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

Reserved on : 21.07.2023
% Pronounced on : 09.10.2023

\+ **O.M.P. (COMM) 165/2023**

IN THE MATTER OF:

IRCON INTERNATIONAL LIMITED ..... Petitioner
Through: Mr. Suman K. Doval, Mr. Hari Krishan Pandey and Mr. Preetpal Singh, Advocates.

versus

DELHI METRO RAIL CORPORATION ..... Respondent
Through: Mr. Tarun Johri and Mr. Ankur Gupta, Advocates

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of present petition instituted under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter, the *'A&C Act'*), the petitioner (hereafter, *'Contractor'*) seeks partial setting aside of the Award dated 22.11.2022 (hereafter, the *'impugned award'*) in relation to Claim Nos. 2, 3, 4 and 12 delivered by the Arbitral Tribunal (hereafter, the *'AT'*).

2. The impugned award came to be passed in the context of disputes

arising w.r.t the work of *'Supply, Installation, Testing and commissioning of Ballastless Track of Standard Gauge, Part-I Corridor of sections of Mukundpur-Lajpat Nagar (excluding) Line-7 in elevated and underground sections alongwith ballasted/ballastless tracks in Mukundpur Depot of Delhi MRTS Project of Phase-III'*.

3. The respondent (hereafter, *'DMRC'*) invited bids for the said work, which was awarded to the Contractor vide Letter of Award dated 17.02.2015 for a total contract value of INR 153,65,61,349/- + USD72,65,823/-. The Contract period was of 24 months with scheduled date of start as 23.02.2015 and scheduled date of completion as 22.02.2017. A formal Contract was also executed between the parties. The work was completed on 06.08.2018 i.e., after a delay of 18 months. DMRC had granted extensions of time (hereafter, *'EOT'*) for the entire prolongation of contract without levy of any liquidated damages.

DISPUTES BEFORE THE AT

4. The Contractor filed its statement of claims (hereafter, *'SOC'*) thereby raising as many as 12 claims. Claim Nos.2, 3, 4 and 12, that are in issue in the present proceedings, are extracted hereinbelow:-

Claim No.	Description of Claim	Amount
2(a)	Claim on account of extra Cost on increased Establishment Cost including Overheads, Salary of Regular and Contractual Staff, Inspection Vehicle hire Charges, etc. due to prolongation of contract	Rs.6,05,50,281.00

2(b)	Claim on account of extra cost due to payment of bank charges for repeated extension of Performances Bank Guarantee beyond stipulated completion date	Rs. 43,035.00
2(c)	Claim on account of extra cost due to extension of CAR and WC Insurance Policy	Rs.65,04,290.00
2(d)	Claim on account of Loss of Profit because of prolongation of contract	Rs.8,67,59,946.00
2(e)	Claim on account of Extra cost due to depreciation due to prolongation of contract period	Rs. 12,43,393.00
3	Claim on account of additional cost due to use of 04 bolt fastening system for radius beyond 700 mt.	Rs.1,28,87,297.00 & USD64,987.00
4	Claim on account of abnormal increase in quantity of track fastenings	INR 1,47,44,999.00 & USD64,987.00
12	Claim on account of Additional GST burden	Rs.56,40,553.00

5. The Contractor contended that under the Contract, DMRC was obligated under the Contract to provide the project site progressively. For the delay of 18 months in completion of the project, the Contractor laid the entire blame on DMRC. It was contended that DMRC not only delayed in handing over the project site but also unilaterally changed the design which

resulted in abnormal increase in quantities of Fastening System causing variation to the extent of 450-900%. Additionally, the DMRC, in deviation from Bill of Quantity (hereafter, *'BOQ'*), gave new bolt calculations as per which fastening for curve track radius above 1000 was to be fitted with two bolts and below 1000 to be fitted with four bolts. The Contractor submitted the Claim for variation in quantities of Item No.8 of BOQ vide its letter dated 31.08.2017 (amended by letter dated 12.11.2018). DMRC also asked the Contractor to execute certain non-scheduled items which were not part of the Contract. It was further contended that during the execution of the Project, GST regime came into force resulting in additional tax burden on the Contractor, for which Contractor raised claims with DMRC. DMRC agreed to reimburse @1.40% towards additional burden on account of GST for the work done beyond 01.07.2017.

