



2025:DHC:4076



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

% Reserved on : 03.02.2025
Pronounced on : 19.05.2025

+ **O.M.P. (COMM) 60/2025, I.A. Nos. 2873-74/2025**

JAMMU & KASHMIR ECONOMIC RECONSTRUCTION
AGENCY

.....Petitioner

Through: Mr. Praveen Chauhan, Mr. Parth
Awasthi, Ms. Malvica Satija, Mr.
Sarbhak Swahney and Mr. Parth Sen,
Advocates.

versus

M/S SIMPLEX PROJECTS LIMITED

.....Respondent

Through: Mr. S.D. Singh, Mr. K. Prasad, Ms.
Swetha Sinha, Mr. Siddharth Singh
and Ms. Meenu Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The present petition is instituted under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter, referred to as the 'A&C Act') thereby seeking part setting aside of the arbitral award dated 13.07.2024 (hereinafter, '*impugned award*') delivered by the Arbitral Tribunal comprising of Sole Arbitrator (hereinafter, 'AT') in respect of Issue Nos. 1 and 2 as framed by the AT.

2. The impugned award came to be delivered in the context of Contract Agreement No. JKUSDIP Srinagar/UT/02 dated 02.04.2013 (hereinafter, '*subject contract*') which came to be executed between the parties in



consequence of Letter of Acceptance dated 06.03.2018 issued by the petitioner in pursuance of the respondent/claimant submitting its bid on 04.12.2012 against the petitioner's tender dated 15.10.2012 inviting bids for '*Construction of Multi-Storied Mechanized Parking Facility on MA near Lal Chowk, Srinagar*' (hereinafter, '*subject project*').

3. Pertinently, the scope of work under the subject contract also included the Operation & Maintenance (O&M) of the multi-level car parking for a period of three years from the date of the Defect Liability Period ending. It is the case of the petitioner that the stipulated dates of commencement and completion of the subject project were 06.05.2013 and 05.11.2014, respectively, and that the initial period of completion of the subject project was 549 days. On the contrary, it is the respondent/claimant's case that the stipulated date for completion of the said project as per the subject contract was 24.02.2015. Indisputably, the construction work was completed on 30.04.2017, after eight Extensions of Time (hereinafter, 'EOT') granted to the Petitioner.

DISPUTES BEFORE THE ARBITRAL TRIBUNAL

4. The respondent/claimant made various claims pertaining to the works in question. It filed its Statement of Claim (hereinafter, 'SOC') before the AT on 28.01.2023, which was responded to by the Counter-Claims filed by Petitioner along with its Statement of Defence (hereinafter, 'SOD') on 03.03.2023.

5. In its SOC, respondent raised 9 claims in all and the petitioner raised a total of 3 Counter Claims.



6. Of the 9 claims, the Respondent, did not press Claim Nos. 2 and 8, which consequently, were not dealt with by the AT in its award. Additionally, during the course of the arbitral proceedings, the Petitioner conceded Claim No 1, 4 and 6 and requested the AT to adjust the same from its Counter Claim of Liquidated Damages, that might be awarded in its favour.

7. Claim No 1 of the Respondent pertained to outstanding payments under various RA bills raised by it, amounting to Rs.1,44,85,305/-. Under Claim No.3, the respondent claimed a sum of Rs.2,25,12,541/- towards unpaid price adjustment/escalation, it claimed to be entitled to. Vide Claim No.4, an amount of Rs.43,08,586/- was claimed towards refund of the excess deduction of CWST made by the Petitioner. Vide Claim No.5, pertained to a reimbursement of Rs 1276387/- it claimed towards service tax, after the introduction of GST regime w.e.f. 08.07.2017. Claim No.6 pertained to return of security deposit/retention money amounting to Rs. 90,89,152/-. Claim No.7, amounting to Rs.2,93,98,658.05/- pertained to loss claimed to have been incurred on account of stoppage of work due to unrest in the Kashmir Valley for the period between 09.07.2016 and 09.11.2016. Additionally, the respondent claimed a sum of Rs.3,17,88,740/- towards interest on the claim amounts @ 12% per annum for the pre-reference period and pende-lite and future interest.

