

BEFORE SHRI SURESH CHANDRA
LAW SECRETARY AND APPELLATE AUTHORITY
MINISTRY OF LAW & JUSTICE, DEPARTMENT OF LEGAL AFFAIRS
ROOM NO. 404, 'A' WING, SHASTRI BHAVAN, NEW DELHI-110001

Appeal No. 16/LS/2012
LIMBS NO:545

IN THE MATTER BETWEEN:

The Chief Engineer, Military Engineer Services

Appellants

AND

National Projects Construction Corporation Limited (NPCC)

Respondents

APPELLATE AWARD

DATE : 23.09.2017

M/S Military Engineer Services, (hereinafter referred to as 'Appellants') has filed an Appeal No 16/LS/2012 on 04.09.2012 vide letter no. 980388/FAT/ARB/137/E8 (LZ) dated. 31.08.2012 before the Law Secretary & Appellate Authority under the provisions of Permanent Machinery of Arbitration (PMA) i.e. Clause X of office Memorandum No.4(1)/2011-DPE(PMA)-GL dated 12.06.2013 issued by Government of India, Ministry of Heavy Industries and Public Enterprises against award dated 16.07.2012 case No PMA/Dr.GR/04/2009 by Ld. Sole Arbitrator Dr. Gita Rawat in the matter between the Appellants and National Projects Construction Corporation Limited (hereinafter referred to as 'Respondents').



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2. Brief facts:

2.1 That the Appellants and Respondents entered into a contract bearing agreement no. CELZ/FAT/02 of 2003-2004 dated 30.07.2003 for "provision of OTM Accn for Rajput Regiment Centre (Phase-I) at Fatehgarh" for an amount of Rs 5,88,93,428.17. The allotted work was required to be completed in 5 phases, which was supposed to be commenced on 25.08.2003 and completed by 24.08.2005 as follows:

Phase	Months	Commencement	Completion
I	03	25 August 2003	24 November 2003
II	10	25 August 2003	24 June 2004
III	08	25 August 2003	24 April 2004
IV	18	25 November 2003 or very next day from the date of completion of all works under phase-I whichever is earlier	24 May 2005 or after 18 months from the actual date of completion whichever is earlier
V	13	25 July 2004 or after 01 month from the date of completion of all works under phase-II whichever is earlier	24 August 2005 or after 13 months from the actual date of completion of work whichever is earlier
Contract as a whole	24	24 August 2003	24 August 2005

2.1 During the contract period, the Appellants vide letter no. 980388/FAT/70/E8 (LZ) dated 23.08.2004 cancelled the contract with effect from 10.09.2004 on the ground that the Respondents had failed to proceed with the work with due diligence inspite of



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several warnings. However, the Appellants, in pursuance of a request made by the Respondents vide letter Ref. NZ/Comp Lucknow dated 29.12.2004, revoked the cancellation of the contract vide letter dated 03.02.2005 with effect from 22.02.2005. Thereafter, the Appellants again, cancelled the contract vide letter dated 01.07.2005 with effect from 16.07.2005 on the grounds that the Respondents had failed to recommence the work despite lapse of considerable time. Thereafter, the Appellants awarded the contract in question on 18.01.2006 on Risk and cost of the Respondents to other contractor as per the condition 54 of IAFW-2249 i.e. General Conditions of Contract and claimed Rs 2, 54, 52,567.00 from Respondents.

2.2 Thus, dispute and differences arose between the parties on account of demand of risk and cost payment to the tune of Rs 2, 54, 52,567.00 from the Respondents by the Appellants. And also on account of the wrong cancellation of contract in question by the Appellants as alleged by the Respondents. To settle the dispute, the parties went to the PMA and filed their claims and counter claims before the Ld Sole Arbitrator. Ld Sole Arbitrator after considering the claims and counter claims of the parties rejected the contentions of the Appellants who were claimants in the original arbitration and allowed the counter claims of the Respondents.

