2025 INSC 138

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6657 OF 2023

M/s. C & C Constructions Ltd. ... Appellant

versus

IRCON International Ltd. ... Respondent

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. This appeal arises out of the impugned judgment and order of the Division Bench of the High Court of Delhi dated 1st March, 2021, which is passed in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Arbitration Act').

2. We refer to a few factual aspects of the case. An agreement dated 28th June, 2012 was entered into between the appellant and the respondent for constructing five Road Over Bridges (for short, 'ROBs') and their approaches at different locations in the State of Rajasthan. The schedule of completion in respect of each ROB was different. The locations where ROBs were to be constructed have been described as LC-200, LC-89, LC-228, LC-233 and LC-108. According to the appellant's case, the work at the sites was delayed for the reasons attributable to the respondent. According to the appellant's case, the

respondent withdrew the work relating to the construction of two ROBs (LC-200 and LC-233) from the scope of work and certified the completion of the remaining work. There is no dispute that we are not concerned with LC-200 and LC-233 in this appeal. In the case of LC-89 and LC-228, the scheduled completion date was 15th September, 2013. For LC-108, it was 16th July, 2013. As per the completion certificate dated 22nd March 2016, the work of LC-89 was completed on 8th October 2014, and the work of LC-228 was completed on 21st March 2015. According to the appellant's case, work at LC-108 was completed on 31st March 2017.

3. On 19th June 2013, the appellant addressed a letter to the respondent's General Manager stating that the construction delay of ROBs at LC-108 was due to various hindrances at the site. By the said letter, the appellant requested the respondent to grant an extension of 264 days. The appellant contended that the delay in construction work has resulted in an additional financial burden on account of the establishment and overheads, etc., for a longer period than planned, for which the appellant would be claiming separately. By the reply dated 14th October 2013, the respondent informed the appellant that the statement of the appellant that it would be claiming separately for financial burden was not acceptable. The respondent stated that the claim would have to be considered along with the prayer for extension. Therefore, the respondent requested the appellant to submit a detailed claim immediately so that the prayer for an extension of time could be considered. Separate letters dated 30th August, 2013 were addressed by the appellant to the respondent regarding LC-89 and LC-228 for grant of extension by 430 and 437 days, respectively. By a letter dated 29th

November, 2013, the respondent granted an extension of time as follows:

LC No.	**Extension Upto**	**Penalty**
228	20th March, 2014	With Penalty
89	28th February, 2014	With Penalty
108	31st March, 2014	Without Penalty

4. On 28th February, 2014, 09th April, 2014 and 19th April, 2014, the appellant again applied for a grant extension of time regarding LC Nos. 89, 228 and 108, respectively. By a letter dated 24th May, 2014, the respondent granted an extension of time as follows:

LC No.	**Extension Upto**	**Penalty**
228	31st January, 2015	Without Penalty
89	30th November, 2014	Without Penalty
108	15th December, 2014	Without Penalty

5. By letters dated 03rd September, 2014, the appellant submitted separate claims concerning the three ROBs for damages on account of the delay on the part of the respondent. By letters dated 14th October, 2014, the respondent rejected the claims. The appellant applied for further extension of time by letters dated 08th January, 2015. In response, the respondent addressed a letter dated 09th January, 2015 by which the appellant was called upon to give undertakings to the effect that the appellant will not claim anything extra other than escalation for the work executed. The appellant submitted undertakings on 14th January, 2015 accordingly.

6. The appellant invoked the arbitration clause on 25th January 2017. The appellant filed a statement making a claim for Rs. 44.11 crores under 15 substantive heads besides the claim of interest and costs. The respondent filed its statement of defence on 25th August, 2017.

7. The respondent filed an application under Section 16(2) of the Arbitration Act. It was contended in the said application that clause 49.5 of the General Conditions of Contract (for short, 'GCC') disentitles the appellant from raising any claim for damages or compensation for failure or delay caused by the respondent in fulfilling its obligations under the contract. The Arbitral Tribunal passed the order in the respondent's application under Section 16 of the Arbitration Act in nature of an award dated 21st December, 2019 by which all claims were rejected based on clause 49.5 of GCC.

