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

Reserved on:24th April, 2024

% ***Pronounced on:15th July, 2024***

\+ **ARB. A.(COMM) NO.38/2019, I.A. 17 854-17855/2019**

GAE PROJECTS (P) LTD.
Registered Office at:
No.11, Railway Station Road,
Alandur, Chennai-600016.

..... Appellant

Through: Ms. Swati Bansal, Mr. R. Rangarajan and Mr. Arovind Gopinathan, Advocates.

versus

GE T&D INDIA LTD. (FORMERLY ALSTOM T&D INDIA LTD.)
Registered Office at:
A-18, First Floor,
Fiee Complex Okhla Industrial Area,
Phase II, New Delhi – 110020.
Also, at:
A7, Sector 65,
Noida – 201301,
Uttar Pradesh.

..... Respondent

Through: Mr. Sulabh Rewari and Ms. Mansvini Jain, Advocates.

\+ **ARB. A. (COMM.) 39/2019, I.A. 17857-17858/2019**

GAE PROJECTS PVT. LTD. ..... Petitioner

Through: Ms. Swati Bansal, Mr. R. Rangarajan and Mr. Arovind Gopinathan, Advocates.

versus

GE T&D INDIA LTD. (FORMERLY ALSTOM T&D INDIA LTD.)

..... Respondent

Through: Mr. Sulabh Rewari and Ms. Mansvini Jain, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

I.A. No.17855/2019 & I.A. No.17858/2019 (Condonation of Delay)

1. The applications under Section 151 of the Civil Procedure Code, 1908 have been filed on behalf of **the petitioner for condonation of delay of 138 days in re-filing of petition under Section 37 of the Arbitration & Conciliation Act, 1996.**

2. It is submitted in the application that the petition was filed on 27th May, 2019 which was within the limitation period, and defects were notified on 29th May, 2019. It is stated that the appellant's counsel was away in Chennai, and thereafter the summer vacation for this Hon'ble Court commenced. Further, the counsel was in personal difficulty, and consequently there was a delay of 138 days in removing the defects and refilling of the petitions. A prayer is, therefore, made that the delay may be condoned.

3. The **respondent by way of his reply** has opposed the condonation of delay of 138 days in refilling. It is stated that defects noticed on filing of the petition on 27th May, 2019 should have been cured till 01st July, 2019, but there is no explanation as to why no steps were taken by the petitioner to cure the defects within this period. Merely stating that the counsel was in

Chennai cannot be any reason or impediment on the part of the appellant to have removed the defects. Further, no condonation of delay application has been filed for the period between 31 October 2019 and the actual date or re-filing, i.e., 20 November 2019 or the further re-filings on 9TH and 12th December 2019. There is no reason given for delay in rectification of the defects at the time of refilling and the application is liable to be dismissed.

4. The respondent has placed reliance on the following judgments:

I. *Union of India v Bharat Biotech International Ltd*, 2020 SCC OnLine Del 483 (paras. 3, 6-7, 11, 16-22, 24-26)1.

II. *Oil and Natural Gas Corporation Ltd. v Joint Venture of M/s Sai Rama Engineering Enterprises (SREE) & M/s Megha Engineering & Infrastructure Ltd. (.MEIL)* 2019 SCC OnLine Del 10456 (paras. 37 -47)

III. *Delhi Development Authority v Durga Construction Co.*, (2013) 139 DRJ 133 [DB] (paras. 17-18 20-21 25-26).

5. In the present case, the petition had been filed within the limitation of ninety days. The delay in refilling as sought to be explained by essentially claiming that the counsel for the appellant was in Chennai and further personal difficulty of the counsel.

6. In *Competent Placement Services through its Director/Partner* v. *Delhi Transport Corporation through its Chairman*, 2011 (2) R.A.J. 347 (Del), the Division Bench of this Court held that though the rigors of condonation of delay in re-filing are not as strict as for condonation of delay but it does not mean that a party can be permitted an indefinite and unexplainable period for re-filing the petition.

7. Though the explanation given may not be very convincing, but it

cannot be overlooked that the initial filing had been done within time. In the light of observations made in *The Executive Engineer v. Shree Ram Construction Co., 2011 (2) R.A.J. 152 (Del)*, that justice requires that matters be decided on merits, the delay in refilling of the petition is hereby condoned.