2.3 Aggrieved by the award dated 16.07.2012 of Ld Sole Arbitrator, the Appellants preferred this Appeal on 04.09.2012 vide cover letter no. 980388/FAT/ARB/137/E8 (LZ) dated. 31.08.2012 before the Law Secretary & Appellate authority. The then Law Secretary



and Appellate Authority Dr B.A. Aggarwal vide order dated 11.09.2012 nominated Dr S.S. Chahar, the then Additional Secretary to decide this Appeal. After the superannuation of Dr S.S. Chahar, the case was again remitted back to Shri P.K. Malhotra, the then Law Secretary and Appellate Authority.

- 2.4 Shri P.K. Malhotra, the then Law Secretary and Appellate Authority vide order dated 05.04.2016 nominated me (working as Additional Secretary) to decide this appeal. I assumed charge of Law Secretary 14.06.2016. Thereafter I conducted hearings in this matter on 14.02.2017, 29.04.2017, 24.06.2017 and 22.07.2017 and closed the proceedings with consent of the parties and took up the matter for pronouncement of award.
3. The Appellants challenged the award given by the Ld Sole Arbitrator *inter alia* on the grounds that the Arbitrator has erroneously concluded that the cancellation and conclusion of risk and cost contract invalid; that the grounds based on which the Arbitrator had declared the conclusion of risk and cost contract invalid were not raised by the Respondents in their pleadings before the Arbitrator; that the Arbitrator has travelled beyond the agreed terms and conditions of the agreement and thus misconduct the proceedings.
4. The Respondents while defending the award refuted the contentions of the Appellants and defended the award *inter alia* on the grounds that the award should not be set aside merely on the ground of an erroneous application of law or re-appreciation of evidence; that the Appellant is not entitled for payment of amount on account of the risk and cost contract invoked by the Appellants;



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that the Respondents had not committed breach of the contract; that the Appellants illegally terminated the contract and awarded the same to a private contractor on an exaggerated amount at a belated stage.

5. At the outset, I discuss the scope and power of this Appellate Authority while adjudicating the Appeal under the PMA guidelines. It is pertinent to mention that the Department of Public Enterprises, Ministry of Heavy Industries & Public Enterprises vide OM dated 11.04.2017, after referring to all the previous guidelines, provided the consolidated guidelines regarding the settlement of commercial disputes between Public sector Enterprises *inter se* and Public Sector Enterprises (s) and Government Department(s) through PMA in the Department of Public Enterprises. The relevant portion for purpose *inter alia* is as under:

"..... The Appellate Authority may decide the appeal/revision on merits and set aside or revise the award. The matter cannot be remitted back to the Arbitrator for reconsideration. The Appellate Authority will have the power to revise his/her own decision for rectification of an error or for editorial correction etc."

6. Moreover, the provisions of Arbitration and Conciliation Act, 1996 as amended are not applicable for arbitration conducted under PMA guidelines. Thus, it is apparent from the above guidelines that the Appellate Authority is not guided by the grounds mentioned in Section 34 of the Arbitration and conciliation Act,



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1996. The Appellate Authority can certainly relook the matter. Moreover, the arbitration agreement dated 02.04.2008 between the parties also categorically suggests that the parties to the dispute, if aggrieved by the award of the arbitrator, may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs.

7. It is also relevant to discuss the findings of the Ld. Sole Arbitrator in award dated 16.07.2012 before I decide this appeal on merits. The perusal of the award dated 16.07.2012 reveals that the Arbitrator while discussing the contentions of both the parties had noticed that, the contract dated 30.07.2003 was first cancelled on 23.08.2004 and the Appellants awarded the contract at the risk and cost of the Respondents on 18.01.2006 in violation of the conditions of the GCC. Hence the recovery of the same cannot be allowed. Arbitrator has also observed that if the Appellants wished to get the work done from the original contractor, i.e. the Respondents, they should have fixed another date for the completion of the work which they failed to do thereby breaching the various norms of the Risk and Cost contract.
8. I have heard the representatives of both the parties at length also perused the record summoned from the PMA. Hence, my findings as follows:
 - 8.1 With respect to the issue of breach of contract, the Arbitrator in her award dated 16.07.2012, has made the following observations:

"13.2 The claimant has claimed for the assessed/estimated cost to be paid to the contractor on the materialisation of the Risk and Cost contract.



