent had contested the same on the ground that it had furnished the NCC under duress. The covering letter under which the NCC was furnished also clearly indicated that the respondent did not intend to give up its claims. In view of the rival contentions, the Arbitral Tribunal had by an order dated 06.02.2019 rejected the application under Section 16 of the A&C Act. However, the Arbitral Tribunal had also observed that the question whether the respondent had furnished the NCC under duress or voluntarily, would be determined at the final stage.

30. A reading of the impugned award indicates that the Arbitral Tribunal had discussed the law on the subject and also examined the facts of the case. The Arbitral Tribunal noted that the respondent's claim was largely due to (a) prolongation of the Contracts; (b) claims arising in respect of measurement of certain items; and (c) claims on account of extra works. The respondent had communicated its grievance and had highlighted the issues on several occasions during the course of execution of the works. The parties had also attempted to discuss and settle the issues amicably. The Arbitral Tribunal noted that a meeting was held between the parties on 10.09.2015 to settle the issues. The Arbitral Tribunal was of the view that the decisions taken at the said meeting were voluntary and without any coercion. Thus, the issues that were settled at the said meeting could not be reopened. However, insofar as the issues that were not settled, it was difficult to accept that the respondent had voluntarily waived its outstanding claims which it was diligently pursuing with Ircon. Some of the claims that remained pending were specifically mentioned by the respondent in the letters dated 09.12.2016 (that is, barely four days prior to furnishing the NCC). The Arbitral Tribunal noted that even at that stage, the respondent had stated that it may have other claims which were under preparation. The Arbitral Tribunal also noted the following assertion made by the respondent in its letters dated 09.12.2016:

> "…..In this connection, we have now been advised to sign a "No Claim" Certificate in favour of IRCON as per the attached proforma. We are further given to understand that the due payments

will be released only after submission of the certificate."

31. In view of the above, the Arbitral Tribunal concluded that it was discernable from the letters that certain claims were under preparation and the respondent had clearly indicated that it would be preferring those claims. The Arbitral Tribunal was of the view that the NCC was required to be examined along with the covering letter under which it was sent. Apart from the above, the Arbitral Tribunal was also of the view that the respondent was in need of money and was facing financial stress and Ircon had withheld certain payments due to the respondent, in addition to levying liquidated damages. The findings of the Arbitral Tribunal in this regard are relevant and are reproduced below:

> "10.56 I am also of the view that the Claimant was in need of money and was facing financial stress. The amount payable to the Claimant at that time cannot be considered vis-à-vis the total amount of the contract and the amount which had already been paid, which was the contention of the learned Counsel for the Respondent. Ground realities as on the date of signing the NCC have to be looked into. The contract had been stretched for more than three years which is quite considerable having regard to the original time for completion of the project stated in the contract. Because of this prolongation, the Claimant felt that it was entitled to escalation amount in terms of Clause 59.3 of the contract. This prolongation had also contributed towards increase in overhead costs.

10.57 The Respondent had withheld certain payments and had also recovered amount on account of Liquidated Damages which the Respondent was ready to refund back only on signing of NCC. Threat of invocation of Bank Guarantees also loomed large. Under these circumstances, when the Claimant signed the NCC, in order to receive the payments of the amount which the Respondent had agreed to, it cannot be said that NCC was given voluntarily. Be as it may, as already mentioned above, covering letter dated 09.12.2016 itself states that the Claimant was signing as it was given to understand that payment would be released only after submission of the Certificate. The Claimant was, therefore, faced with Honson's choice – either to receive whatever is offered by signing NCC or to refuse to sign NCC and raise the claims. Latter alternative would have resulted in withholding the payment, non-refund of Liquidated Damages and even invocation of Bank Guarantees. All these could be part of the claims to be raised by the Claimant in that even along with other claims which the Claimant has raised now, making the Claimant to await the passing of the award by the Arbitral Tribunal. If the Claimant chose the first alternative by signing the NCC, but at the same time made it clear in the covering letter that it would be preferring some other claims, I am of the view that the singing of the NCCs cannot preclude Claimant from making further claims."

32. The contention that the Arbitral Tribunal has failed to appreciate that only a small fraction of the total admitted amount was payable by Ircon at the material time, is unpersuasive.

33. It is clear that Arbitral Tribunal had examined various facets of the disputes and has taken an informed decision. The scope of interference on the ground of patent illegality under Section 34(2A) of the A&C Act does not extend to re-appreciating the material before the Arbitral Tribunal and re-adjudicating the disputes.

34. The contention that the impugned award is vitiated by patent illegality as it is based on no evidence is also unmerited. It is necessary to bear in mind that the Indian Evidence Act, 1872 and the strict rules of evidence are inapplicable to arbitral proceedings. The Arbitral Tribunal is required to render a decision after evaluating the material placed before it.