8. On the other hand, Petitioner raised three Counter Claims before the AT, namely; Counter Claim No 1 for Rs. 6,54,25,280/-, towards loss of earnings in the form of car parking charges potentially it could earn if the parking project was completed by the Respondent in the stipulated time.



Counter Claim No. 2 for Rs. 71,87,715/- pertained to idling of manpower during the period of delay and, Counter Claim No.3 for Rs. 4,20,42,924/- pertained to interest claimed @ 10% p.a. on the claim amount, for all three periods, namely, pre-reference, pendent-lite and future.

9. Besides the three Counter Claims, the Petitioner also defended the unilateral adjustment it carried out in the accounts to recover its claim of Liquidated Damages. It adjusted a sum of Rs 27514796/-, claimed towards Liquidated Damages, payable by the Respondent under Clauses 8.7 and 14.15(b) of the GCC, on account of delay in the completion of works, from the sums payable to the Respondent for the work done. As per Clause 8.7 of GCC, a sum equivalent to 10 % of the project cost was payable towards LD

IMPUGNED AWARD

10. AT framed and determined the following four issues/points of determination in its award, dealing with the Claims and Counter Claims:

- (i) *“First considering the Counter Claim of the petitioner for liquidated damages on account of delay of the claimant in performance of its obligations.*
- (ii) *Thereafter considering the claims No. 3, 5 and 7 of respondent;*
- (iii) *Thereafter considering the Counter Claim of the petitioner towards idling charges; and,*
- (iv) *Lastly considering the claims for interest and costs of arbitration proceedings. “*

11. During the course of the arbitral proceedings, the Petitioner conceded Claim No 1, 4 and 6 of the Respondent and requested the AT to adjust the same from its Counter Claim of Liquidated Damages, that might be awarded in its favour. Consequently, the AT dealt with the LD claim of the Petitioner, both in the form of Counter Claim raised by it, and the pre-



emptory adjustment of accounts carried out by it towards its LD.

12. AT rejected the adjustment carried out by the Petitioner towards its LD claim. AT held that the Petitioner did not make a counter claim before the AT, for adjudication of LD amount recovered by it by way of adjustment from the pending bills of the Respondent. AT was of the view that unilateral adjustment was not permissible and the Petitioner was legally required to get its LD claim adjudicated by the AT. In addition thereto, the AT interpreted Clauses 8.7 and 14.15(b) of the GCC to hold that the same were not a genuine pre-estimate of damages mutually agreed to by the parties, for it to qualify as LD. AT held that the abovementioned clauses were part of the standard form of contract adopted by the Petitioner with no evidence of any mutual estimation of damages carried out by the parties.

13. Similarly, the AT also rejected Counter claim No. 1 towards "Loss to Exchequer on account of Car Parking Charges" of the Petitioner holding that there was no evidence of any loss suffered by the Petitioner in the form of loss of parking charges earnings due to delay in the completion of project.

14. After having rejected the Petitioner's claim of LD and other losses suffered by it on account of delay, purely on the basis of legal principles governing LD, the AT did not consider it necessary to find out if the delay was attributable to the Respondent or not.

15. Consequently, AT awarded the contested claims of the respondent, i.e. Claims 3, 5, 7 in the following manner:

- Claim 5: AT noted that the petitioner did not deny their liability to pay to the respondent any additional amount which the respondent has had to bear on account of change in legislation i.e. the tax regime.



The only dispute between the parties was whether the rate of GST at relevant time was 18%, as claimed by the respondent or 12% as per the petitioners. Since the petitioner was not able to verify whether the respondent had paid GST@ 18% or not, the respondent was found entitled to claim no. 5 in the sum of Rs. 12,76,387/-.

- Claim 3: As regards Claim No. 3 for price adjustment, the AT, while noting that the EoTs granted were without price escalation, held that the respondent was estopped from making a claim for price escalation after completion of the project. Considering that the petitioner did not dispute its liability to pay Rs.15,50,306/-, any claim beyond that amount was declined.
- Claim No. 7: with the same was rejected on the grounds of lack of any evidence led by the respondent and the absence of any evidence of loss/costs incurred.