For this purpose, I have to discuss the settled law of compensation for loss and damage caused by breach of contract. When a contract has been broken, the party who suffered by such breach, is entitled to receive compensation for any loss or damage caused to him hereby, from the party who has broken the contract. The damages for breach of contract are payable because the law imposes an obligation to perform the contract according to its terms. A failure to fulfil the said obligation causes injury to a party to the contract. Such injury must be redressed. Once a breach of contract takes place, the injured party has a right to ask for specific performance or to recover damages. He is thus entitled to recover the benefit of which he has been deprived by the breach. Risk and Cost contract shall be placed within a fixed period from the date of breach of contract."

Arbitrator has further observed:

"15.3 The contract was cancelled under Clause 54 of GCC to complete the left work at contractor's risk and cost. The Clause give the power to the claimant to claim the loss after work is finalised in this case. The claimant came for recovery of loss in anticipation which is against the terms of Clause 54."

8.2 Whereas, the Appellants vide letter dated 23.08.2004 cancelled the contract with effect from 10.09.2004 on the ground of slow



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progress in the completion of assigned work as per schedule, the relevant portion of letter dated 23.08.2004 reproduced as below:

*"3. Therefore, I Accepting Officer of the contract, on behalf of the Government, acting under the powers vested in me in terms and conditions- 54 of the General Conditions of contracts (IAFW- 2249) and without prejudice to any other right or remedy which shall accrue hereafter to the Government under the terms of the above said contract, hereby cancel your contract on account of your default and the said contract shall stand cancelled with effect from **16 July 2005.**"*

- 8.3 Thereafter, the Respondents vide letter dated 29.12.2004 requested the Appellants to revive the contract. The Appellants, in pursuance of the said letter, revoked the cancellation of the contract vide letter dated 03.02.2005 with effect from 22.02.2005. It is also noted that along with the request for revival of the cancelled contract, the Respondent also furnished an affidavit whose contents are reproduced as below:

"I, Rajendra Singh, son of Sh. Late Genda Singh Zonal Manager (NZ), NPCC Limited, Plot no. 67-68, Sector 25, Faridabad solemnly hereby confirm that:

- 1. The work of Provision of OTMACCN for Rajput Regimental Center (Phase-I) at Fatehgarh will be completed within 12 months from the date of recommencement of work.*



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2. *MES is at liberty to recover compensation as per revised agreement, if warranted and we have no claim on this account.*
3. *Escalations of prices in labour & fuel will be priced as applicable at the time of original date of completion and we will have no claim on this account.*
4. *If the progress of work is not satisfactory within one month of recommencement of work, MES is at liberty to cancel the work again. No claim, whatsoever, will be entertained on this account.*
5. *Request for change in the quoted contract rates will not be entertained in any circumstances before and after recommencement of work."*

8.4 In pursuance of the abovementioned request letter dated 29.12.2004 of the Respondents, the Appellants revoked the cancellation of the contract vide letter dated 03.02.2005 with effect from 22.02.2005. It is noted that despite the revocation of cancellation of contract, the Appellants vide letter dated 12.05.2005 again complained about the delay in execution of the assigned work. However, on perusal of the correspondences between the parties, no reply was found from the Respondents side to the letter of the Appellants dated 12.05.2005. Finally, the contract was cancelled by the Appellants vide letter dated 01.07.2005 with effect from 16.07.2005.