6. DMRC contested the claims and filed its Statement of Defence (hereafter, *'SOD'*). It attributed delay in completion of the Project to the Contractor, for which it referred to the Monthly Progress Reports whereby the Contractor was repeatedly informed about the shortage of manpower and material on the Project site. The EOTs were granted without imposition of liquidated damages and with payment of price escalations in terms of Clause No.11.1.3 of Special Conditions of Contract (hereafter, *'SCC'*). Insofar as the aspect of the design was concerned, DMRC contended that the same was, as per clause 5.1 of General Conditions of Contract (hereafter, *'GCC'*), within the scope of the work awarded to the Contractor. The design was to be in conformity with the criteria of fastening system laid down by the Ministry of Railways which formed part of the Contract. The design proposed by the Contractor was subject to approval by the

Engineer/Employer, who could propose changes thereto as per the requirement of the overall design. It was contended that the change in design sought by the EIC was attributable to the Contractor. DMRC also challenged the variation of quantity of work under Item 8 of BOQ pertaining to "Supply of Track Fitting". It was contended that the BOQ rate for Item 8 were neither sought for by DMRC on the basis of number of bolts nor the same was quoted by the Contractor. The BOQ rates were differentiated for two sub-items namely for track with radius flatter than 1750 metres under BOQ Item 8.1 and for curved tracks under BOQ Item 8.2. Item 8.2 had further sub-items (a), (b), (c) and (d) for different radius of the curved track. According to DMRC, the actual variation in quantity from the BOQ quantity was only 6.55% for which payments have been made in line with Clause 12.5 of the GCC.

IMPUGNED AWARD

7. AT agreed with the Contractor and held that the time was the essence of the Contract. While considering Claim No.2, the same was sub-divided into 5 sub-claims as under:-

2(a)	Claim on account of extra Cost on increased Establishment Cost including Overheads. Salary of Regular and Contractual Staff, Inspection Vehicle hire Charges, etc. due to prolongation of contract	Rs.6,05,50,281/-
2(b)	Claim on account of	Rs. 43,035/-

	extra cost due to payment of bank charges for repeated extension of Performances Bank Guarantee beyond stipulated completion date	
2(c)	Claim on account of extra cost due to extension of CAR and WC Insurance Policy	Rs.65,04,290/-
2(d)	Claim on account of Loss of Profit because of prolongation of contract	Rs. 8,67,59,946/-
2(e)	Claim on account of Extra cost due to depreciation due to prolongation of contract period	Rs 12,43,393/-

While Claim Nos.2(a), (b) and (c) were partially allowed, Claim Nos.2(d) and (e) were rejected. While doing so, AT relied on Clause 8.3 of GCC as modified by Sl. No. 22 of SCC. AT further noted that the Contractor had sought EOT on four occasions and only when EOT was sought on the third occasion, the Contractor reserved its right for seeking compensation due to prolongation of Contract on ground of delay in handing over of stretches and taking over of works. On other occasions, no such right was reserved. Accordingly, while referring to Clause 4.4 of the Contract and Clauses 2.2 and 8.3 of the GCC, AT concluded that out of the 18 months of the period of prolongation, period of 12 months was without any financial implication as mutually agreed between the parties and thus the claim for

compensation with respect to those 12 months was rejected. However, considering the period of six months under the third EOT i.e., from 01.01.2018 to 30.06.2018, AT awarded proportionate amount under sub-claim Nos.2(a), (b) and (c). AT did not find any merit in the claims for loss of profit and extra cost claimed due to depreciation under sub-claim Nos.2(d) and (e). In concluding so, AT noted that the Contractor did not provide any cogent evidence for them.