8. Aggrieved by the impugned award dated 21st December 2019, the appellant preferred a petition under Section 34 of the Arbitration Act. The learned Single Judge of the High Court of Delhi dismissed the petition, holding that a term like clause 49.5 of the GCC would bar the appellant's claim. Moreover, the appellant had accepted the communication dated 14th October 2014, issued by the respondent dismissing the claim. It was also held that clause 49.5 was valid and, after the appellant accepted the same, it could not contend to the contrary.

9. Being aggrieved by the judgment of the learned Single Judge, the appellant preferred an appeal before the Division Bench of the High Court of Delhi by invoking Section 37 of the Arbitration Act. While

dismissing the appeal, the Division Bench held that the requirement of clause 49.5 was never waived by the respondent. The Division Bench held that clause 49.5 was a valid clause. After holding that the powers of the Court while dealing with an appeal under Section 37 of the Arbitration Act are limited by Section 34, the Division Bench dismissed the appeal.

SUBMISSIONS

10. The learned counsel appearing for the appellant has made detailed submissions. His first submission is that the award of the Arbitral Tribunal was contrary to public policy and suffered from patent illegality. The learned counsel also pointed out that the main issue was whether a clause prohibiting the payment of damages, like clause 49.5, could be enforced. He submitted that the Arbitral Tribunal and the learned Single Judge failed to appreciate the crucial aspects striking at the root of the award. The learned counsel pointed out various decisions of the Delhi High Court and this Court. After relying upon several decisions of this Court, he urged that the parties to the contract cannot contract against the Indian Contract Act, 1872 (for short, 'the Contract Act'). He submitted that the finding recorded by the Arbitral Tribunal that clause 49.5 aims to protect the interests of PSUs and the Government is illegal. He relied upon the decision of this Court in the case of ***Pam Developments Pvt. Ltd. v. State of West Bengal***[1]**.** The learned counsel submitted that the additional documents filed by the appellant ought to be considered. Therefore, the learned counsel appearing for the appellant submitted that the impugned judgments deserve to be set aside.

[1] (2019) 8 SCC 112

11. Learned counsel for the respondent submitted that clause 49.5 of GCC read with clause 12 of the Special Conditions of Contract (for short 'SCC') are limitation of liability clauses. These clauses are not in conflict with either Section 23 or Section 28 of the Contract Act. He submitted that if clause 49.5 of GCC and clause 12 of SCC are read together, it is apparent that in case of delay or fault on the part of the employer (respondent), a reasonable extension of time can be granted and payment of price variation as per the formula agreed between the parties in the contract itself can be made. Learned counsel submitted that this Court has consistently upheld the enforceability of limitation of liability clauses. He relied upon what is held in paragraph 10 of the decision of this Court in the case of ***ONGC v. Wig Brothers Builders and Engineers Private Limited***[2]. He submitted that the appellant made an irreversible election to accept the extension of time in terms of the agreed scheme of the contract between the parties without payment of liquidated damages. Therefore, the appellant is not entitled to make any additional claim for compensation and/or damages beyond the stipulations in the contract and contrary to the express prohibition in clause 49.5 of GCC. He pointed out the letters addressed by the respondent by which initially liquidated damages/penalty were imposed on the appellant for the delay. However, on the request made by the appellant, the respondent granted an extension of time by waiving liquidated damages. Therefore, the appellant made an irreversible election to accept an extension of time under clause 49.5 of GCC. He relied upon three letters addressed by the appellant in which the appellant agreed not to make any claim other than escalation against the respondent because of the delay on the part of the

[2] (2010) 13 SCC 377

respondent for which an extension of time has been sought. He pointed out that the claim for damages was raised two years after the date of the last extension. Learned counsel would, thus, submit that the appellant has lost its right to challenge clause 49.5 and therefore, no interference is called for with the impugned judgment.