8.5 In the impugned matter, it is noted that the Appellants started complaining in delay in execution of work awarded to the



Respondents since September, 2003, i.e. soon after one month of the scheduled commencement of the first phase, i.e. 25.08.2003. This is evident from the letters dated 22.09.2003, 14.10.2003, 15.10.2003, 08.12.2003, 12.12.2003, 15.01.2004, 23.01.2004, 26.05.2004, 11.06.2004, 17.07.2004 and 19.07.2004 by the Appellants addressed to the Respondents.

- 8.6 It is pertinent to mention that the perusal of the record reveals that the Respondents did not respond to the communication of the Appellants regarding the delay in execution of the work. Further, the Respondents vide letter no. Proj/340/202/81 dated 04.11.2003 had cited that the reason for delay in commencement of the work which is reproduced as below:

"Kindly refer to above letter regarding commencement of work, I would like to draw your attention that initially the state of work was delayed due to heavy continuous downpour in this season which was above average in the last three decades, causes considerable damages to the main roads and culverts approaching to site. Hence even after placing the supply orders of construction materials well in advance, arrival of the same were delayed."

- 8.7 Thus, it is crystal clear from the correspondence of the Respondents that, neither did they raise the issue of late handing over of the site in their correspondence as mentioned above nor during the monsoon period did they apply for extension of time owing to heavy rainfall in that region in the stipulated time period mentioned in Condition 11 of GCC (IAFW-2249), i.e. within 30 days of the happening of the event. It is appropriate to mention



that even if we presume the Force Majeure did exist, the Respondents did not comply with condition 11 of GCC (IAFW-2249 and applied for extension of time within the stipulated time period. Further, the first correspondence regarding the approval of sample started from 18.10.2003 which is much belated from the date of actual commencement of the first phase, i.e. 25.08.2003. The reason for such delay is best known to the Respondent which they had miserably failed to highlight before the Ld Sole Arbitrator as well as to the Appellate Authority.

- 8.8 If we dwell upon the undertaking given by the Respondents as well as the Conditions of the GCC, the Appellants are well within their right to cancel the contract even before the actual date of completion if they found the work to be unsatisfactory as per Condition 54 of the GCC (IAFW-2249) relevant portion whereof is, reproduced as below:

"54. Cancellation of Contract in part or in full for Contractor's Default- If the Contractor

(b)in the opinion of the G.E. at any time, whether before or after the date or extended date for completion, makes default in proceeding with the Works, with due diligence and continues in that state after a reasonable notice from G.E."

- 8.9 Moreover, I do not find arbitrariness in the cancellation of the contract. I also disagree with the reasoning of the Ld Sole Arbitrator that the contract cannot be cancelled twice. It is well settled principle that the contract is the product of the consent of the parties and it is parties who stipulates the terms and conditions



of the contract. By way of those stipulations, they bound themselves and agree to abide by the same. The first cancellation was not revoked unilaterally, rather the parties arrived at *consensus ad idem* and thereafter, they revived the contract. I also observed that the Respondents had committed breach since the different phases prescribed in the contract were themselves constituting conditions precedent and breach thereof certainly invites the repudiation of the contract. Now the Respondents cannot step back from what they have agreed for with the Appellants. Further, regarding the payment of escalation prices of cement and steel, the Appellants had agreed as per the Clause no. 16 and 17 (Special Conditions) of the Contract agreement. Thus, one cannot travel beyond the express conditions of the contract. Hence, I find the argument of the Respondents regarding payment of escalation prices to be unpersuasive.

- 8.10 Thus, I reverse the finding of the Ld Sole Arbitrator and hold the Respondents liable for breach of the contract for construction of OTM provisions by delaying the work as well as not completing the work with due diligence.
9. On the issue of "Whether the risk and cost clause was validly invoked?" The Arbitrator in her award dated 16.07.2012 while deciding the issue related to proper invocation of risk and cost contract has as held under:

"The claimant has committed a default by breaching the various norms of the Risk and Cost contract. Since the Risk and



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Cost Contract is not valid. The claimant is not entitled for the recovery invalid Risk and Cost contract."