SUBMISSIONS BEFORE THIS COURT

16. The petitioner assails the impugned award on the grounds that the said award is patently illegal and against the terms of the subject contract. At the outset, learned counsel for the petitioner submitted that the petitioner restricts its challenge of the impugned award to Issue Nos. 1 and 2, i.e., in respect of whether the stated delay was attributable to the petitioner and the petitioner's entitlement to levy and recover liquidated damages under the subject contract.

17. As regards the first issue, it is the case of the petitioner that the commencement and completion of the subject project was stipulated for 06.05.2013 and 05.11.2014, respectively, however, the work actually



commenced on 24.08.2013 and was completed on 30.04.2017. Therefore, there was a delay of 1003 days, out of which concededly, the respondent/claimant was not responsible for 326 days, however, the remaining 677 days of delay were attributed to the respondent/claimant. In the meantime, it is stated that 8 EoTs were granted to the respondent/claimant by the petitioner, keeping in view the prevailing situation in the Kashmir valley and the related difficulties faced by the respondent/claimant. It is contended that the petitioner duly issued notices of non-compliance and delay in terms of Clause 15.1 of the General Conditions of Contract (hereinafter, 'GCC'), which were not acknowledged by the respondent. Consequently, in line with the decision of the Tender Approval Committee (TAC) held on 03.08.2017, the petitioner was constrained to impose LD of 10% of the final contract amount upon the respondent, as stipulated in Clause 8.7 of the subject contract, which expressly provided for damages at the rate of 0.05% of the final contract price for each day of delay, with a ceiling of 10%.

It is further pointed out that the AT has failed to adjudicate as to which party the delay was attributable to and it is contended that without delving into the same, the AT could not have fairly dealt with the question of LD, thus, there was a non-application of mind on part of the AT in terms of Issue Nos. 1 and 2.

18. Moreover, it is contended that the AT erred in concluding that, in the context of public contracts, government or government agencies do not suffer any loss or damage due to delays in construction. In support of his contention, reliance is placed on the decision of this Court in Cobra



Instalaciones Y Servicios, S.A. & Shyam Indus Power Solution (P) Ltd. v. Haryana Vidyut Prasaran Nigam Ltd.¹ which in turn relied on the decision of Supreme Court in Construction & Design Services v. DDA². It is further submitted that Clauses 8.7 and 14.15(b) of the GCC form genuine pre-estimate between the parties for relief and that the petitioner is entitled to damages even in the absence of proof of loss on the basis of the ceiling limit provided in the aforesaid clauses. It is stated that the AT has completely disregarded the fact that both parties had admitted that the project was delayed by 1,003 days, and that Clauses 8.7 and 14.15(b) of the subject contract specifically provided for the imposition of damages in the event of such delays.

19. *Per contra*, the respondent defends the impugned award and submits that it has been rightly held by the AT that no Counter claim related to liquidated damages was ever pleaded and that the petitioner attempted to merely unilaterally adjust it against the undisputed claims of the respondent, without taking the respondent's consent. It is also submitted that up till the subject project was completed and handed over, no LD was imposed and that the petitioner's stand of adjusting the LD against the admitted claims came for the first time at the stage of filing of the SOD and Counter claims.

20. It is further submitted that, for the sake of argument, if challenge against Issue Nos. 1 and 2 was to be considered, the damages contemplated under Clause 8.7 are in the nature of penalty and not liquidated damages, contrary to the petitioner's submissions. Attention of this Court is drawn to Clause 8.7 of GCC as well as Section 8 of the Particular Conditions of

¹ 2024 SCC OnLine Del 2755.

² (2015) 14 SCC 263.



Contract (PCC) (Part A – Contract Data), wherein in the case of delay damages, Clauses 8.7 and 14.15(b) are referred to and it is mentioned that the said delay damages would be charged at 0.05% of the final contract price per day and in case of previous milestones not being achieved during the subsequent milestones, the penalty will continue alongwith penalty for non-achieved milestones till it is achieved. Thus, it is submitted that the word “*penalty*” is specifically used in the context of damages under Clause 8.7.