OUR VIEW

12. We are concerned with three ROBs bearing numbers LC-89, LC-228 and LC-108. Clause 49.5 of GCC reads thus:

> "**49.5 Delays due to Employer/Engineer**
> **In the event of any failure or delay by the Employer/Engineer in fulfilling his obligations under the contract, then such failure or delay, shall in no way affect or vitiate the contract or alter the character thereof; or entitle the Contractor to damages or compensation thereof** but in any such case, the Engineer shall grant such extension or extensions of time to complete the work, as in his opinion is/are reasonable."
>
> (emphasis added)

13. Initially, by a letter dated 11th February, 2013, the respondent had imposed a penalty on the appellant for slippage of milestones and non-deployment of engineers. On 19th June, 2013, a letter was addressed by the appellant to the respondent in respect of LC-108 seeking an extension of time of 264 days as there were delays on the part of the respondent. The said letter mentioned that as the delay resulted in an additional financial burden on the appellant, they would claim it separately. Similar separate letters in respect of LC-228 and LC-89 were addressed by the appellant on 30th August, 2013. In the said three letters, the appellant invoked clause 49 of GCC for grant of extension of

time. Sub-clause No.5 of clause 49 is the only sub-clause in clause 49 which provides for extension of time on account of delay due to the respondent. By a letter dated 29th November, 2013, the respondent communicated to the appellant the decision regarding the grant of extension of time regarding LC-228, LC-89 and LC-108 till 09th April, 2014, 28th February, 2014 and 19th April, 2014 respectively. As stated in the letter, in the case of LC-89 and LC-228, the extension was granted subject to penalty. In the case of LC-89, the appellant addressed a letter dated 28th February, 2014 to the respondent requesting that an extension of time be granted till 30th May, 2014, without penalty. Similar letters were addressed on 9th April, 2014 regarding LC-228 and on 19th April, 2014 regarding LC-108, wherein a request was made to grant an extension of time till 31st January, 2015 and 15th December, 2014 respectively, without penalty. It is pertinent to note that in these letters, the appellant did not state that it would be making any claim on account of the delay on the part of the respondent. On 28th February, 2014, 9th April, 2014 and On 19th April, 2014, by separate letters, the appellant applied for grant of extension of time for all three ROBs without penalty.

14. By letter dated 24th May, 2014, the respondent approved the extension of time for LC-228, LC-89 and LC-108 up to 31st January, 2015, 30th November, 2014 and 15th December, 2014 respectively. The extension was granted without penalty. Thus, based on the requests made by the appellant, while granting further extension, the respondent waived the penalty.

15. Thereafter, on 03rd September, 2014, the appellant addressed three separate letters to the respondent raising monetary claims on

account of the delay on the part of the respondent. The respondent replied on 14th October, 2014 by separate letters. The letters are identical. For the sake of convenience, we are referring to the letter of the respondent in respect of LC-108, which reads thus:

> "The claim of Rs. 65696068/- is not at all admissible and acceptable. The time extension which has been granted to you without penalty is not at all basis of any claims as per clause 49 of General Conditions of Contract. As per clause No. 4.1 of Special Conditions of Contract your claims is not tenable. **The same was already discussed with you earlier and in response to that you had removed your lines of *"It is also to mention here that delay in work is resulting in additional financial burden on us on account of establishment and over heads and cost overrun etc., for a lengthier period than planned, for which we will be claiming separately"* from your request letter for extension of time. That time you were also agreed with it and re submitted your request letter without such lines.**
> **Once again you are requested to complete the work within the extended period and do not waste your time as well as our time in writing such type of false claims**."
>
> (emphasis added)

16. Thereafter, concerning the three LCs, separate letters were addressed by the appellant on 8th January, 2015, requesting the respondent to grant further extension. The respondent sent separate replies to these three letters on 9th January, 2015. In the said letters, the respondent informed the appellant as under:

> "Vide above mentioned letters you have requested for Extension of Time in respect of ROB in lieu of LC No. 89 (Dadi ka Phatak) up to 30.06.2015. **In this connection you are requested to kindly submit an undertaking that you will not claim anything extra other than escalation for work executed in the extended.**"
>
> (emphasis added)

17. Pursuant to the said letters, by three separate letters dated 14th January, 2015, in respect of the said three LCs, the appellant submitted undertakings in the following terms:

> "We, therefore, undertake that **we will not make any claim other than Escalation against the IRCON because of the delay in completion of which extension of time has been sought by us**."
>
> (emphasis added)

18. After giving the said undertakings, two years thereafter, on 25th January, 2017, the appellant made claims on account of delay on the part of the respondent, for which an extension was granted. The appellant invoked the arbitration clause on the basis of the said claims.

19. Considering the conduct of the appellant, the following conclusions can be drawn:

a) The appellant acted upon clause 49.5 and sought an extension of time on three occasions;

b) The claim in the letter dated 25th January, 2017 was made by the appellant after giving solemn undertaking on 14th January, 2015 not to make any claim other than escalation in respect of delays in the completion of work. The claim made was contrary to the undertakings;

c) By the undertakings, the appellant agreed not to make a claim contrary to what is provided in clause 49.5; and

d) Therefore, by conduct, the appellant was estopped from challenging the validity of clause 49.5.

20. At this stage, we must refer to the decision of the learned Single Judge in the petition under Section 34 filed by the appellant. The contentions raised by the appellant have been reproduced by the learned Single Judge of Delhi High Court in paragraphs 12 and 13 of the Judgment. Paragraphs 12 and 13 read thus:

> "12. Mr. Naveen Kumar, learned counsel for the petitioner has primarily submitted that the Tribunal has clearly erred in accepting the application of the respondent under Section 16 of the Act of 1996. **The Tribunal should have allowed the petitioner to produce evidence that the delay in discharging the obligations under the contract was clearly on the respondent and as such, the petitioner was entitled to the claims, which were in the nature of damages**.
>
> 13. **That apart, he has drawn my attention to various documents to contend that the respondent had by its own conduct, not adhered to Clause 49.5 of the GCC**. In support of his submission, he has drawn my attention to page 670 of the documents, wherein the respondent in its communication to the petitioner has stated for grant of extension of time, the petitioner's claims for additional financial burden has to be dealt together. In other words, the respondent has agreed with the claim of the petitioner for additional financial burden. Mr. Kumar has relied upon the judgment reported in ***MANU/SC/1620/2009, Asian Techs***

> ***Ltd. v. Union of India***, in support of his submission that de-hors a stipulation which bars a claim, still the Arbitrator can consider the aspect of delay and award the claim, if justified."
>
> (emphasis added)

21. No other submission made by the appellant has been noted in the judgment. The learned Single Judge firstly held that on the plain reading of clause 49.5 of the GCC, the claims made by the appellant before the Arbitrator were barred. Learned Single Judge held that having accepted the stipulation in clause 49.5, the appellant could not have contended otherwise.

22. Now, we turn to the impugned judgment of the Division Bench. The first contention raised by the appellant was that all 15 monetary claims could not have been summarily rejected by the Arbitral Tribunal exercising jurisdiction under Section 16 of the Arbitration Act, without giving an opportunity to the appellant to lead evidence and to prove that the claims were not barred by clause 49.5. Secondly, the appellant sought to rely upon clause 49.4. Another contention raised on behalf of the appellant was that clause 49.5 was waived by the respondent.

23. As the claims were hit by Clause 49.5 on its plain reading, there was no question of allowing the appellant to lead evidence. Clause 49.4 will apply when the delay is not due to the respondent. Admittedly, in this case, the delay was on the part of the respondent. Hence, clause 49.5 will apply and not clause 49.4.