- 9.1 It is relevant to mentioned that the conditions precedents for invoking the risk and cost clause are envisaged in Condition 54 of the GCC (IAFW 2249). It means that the act of the contractor should come within the ambit of clauses (a) to (d) of the said condition. In the present matter and also as discussed above, the act of the Respondent did contravene the said conditions and thus, I disagree with the reasoning of the Arbitrator that awarding the work at the risk and cost of the Respondents is not valid and recovery of the loss of the same is also not valid.
- 9.2 Since, the risk and cost clause forms part of the contract and the Appellants had validly invoked the said clause i.e. Condition 54 of the GCC (IAFW 2249) after duly cancelling the contract after several letters and show causes as discussed above.
10. On the issue of relief the Arbitrator while deciding the claim of the Appellants for Rs.2, 39, 43,196.88/- regarding the payment of Risk and cost amount, had made the following observations, which are reproduced as below:

"...Since the Risk and Cost contract is not valid. The claimant is not entitled for the recovery invalid Risk and Cost contract."

- 10.1 I hereby allow the claim of the Appellants of Rs.2, 39, 43,196.88 as the Appellants can invoke the Risk and Cost clause as



prescribed in the Condition 54 of the GCC (IAFW 2249). The relevant para of said clause is reproduced as below.

" In case the Government completes or decides to complete the Works or any part thereof under the provision of this Condition, the cost of such completion to be taken into account in determining the excess cost to be charged to the Contractor under this Condition shall consist of the cost or estimated cost (as certified by G.E.) of materials purchased or required to be purchased and/or the labour provided or required to be provided by the Government as also the cost of the Contractor materials used with an addition of such percentage to cover superintendence and established charges as may be decided by the C.W.E. whose decision shall be final and binding."

- 10.2 The perusal of above clause also reveals that in context of the calculation of the cost of the work, completed on the risk and cost of the contractor, the decision by the C.W.E. (Command Works Engineer) shall be final and binding. It is settled principle of arbitration proceedings that when the parties by their contract excluded the jurisdiction of the arbitrator, the arbitrator should not step into deciding those claims. My reasoning is further fortified by the dictum of Hon'ble Supreme Court in the case of *Vishwanath Sood v Union of India & Anr.* (Civil Appeal no. 1524 of 1982) whose relevant portion is reproduced as below:

"Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of



which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in Clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words "except where otherwise provided in the contract" would become meaningless. We are therefore inclined to hold that the opening part of Clause 25 clearly excludes matters like those mentioned in Clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, therefore, is that the question of awarding compensation under Clause 2 is outside the purview of the arbitrator and that the compensation, determined under Clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator."

- 10.3 I set aside the finding of the Ld. Sole Arbitrator regarding the payment of the Risk and Cost amount.
11. Regarding the payment of Rs.23,55,737.13/-, I allowed the claim of the Appellants and set aside the findings of the Ld. Sole Arbitrator. It is already discussed that the Respondent committed breach in delay in completion of first phase of the contract in question.
12. Regarding the cost of the Arbitration I affirmed the view of the Ld. Sole Arbitrator.



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13. I allowed the rate of interest on the due amount i.e. Rs.2, 39, 43,196.88/- and Rs.23,55,737.13/- at rate of 6% per annum from the date of the pronouncement of the award i.e.16.07.2012 till the pronouncement of this Appellate Award. Thereafter, at the rate of 12% per annum till the complete payment is made.
14. With Respect to the counter claims no. 1,2 and 3 as per the award of the Arbitrator dated, 16.07.2012, the Arbitrator observed as under:

"The claimant has adopted his own procedures to run the contract not allowed by the GCC and respondents suffered the loss.

In view of the above, a lumpsum amount of Rs. 1,50,00,000.00 (Rupees one crore fifty lakhs only) is awarded to the respondent in Counter Claim No. 1,2 & 3 of the respondent."