21. Moreover, it is an admitted fact that 8 EoTs were granted by the petitioner to the respondent. However, it is the respondent’s case that the first 7 EoTs were granted without imposition of LD for the delay, and that the same resulted in condoning the delay as the alleged delay was beyond the control of the respondent due to the unrest and inclement weather in Kashmir Valley. The same was also duly communicated to the petitioner vide multiple letters/communications. Reference is specifically made to the 8th EoT, i.e., the final EoT granted, whereby, for the first time, a delay of 677 days was stated to be directly attributed to the respondent and liable for damages and an imposition of damages at the rate of 0.05% per day up to 10% of the contract amount was recommended. It is also pointed out that even in the 8th EoT, no loss was mentioned to be suffered by the petitioner which can justify the imposition of LD. While placing reliance on decisions of the Apex Court in Kailash Nath Associates v. DDA,³ Fateh Chand v. Balkishan Dass,⁴ and Maula Bux v. Union of India,⁵ as well as decisions of

³ (2015) 4 SCC 136.

⁴ 1963 SCC OnLine SC 49.

⁵ (1969) 2 SCC 554.



this Court in Sudershan Kumar Bhayana v. Vinod Seth⁶ and Vivek Khanna v. OYO Apartments Investments LLP,⁷ learned counsel submits that the petitioner cannot *ipso facto* be entitled to levy LD without proving loss on account of an alleged breach of contract. It is contended that it is the petitioner's case that damages were imposed on account of delay, however, nowhere in the pleadings were losses shown or attempted to be proved. It is also submitted that since the project is indisputably a public project, no damage/loss was suffered by the petitioner.

22. Lastly, it is submitted that the figure of 10% as stipulated in Clause 8.7 of the GCC was not pre-negotiated and agreed upon between the parties and it was in fact a standard clause. Therefore, the same cannot qualify as a genuine pre-estimate by the parties, as is essential to be established before awarding LD, in the absence of proof of loss. In support of his submissions, reliance is placed on Section 74 of the Contracts Act as well as decisions in Kailash Nath Associates (Supra) and Vivek Khanna (Supra).

23. In rejoinder, learned counsel for the petitioner draws the attention of this Court to the 2nd EoT granted by it to submit that it was clearly mentioned therein that delay in days attributed to the contractor/respondent shall be discussed in the final EoT. The fact that the EoT was admittedly accepted by the respondent precludes it from denying the said stipulation stated in the EoTs. Therefore, it is submitted that the respondent/claimant cannot claim waiver of damages for delay especially when the situation is already contemplated under the subject contract and the terms were agreed upon by both the parties when entering the said contract.

⁶ 2023 SCC OnLine Del 6097.

⁷ 2023 SCC OnLine Del 5792.



ANALYSIS AND CONCLUSION

24. In these proceedings the attention of this court is largely detained to examine if the rejection of the LD claim of the petitioner suffers from patent illegality of the kind making it susceptible to a challenge under Section 34. Rejection of the Claim No 3, 5 and 7 raised by the respondent have not been independently challenged by the respondent under Section 34, therefore are not examined by this court.

25. Issue No.1 & 2 framed by the AT pertained to the petitioner's ability to claim LD and consequent unilateral adjustment carried out by it to deny the respondent sums claimed by it under Claims No 1 , 4 and 6.

26. AT has extensively discussed the LD claim of the petitioner, examining it in the light of evidence produced by the parties and has rightly concluded that the Petitioner ought to have raised a counter claim to seek adjudication of its claim of LD based on Clause 8.7 of the GCC. Once the unilateral adjustment was objected to by the Respondent, it was incumbent upon the Petitioner to seek a declaration that the adjustment was legal and justified.