8. Claim Nos.3 and 4 were taken up together for consideration as both pertained to Ballastless Track Fastening System. Claim No.3 related to change in design and Claim No.4 related to abnormal variation in the quantity of Ballastless Track Fitting System. AT observed that the claims related to deviation in quantity of Item No.8 in BOQ.

AT observed that under Clause 5.1 of the Contract, the design was in Contractor's scope, who was obligated to submit the same in accordance with Clause 6.3.2 of the Contract. The first technical design submitted by the Contractor on 03.06.2015 was found to be technically deficient with number of non-compliance issues as indicated by DMRC in its letter dated 08.06.2015 and a reminder dated 02.07.2015. The Contractor changed the complete design and resubmitted new bolt calculations vide its letter 19.09.2015. This aspect as stated in SOD was not specifically denied by the Contractor in its rejoinder. On the aspect of ETAG001 (European Guidelines), AT observed that the Contractor did not place any document on record evidencing its objection that the same did not form part of the Contract. AT also observed that vide its Procedure Order No.13, though the Contractor was asked to submit its point-wise reply to DMRC's second report dated 08.07.2015, a bunch of documents was filed without any point-

wise reply. AT further observed that the BOQ specified in the Contract was not based on the number of bolts to be used but was based on the radius of curve i.e., 1750 m and 500 m without specifying number of bolts to be used on curves. Thus, AT rejected both the claims.

9. While partially allowing Claim No.12 relating to additional GST burden, AT noted that the Goods and Services Tax Act came into effect on 01.07.2017. In its claim, the Contractor claimed 18% GST from August, 2017 to February, 2018 and 12% thereafter as per applicable GST rates on work contracts. AT noted that on claim being raised by the Contractor with DMRC, the latter was initially willing to reimburse @1.40% towards additional burden on account of GST after taking into consideration the taxes that were applicable and payable by the Contractor during the pre-GST regime which were subsumed in the post-GST regime, and also input credits availed by the Contractor. The Contractor had rejected DMRC's offer of 1.4% reimbursement, and the same was withdrawn by the latter. While referring to Clause 27(v) of the SCC, the AT concluded that though the contract price was not to be adjusted on account of change in taxes/duties/levies, GST being a new tax was not barred by the aforesaid clause. The Contractor was asked to submit documents related to filing of GST returns and deposit of GST on the invoices raised by DMRC. AT noted that the total amount of GST deposited matched with the calculation sheets of the Contractor, however, from the one-page statement submitted by the Contractor, the amount of input credit availed by it could not be substantiated. Resultantly, AT allowed the claim by awarding Rs.26,44,277/- towards the additional GST burden @1.40%. In total, AT passed an Award holding the Contractor entitled for a sum of

Rs.3,93,03,109/- towards various claims along with interest @10% per annum on the awarded sum from the date of the Award till payment.

10. DMRC has not challenged the Award and the entire award amount has been paid to the Contractor.

SUBMISSIONS BEFORE THIS COURT

11. It was contended on behalf of the Contractor that the partial rejection of Claim No.2 by AT suffers from patent illegality, inasmuch, AT while limiting the compensation to six months, returned a perverse finding that in seeking EOT on the first, second and fourth occasion, the Contractor had not reserved its right to seek compensation, which amounted to a waiver. AT wrongly relied only upon Section 55 of the Indian Contract Act, 1873 (hereafter, *'ICA'*) instead of reading it in conjunction with Section 73, ICA. The rejection of Claim Nos.3 and 4 is also hit by the vice of patent illegality. AT overlooked that the insistence of DMRC to use four bolts instead of two on certain curves was in departure from International and National practice. Further, AT failed to appreciate that Clause at S.No.31 of SCC had replaced the earlier Clause No.12.5(ii)(f). The replaced new provision provided that positive variations above 25% in *individual* or *group of items* would be considered for negotiation of rates. AT also overlooked that the replaced new clause had equated *group of items* with *individual items*. Contractor also called into question AT's finding w.r.t. Claim No.12 being patently illegal. It contended that GST ought to have been granted @12%.