24. Now, in this appeal, a contention has been raised that the validity of clause 49.5 ought to have been examined in the light of Sections 23 and 28 of the Contract Act, but the High Court has not examined the said issue. Careful perusal of the judgment of the learned Single Judge shows that the contention that the validity of clause 49.5 ought to be decided in the light of Sections 23 and 28 of the Contract Act was not raised before the learned Single Judge in a petition under Section 34. The said contention was not raised even before the Division Bench in appeal under Section 37. Therefore, it is not open to the appellant to raise the said contention in this appeal for the first time.

25. A contention was raised for the first time in appeal under Section 37 that clause 49.5 was waived by the respondent. Apart from the fact that said contention could not have been raised for the first time in appeal under Section 37 of the Arbitration Act, on the applications made by the appellant specifically invoking clause 49, the respondent granted an extension of time on more than one occasion. On this behalf, much capital was sought to be made about what is stated by the respondent in its letter dated 14th October, 2013. Though the said contention could not have been raised in an appeal under Section 37 still, we are examining the same. In the letter dated 14th October, 2013, the respondent stated:

> "Vide above mentioned letter, you have requested for extension of time for a total of 264 days. However, in, your letter you have mentioned as under:
>
> ***"it is also mentioned here that delay in work in resulting in additional financial burden on us***

on account of establishment and over heads etc., for a longer period than planned, for which we will be claiming separately"

For grant of extension of time, your claim for additional financial burden has to be dealt together with the proposal of extension of time. Hence, your statement that you will be claiming separately for additional financial burden is not acceptable.

Hence, you are requested to submit your detailed claim immediately so that your request for extension of time can be processed early."

26. By no stretch of imagination, after reading the said letter it can be inferred that clause 49.5 was waived by the respondent. In fact, the respondent stated that the claim for financial burden would have to be dealt with together with the proposal for an extension of time, and the said claim cannot be processed separately. Thereafter, on two occasions, on specific requests made by the appellant under clause 49 of the GCC, the extension of time was granted by the respondent. Except sub-clause 5 of clause 49, there is no other sub-clause which provides for grant of extension when the delay was attributable to the respondent. The extensions were granted at the instance of the appellant by invoking clause 49. Hence, the argument of waiver of Clause 49.5 by the respondent deserves to be rejected. Moreover, detailed claim, as stated in the letter dated 14th October, 2013 was not submitted by the appellant. Therefore, the Division Bench rightly found no merit in the said contention.

27. As far as scope of interference in an appeal under Section 37 of Arbitration Act is concerned, the law is well settled. In the case of ***Larsen***

Air Conditioning and Refrigeration Company v. Union of India and Ors.[3] in paragraph 15, this court held thus:

> **"15.** The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality i.e. that "*illegality must go to the root of the matter and cannot be of a trivial nature*"; and that the Tribunal "*must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground*" [ref : *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , SCC p. 81, para 42]. The other ground would be denial of natural justice. **In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34.**"
>
> (emphasis added)

28. In the case of ***Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking***[4] in paragraph 18, this court held thus:

> **"18.** At the outset, we may state that the jurisdiction of the court under Section 37 of the Act, as clarified by this Court in *MMTC Ltd.* v. *Vedanta Ltd.* [*MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , is akin to the jurisdiction of the court under Section 34 of the Act. [*Id*, SCC p. 167, para 14:"*14*. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37

[3] (2023) 15 SCC 472
[4] (2023) 9 SCC 85

cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision."] Scope of interference by a court in an appeal under Section 37 of the Act, in examining an order, setting aside or refusing to set aside an award, is restricted and subject to the same grounds as the challenge under Section 34 of the Act."

29. Considering the limited scope of interference, as laid down by this Court, we find absolutely no merit in the appeal and the same is accordingly dismissed.

.....J.
(Abhay S. Oka)

.....J.
(Ujjal Bhuyan)

New Delhi;
January 31, 2025.