27. In Fateh Chand (Supra); Kailash Nath (Supra); Sudershan Kumar Bhayana (Deceased) Thr LRs Vs. Vinod Seth (Deceased) Thr LRs (Supra), it has been held that a clause in a contract enabling a party to claim LD only entitles it to claim the sum up to the LD amount mentioned in the contract subject to proving the actual loss suffered. The LD clause does not entitle a party to claim the whole LD sum automatically upon the occurrence of breach. In view of this settled position of law, the Petitioner's failure to raise



its LD claim as a counter claim and seeking a declaration that pre-arbitration adjustment carried out by it to unilaterally recover the LD amount, was illegal.

28. AT has rightly held that unilateral recovery of LD by way of adjustment of accounts does not dispense with the requirement of seeking adjudication from the AT regarding the claim. This Court does not find any legal anomaly in the reasoning of the AT in this regard.

29. However, it is seen that the AT has not rejected the Petitioner's claim for LD under Clause 8.7 of the GCC, merely because the same was not raised as a counter claim, but has rejected the same by way of a decision of Issue Nos. 1 and 2, where Petitioner's right to claim LD was a question framed by AT.

30. So, the Petitioner is not correct in contending that the rejection of LD claim was on the ground that the same was not raised as part of Counter Claims. The rejection is much beyond the aforesaid technicality, but is largely on the ground that Clause 8.7 of the GCC does not qualify as an LD clause, lacking in demonstration of it being a genuine pre-estimate of damages.

31. AT has held that there was no evidence produced to show that the said clause was a result of pre-contract negotiations between the parties to pre-estimate the losses and agree on a formula for the same. According to the AT, Clause 8.7 is part of a standard form the GCC adopted by the Petitioner with no say of the Respondent in rejecting parts thereof.

32. According to this Court, the AT interpretation of Clause 8.7 of the GCC is a plausible interpretation and is certainly not perverse or non



judicious. The interpretation may be a narrow and tight view taken by the AT of LD clause, contrary to a more liberal view, where such clauses have mostly not been doubted as a genuine pre-estimate of damages. However, in the present case, the AT expected the Petitioner to establish by leading evidence that clause 8.7 was indeed a genuine pre-estimate of likely damages that the parties mutually arrived at, specifically in relation to this very project. The AT refused to presume that a general clause like 8.7 could be applied as a genuine pre-estimate of damages for all types of projects regardless of the nature of project. It is seen that the Respondent had raised an objection to Clause 8.7 and had specifically alleged that the clause was in the nature of penalty rather than LD. In view of such objection, it was incumbent upon the AT to examine the clause on the basis of settled legal principles and rule one way or the other. The AT examined the evidence and ruled against the Petitioner.

33. It may be noted that as per law of damages evolved by courts in India, unlike UK, the Indian law does not recognise penalties as a measure of damages. The courts have therefore held that LD stipulated in contracts must not be in the nature of penalty but must be in the nature of a genuine pre-estimate of damages made by the parties. Reference is drawn to the judgments in BSNL v. Reliance Communication Ltd⁸ wherein the difference between penalty and LD cause in the following manner:-

47. According to Chitty on Contracts

“whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent

⁸ (2011) 1 SCC 394.



party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss.” (See Paras 26-126 of Chitty on Contracts, 30th Edn.)

The fact that damage is difficult to assess with precision strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trial.

48. According to the Law of Contract by G.H. Treitel (10th Edn.), a clause is penal if it provides for

“a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract.”

49. Lastly, the fact that a sum of money is payable on breach of contract is described by the contract as “penalty” or “liquidated damages” is relevant but not decisive as to categorisation.

Relying on the decision of Supreme Court in ONGC Ltd. v. Saw Pipes Ltd.⁹, and BSNL(Supra), a Division Bench of this Court in Pawan Hans Helicopters Ltd. v. Maritime Energy Heli Air Services Pvt. Ltd.,¹⁰ reiterated the difference between liquidated damages and penalty.