12. DMRC negated Contractor's contentions and defended the impugned award. It denied that Clause 31 of SCC brought any change in Clause 12.5(ii)(a) of the GCC as contended by the Contractor. It further stated that

AT's conclusions are findings of facts which cannot be reappreciated by this Court under Section 34 of the A&C Act.

DISCUSSION & CONCLUSION

13. Contractor's entire challenge to the impugned Award is premised on the ground of 'patent illegality' which has been explained in plethora of decisions lastly being Delhi Airport Metro Express (P) Ltd. vs DMRC[1], wherein it was stated that:-

> *"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents*

[1] (2022) 1 SCC 131

which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."

14. Through Claim No.2, Contractor had claimed extra cost incurred due to prolongation of the project. As noted above, the Contract was delayed by 18 months for which, Contractor had sought four EOTs by way of four letters namely 17.02.2017, 12.10.2017, 26.12.2017 and 23.08.2018, which were granted by the DMRC.

15. Pertinently, DMRC granted EOT on all the four occasions without imposing any liquidated damages. Indisputably, the Contractor reserved its right to seek compensation only at the time of seeking third EOT vide its letter dated 26.12.2017, and in the earlier requests it did not claim any monetary compensation due to the extensions.

16. AT declined to compensate the Contractor for the remaining 12-month period holding that the Contractor had accepted EOT granted by DMRC without compensation and no right to claim the same was reserved by the Contractor, unlike the third EOT sought for the period 01.01.2018 to 30.06.2018. According to the Contractor, the AT committed a judicial error amounting to patent illegality in denying compensation on the ground that the Contractor had forgone its right to claim compensation for the extension sought on the other three occasions.

17. Contractor has referred to judgments in K.N. Sathyapalan vs State of Kerala[2], Asian Techs Ltd. vs Union of India[3], Bharat Drilling vs State of

[2] (2007) 13 SCC 43
[3] (2009) 10 SCC 354

Jharkhand[4] and Simplex Concrete Piles (India) Pvt. Ltd. vs Union of India[5] to contend that even though Clause 4.4 of the Contract and Clauses 2.2 and 8.3 of GCC prohibit the payment of monetary compensation in the cases of EOT however, the Contractor could still claim compensation under Section 73 of the Contract Act, in the event of breach of contract- which the DMRC did by not handing over the sites to the Contractor by the promised time.

18. According to this Court, the Contractor is not required to go as far as to invoke Section 73 of the Contract Act and the aforesaid judgments to assail the award, since the AT has rather recognised the Contractor's right to claim compensation regardless of prohibitive nature of Clause 4.4 of the Contract and Clauses 2.2 and 8.3 of GCC by referring to the judgment in Simplex Concrete Piles (Supra). AT's reluctance to award compensation stems from the Contractor's own waiver of the right to claim compensation, that happened in the first, second and fourth EOT sought by the Contractor, as opined by the AT. AT read the four extension letters sent by the Contractor and interpreted them to conclude that it was only the third one dated 26.12.2017, where the right to claim compensation was reserved. Therefore, according to the AT, out of 18 months of extension, only 6 months were eligible for compensation. The AT does return a finding of fact and interpretation of the contract clauses, in favour of the Contractor, to conclude that DMRC was responsible for delaying the progressive handing over of the sites to the Contractor.

19. The interpretation of the extension letters by AT, is very well within its judicial prerogative. It will be judicially inappropriate for this court

[4] (2009) 16 SCC 705
[5] 2010 (115) DRJ 616

sitting in this jurisdiction, to re-examine the evidence and re-interpret the same as per its own understanding. The interpretation adopted by the AT of the evidence is a plausible view and certainly not the kind that will call for any interference from this court.