35. In the present case, the respondent had supported its claim by furnishing a Certificate of an independent Chartered Accountant [Annexure C(F)-A-35]. A plain reading of the said Certificate indicates that it was accompanied by Statement of Administrative and other Overhead Expenses. Further, the concerned Chartered Accountant had also certified that he had examined the same from various books and accounts maintained by the respondent including vouchers, bank statements, bills, invoices, as well as other relevant supporting records and documents maintained by the respondent. The Arbitral Tribunal had accepted the said Certificate. Although, the author of the said Certificate

was not examined, the concerned officer of the respondent had produced the said Certificate and duly affirmed the quantification. As noted above, strict rules of evidence do not apply to arbitral proceedings and there is considerable discretion available with the Arbitral Tribunal to take a view on the quality and the sufficiency of evidence. The contention that the impugned award is required to be set aside on the ground that quantification of certain claims awarded in favour of the respondent is without any material, is unmerited.

36. Mr. Doval had earnestly contended that Ircon had denied the aforesaid Certificate as well as its contents. However, Ircon had not disputed the said Certificate apart from making a bald denial in the Statement of Admission and Denial. The petitioner also did not raise any specific objection regarding the reasonableness of the expenditure as mentioned in the Certificate of the independent Chartered Accountant including the Statement of Expenses forming part of the said Certificate.

37. As noticed above, the respondent's claim was premised mainly on account of prolongation of works. Admittedly, the respondent was present at site and had executed the works. It is obvious that the respondent had incurred expenses on account of administrative charges and overhead expenses during the period of prolongation of the works. If Ircon would have found any of the expenditure to be exorbitant or unreasonable, it was certainly open for Ircon to have raised that objection. The observation made by the Arbitral Tribunal to the effect that Ircon had not raised any specific challenge must be read in that

context. The said observation cannot be read to mean that Ircon had admitted the expenditure as claimed. It merely means that Ircon had not "*specifically laid any challenge to the details so provided*" by the respondent.

38. Lastly, the contention that the impugned award is vitiated by patent illegality as the Arbitral Tribunal has awarded claims on account of delay in completion of the works despite holding that the respondent was partly responsible for the same, is unmerited. The Arbitral Tribunal found that there were delays on the part of Ircon in handing over the site. The site was required to be levelled and the work of earth filling continued till March, 2009. The site for the first workshop after levelling was handed over in January, 2009 and the site for the second workshop was handed over by April, 2009. However, in terms of Clause 13 of the Additional Special Conditions of Contract (ASCC) read with its corrigendum, the site was required to be handed over within a period of 15 days from 06.09.2008. In view of the above, the Arbitral Tribunal concluded that there was delay in handing over of the site. The Arbitral Tribunal also found that there was inordinate delay in handing over of the GFC drawings. This was a fundamental obligation on the part of Ircon and the same was breached. The Arbitral Tribunal also held that the respondent could not continue certain preparatory work in the absence of the requisite drawings.

39. The Arbitral Tribunal accepted that there was certain delay on the part of the respondent as well. However, the Arbitral Tribunal concluded that the delays on the part of Ircon were in respect of "*critical*

aspects" and the said delays were dominant in prolongation of the works. The conclusion of the Arbitral Tribunal in this regard is set out below:

> "10.160. The Respondent has committed fundamental breaches in not providing site for construction of workshop etc. in time. Further there has been abnormal delay I providing good GFC for construction drawings. Delay was also caused because of change in drawings from time to time. Like-wise, absence of incorporation of strengthening provisions in the drawings too caused the delay. The timeless, as specified in the contract, were not adhered to. There were some other delays caused by the Respondent. It is also recorded that there were initial delays on the part of the Claimant as well as insofar as preparatory work is concerned as the signing of the contract itself was delayed due to non-submission of Performance Security, Bank Guarantee for mobilization advance, etc. An overall picture which emerges is that for significant part of the contract, there is contributory / concurrent delay on the part of Claimant as well which happened parallel during the project. However, certain delays occurred solely because of the non-fulfillment of obligations by the Respondent."

40. The Arbitral Tribunal is of the view that given that the parties had contributed to certain delays, it was essential to apply the principle of apportionment. After evaluating the reasons for the delay, the Arbitral Tribunal concluded that half of the delay could be apportioned to both Ircon and the respondent. However, for the remaining half, Ircon was solely responsible for the same. Therefore, only half of the claim made

by the respondent on account of idling costs was allowed by the Arbitral Tribunal. The relevant paragraph of the impugned award embodying the said conclusion is set out below:

> "10.171 Keeping in view all the aforesaid considerations, I am of the view that the Claimant would be entitled to the losses suffered by it because of certain fundamental delays on the part of the Respondent, but at the same time, the claim preferred by the Claimant to be reduced by applying the principle of apportionment because of the reason that to some extent, delays are caused due to the factors attributable to the Claimant itself. After considering the overall circumstances, the period of delay solely attributable to the Respondent is reduced to half, as for the other period, the Claimant is also liable and therefore, cannot take advantage. The Claims for compensation on the ground of delay are adjudicated on this yardstick."

41. This Court finds no infirmity in the approach of the Arbitral Tribunal. The contention that the same is contrary to law is unmerited. This Court is unable to accept that the impugned award requires any interference in this proceeding.

42. The petition is accordingly dismissed. The pending applications are also disposed of.

VIBHU BAKHRU, J

MARCH 25, 2022
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