- 14.1 However, considering the nature of the counter claims, I have already held the Respondents are liable for breach of contract and thus, I disallow counter claims no. 1, 2 and 3. I, therefore, set aside the finding of Arbitrator in context to these claims.

15. With respect to counter claims as under:

Counter Claim No. 4: Standing security (EMD)	Rs. 5,00,000.00
Counter Claim No. 5: Security deducted from bills	Rs. 3,90,492.00
Counter Claim No. 6: Amount due against materials lying at site	Rs. 4,61,210.00



Counter Claim No. 7:	Credit Schedule for dismantled materials	Rs. 23,150.00
Counter Claim No. 8:	Cost of miscellaneous materials lying at site	Rs. 4,89,220.00
Counter Claim No. 9:	Cost of materials lying at Sample Room	Rs. 3,890.00
Counter Claim No. 10:	Cost of Tools and Equipments	Rs. 1,23,300.00
Counter Claim No. 11:	Cost of Lab Equipments:	Rs. 21,020.00
Counter Claim No. 12:	Claim towards depreciation on cost of machines, tools and plants due to prolongation of contract	Rs. 11,04,233.00
Counter Claim No. 15	Refund of amount deducted on account of compensation against delay in completion of work	Rs. 1,70,914.80

15.1 In respect of the above stated claims, the Arbitrator observed as under:

*"In view of above I came to the conclusion that **contract was cancelled two times before the expiry of contractual period** i.e. completion period expired on **24.08.2005**. It was revoked on 3.2.2005 after a gap of 6*



months of the cancellation (i.e. 23.8.2004) and risk and cost contract awarded on 18.1.2006 i.e. after 16 months from the date of cancellation. When the risk and loss is not valid, the recovery of the loss of the same is not valid. Hence, the claimed amount of respondent should be released.

In view of above, the amount mentioned in Counter Claim No. 4,5,6,7,8,9,10,11,12 & 15 is allowed to the respondent."


- 15.2 I have already held the invocation of risk and cost contract valid and therefore, allow the Appellants to adjust Counter Claim no. 4, 5,6,7,8,9,10,11, 12 & 15. I agree with findings of the Ld. Arbitrator as regards these counter claims are concerned.
16. In respect of Counter Claim No. 13 and 14, I uphold the reasoning of the Arbitrator. Further in respect of Counter Claim No. 16 regarding the escalation due to the amount of Rs. 2,50,00.00/-, I do not find any substance which suggest undersigned that in what manner the Respondents had calculated this amount. Perusal of the Counter Claims also does not suggest any detail furnished by the Respondents with respect to the escalation due. As I had already held that parties are bound by the terms and conditions, therefore, the escalation prices are payable as per Special Condition no. 16 and 17 of the CA NO. CELZ/FAT/02 OF 2003-04. Thus, I disallow the counter claim no 16 of the Respondents and set aside the findings of the Arbitrator in context to counter claim no. 16.
17. Accordingly the claims and counter claims are decided.



18. In light of the above reasons, the Appeal is decided accordingly and the file may be consigned to PMA for maintaining the necessary records.
19. Both the parties are directed to comply with the Appellate Award.

Date: 23.09.2017

Place: Delhi


(SURESH CHANDRA)

o/c LAW SECRETARY AND APPELLATE AUTHORITY

To

1. Chief Engineer, Military Engineer Services Lucknow Zone, 17, Cariappa Road Cantt, Lucknow, Uttar Pradesh-226002.
2. Chairman cum Managing Director, M/S National Projects Constructions Corporation Ltd. Plot No.148, Sector-44, Gurugram-122003, Haryana.


(SURESH CHANDRA)

o/c LAW SECRETARY AND APPELLATE AUTHORITY

Copy to:

1. Secretary, Department of Public Enterprises for information.
2. Shri G.S. Yadav Sole Arbitrator, Permanent Machinery of Arbitrators(PMA),
3. LIMBS team for uploading.
4. Judicial Section for maintaining necessary records.