34. It is in view of the legal mandate laid down by courts that the AT, refused to presume Clause 8.7 to be one to be a genuine pre-estimate of damages, in the absence of any evidence produced by the Petitioner. For the said reason, this court does not find the AT’s decision illegal, let alone patently illegal. As stated above, there is no reason for this court to re-examine evidence and review the decision of the AT. It has already been held above, the view formed by the AT was consistent with the settled legal principles on LD hence, beyond reproach under Section 34 of the A&C Act.

35. Regarding the Counter claim No. 1 raised by the Respondent

⁹ (2003) 5 SCC 705

¹⁰ 2017 SCC OnLine Del 8773



pertaining to "Loss to Exchequer on account of Car Parking Charges", the AT as per its own interpretation based on evidence on record has concluded that Petitioner did not suffer any losses in the form of car parking charges earnings, due to delay in completion of the project.

36. AT further held that since no evidence had been led by any of the parties, it could not have been said with certainty that the delay in completion of construction of the Multi-storied Mechanized Parking Facility would necessarily cause loss to the public. AT noticed that no evidence was produced by the Petitioner in support of its claim except bald pleadings.

37. Petitioner has argued that the AT has wrongly observed that delay in construction of public facilities does not cause any loss to the owner of such facility. It is seen that the AT may have made such an observation however, its reason for rejection was lack of evidence produced by the petitioner. AT has noticed that no evidence was produced to show the amount of parking revenue that could have been earned. No evidence was produced in support of the assumption that the parking would have been utilised to its maximum capacity at all times. The AT felt that merely based on assumptions with no evidence to support the claim, the same could not have been entertained.

38. AT also observed that the petitioner has based its claim on the premise that the delay in completion of the project caused loss to the public exchequer. The AT noticed that the petitioner is a society registered under the Societies Registration Act and was not a department of the Government of Jammu and Kashmir, which is the custodian of public exchequer. The loss to the exchequer, assuming such loss was established with evidence, may have entitled the Government of J&K to claim such loss if it was the



claimant. There was no evidence produced by the petitioner to establish the link between the petitioner society and Government of J&K to show that the Petitioner could claim loss suffered by the Government exchequer.

39. Petitioner may feel that the AT ignored the obvious link between the Petitioner and Government of J&K, being a an agency of the Government, however, since AT is the master of the quality and quantity of evidence required by it to give its findings, it is the standard of proof that the AT demanded will prevail and not this court sitting in Section 34 jurisdiction.

40. Therefore, following the well etched-out law laid down in catena of judicial precedents, some of which are P.R. Shah, Shares and Stock Brokers Pvt. Ltd. vs. BHH Securities Pvt. Ltd. & Ors¹¹; Anglo American Metallurgical Coal Pty. Ltd. v. MMTC Ltd¹²; Associate Builders v. DDA¹³; Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd¹⁴, this court will not replace its own view over the view adopted by the AT based on appreciation of facts. There is no patent illegality committed by the AT in reaching a finding that Petitioner cannot claim loss allegedly suffered by the government exchequer, if any, that may have been proved.

41. As far as Counter claim No.1 is concerned, the AT has rightly rejected the claim on the ground that the said claim is in the nature of LD under clause 8.7 of GCC which restricts the claim on account of delays that Petitioner could claim to 10% of the total project cost. AT held that, Petitioner having already recovered the full LD claim under Clause 8.7 of the GCC, it could not have made an additional claim over and above the

¹¹ (2012) 1 SCC 594.

¹² (2021) 3 SCC 308.

¹³ (2015) 3 SCC 49.

¹⁴ (2019) 20 SCC 1.



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same.

42. AT rightly observed that the petitioner could not claim both LD in terms of the contract for delays, as well as compensation for loss in parking charges earnings, as an additional claim. According to this court, assuming, LD was a genuine pre-estimate of losses, the same would deem to include all losses on account of delay, which would include the loss of earnings from parking charges. In view thereof, Counter claim No 1 was not made out. This court does not find any legal anomaly in the reasoning adopted by the AT.

43. In view of the above, the award under challenge is beyond reproach on the grounds available under Section 34. Consequently, the petition is dismissed alongwith pending applications.

MANOJ KUMAR OHRI
(JUDGE)

MAY 19, 2025
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