20. Coming to Claim Nos.3 and 4, the same relate to deviations in the quantity of Item No. 8 of BOQ which read as under:

Item 8 Supply of Track Fitting

Item No.	Description of Items	Unit	Total Quantity	Rate in Indian Rupees (INR)	Rate in Foreign Currency	Amount in Indian Rupees (INR)	Amount in Foreign Currency
8.	Supply of Track Fittings						

Item 8.1 for Straight Track & curve having radius flatter than 1750m

Item No.	Description of Items	Unit	Total Quantity	Rate in Indian Rupees (INR)	Rate in Foreign Currency	Amount in Indian Rupees (INR)	Amount in Foreign Currency
8.1	For Straight Track & curve having radius flatter than	Set	160000				

	1750m						

Item 8.2 for Curved Track

Item No.	Description of Items	Unit	Total Quantity	Rate in Indian Rupees (INR)	Rate in Foreign Currency	Amount in Indian Rupees (INR)	Amount in Foreign Currency
a.	Fastening for curve track radius between 1750m to 1000m (including)	Set	1500				
b.	Fastening for curve track radius between 1000m to 500m (including)	Set	4500				
c.	Fastening for curve track radius between 500m to 300 m (including)	Set	19000				
d.	Fastening for curve track	Set	1500				

	radius less than 300 m						

21. AT rejected the claims by observing that the BOQ specified in the Contract was not based on number of bolts to be used but on the radius of the curve. AT also observed that the Contractor was unable to convince that the increase in number of bolts was due to the new design that the DMRC required the Contractor to follow. According to the AT, the DMRC's insistence on following ETAG001 (European Guideline) was never objected to by the Contractor at the time of design change suggested by the DMRC or that the same was not required. AT has further observed that even before the AT, the Contractor was unable to link the design change to the requirement of conformity with the European standard and the increase in the number of bolts.

22. Even otherwise, it is seen that in terms of Clause 5.1 of the Contract, the Contractor was responsible for submitting the design in accordance with Clause 6.3.2 of the Contract, which was subject to DMRC's approval. Design was submitted by the Contractor on 03.06.2015 and the same was found to be deficient by DMRC which was conveyed to the Contractor vide its letter dated 08.06.2015. It is observed by AT in the award that the Contractor did not challenge DMRC's comments on the design submitted by it and on its own re-submitted a new bolt calculation on 19.09.2015.

23. Be that as it may, the rates quoted in Item 8 of the BOQ are for quantities that are measured in metre length of the track of various radii. The quantities of individual items of the track fitting system was neither sought for by DMRC in the BOQ nor quoted by the Contractor when they

submitted their rates. It would not have been possible for the AT to order variation in quantities on account of increase in the number of bolts installed, due to the design change, as was claimed by the Contractor, since, the same may have been contrary to the BOQ. In any case, the AT has dealt with the claim in a judicial manner, referring to the contract provisions and the evidence produced by the parties.

24. At the cost of repetition, it is never enough to reiterate that under Section 34, the Court is not called upon to reappreciate evidence or correct the legal errors that the AT may have committed in appreciating the evidence or interpret the contract clauses or applying the law. There is no good reason, to interfere with the AT findings in relation to Claim No.3.

25. The last contention relates to Claim No.12 for non-grant of entire additional GST burden. AT while partially allowing the claim relied on Clause 27(v) of the SCC which reads as under:-

> *"Clause 27(v) - Change in Taxes/Duties: The contract price shall not be adjusted to take into account any increase or decrease in cost resulting from any changes in taxes, duties, levies from the last date of submission of the Tender to the completion date including the dote of extended period of Contract."*

26. AT allowed claim to the extent of 1.40% on account of the concession initially agreed to by DMRC. In the considered opinion of this Court, the AT had rightly relied upon the aforesaid clause which restricted the Contractor from seeking any adjustment in the Contract price either on the increase or decrease in cost as a consequence of change in tax duties/levies. In this regard, it is pertinent to note that AT also noted that the Contractor failed to provide any substantiation on the amount of input credit availed by it. This contention is rejected accordingly.

27. In view of the aforesaid discussions, the petition is dismissed.

(MANOJ KUMAR OHRI)
JUDGE

OCTOBER 9, 2023/*rd/ga*