8. The Application in both the matters, are accordingly allowed.

ARB. A.(COMM) NO.38/2019 & ARB. A.(COMM) NO.39/2019

9. The Appeals under Section 37(2)(a) of the Arbitration & Conciliation Act, 1996 (*hereinafter referred to as* "the Act") have been filed by the appellant against the Impugned Orders dated 26.04.2019 vide which the learned Sole Arbitrator has allowed the application under Section 16(2) of the Act and has terminated the arbitration proceedings.

10. Briefly stated, the applicant/claimant is a construction Company engaged in the business of carrying out civil, mechanical and electrical works, etc.

11. The respondent floated a Tender for performance of works at the facility of its client Cairn India Limited (*hereinafter referred to as "CIL")* at Barmer, Rajasthan for two categories of works namely Civil works and Electrical works. The appellant's bid was successful, and the two Tenders were granted. The *contract for Civil works, the total value of which was Rs.4,03,00,000.52, was awarded* to the appellant vide Purchase Order No.5427-4500688647 dated 12.112013. The Contract for *Electrical works was awarded* to the appellant vide Purchase Order No.5427-4500688647 dated 07.03.2014.

12. The appellant commenced execution of the Civil works under the

Civil Contract in December 2013. The work was performed successfully, strictly in accordance with the terms of the Civil Contract, approved drawings furnished by the respondent and such oral or written instructions as were given by the respondent from time to time. It is further submitted that certain works outside the scope of the Civil Contract were also performed by the appellant on the instructions of the respondent. Such works included fixing of handrails, gratings, fibre glass, PVC pipes, barbed wires etc. Also, the instructions and approved drawings were given for execution of quantities of items beyond the overall scope of the quantities specified in the Purchase Order dated 12.11.2013. Thus, two types of works constituted extra work in relation to the Civil work performed by the appellant, which was completed to the satisfaction of the respondent and its client CIL.

13. It is submitted that the disputes arose between the parties in respect of the two Contracts under both the Purchase Orders dated 12.11.2013 and 07.03.2014. The appellant filed *Arb. P.635/2017 before this Court under Section 11 of the Act* seeking appointment of the Arbitrator for adjudication of their disputes. The respondent had taken an objection about non-compliance of *Clause 23.2 of General Conditions of Contract (GCC),* which provided for referring the disputes in the first instance to the Project Manager, who in turn was to give a written notice of his decision to the Contractor within sixty days.

14. The petition was allowed vide Order dated 06.02.2018 with the observations that since the dispute pertains to two separate Purchase Orders, *they may be treated as two different petitions;* one in relation to Purchase Order relating to Civil works and the other in relation to the Electrical works, though a common Arbitrator was appointed for both the matters. The

various contentions of the parties were left to be agitated before the learned Arbitrator.

15. Learned Arbitrator entered into a reference in respect of both the Purchase Orders pursuant to which the *Statement of Claim was filed by the appellant/claimant seeking a sum of Rs.4,58,60,907.00/-* and *Rs.79,54,045.00/-* under various heads from the respondent, for purchase orders concerning civil works and electrical works respectively, in addition to the *Mandatory Injunction* for directing the respondent to issue the Completion Certificate to the complainant irrespective of the completed works.

16. The *respondent filed his Statement of Defence* and along with it *filed the application under Section 16 of the Act* claiming that the learned Arbitrator had no jurisdiction to entertain the arbitration proceedings. It was asserted that the alleged disputes raised by the claimant were settled between the parties under the Settlement Agreement dated 23.01.2015 **Ex. R-2** so arrived at between the parties pursuant to the meeting held on 23.01.2015 at Noida office of the respondent in which the Authorized Representative of the appellant as well as the respondent had participated actively, and no dispute thus survives between the parties to be referred to the arbitration. Moreover, all the disputes that existed between the parties were first required to be raised in terms of the Settlement Agreement. It was further claimed that the Settlement Agreement dated 23.01.2015 did not contain any Clause for resolution of the disputes through arbitration. A *prayer was, therefore made that the arbitral proceedings were beyond the jurisdiction of the Tribunal.*

17. It was further asserted in the Application that the appellant herein

subsequently attempted to unilaterally and illegally resile from the Settlement Agreement by addressing a letter dated 17.02.2015 **Ex. C-47** to the respondent, wherein the claimant characterized the Settlement Agreement as "*unfair demand thrusted upon us and stated that due to the alleged failure of the respondent to depute its representative to the site, the claimant was unable to perform the work on the punch points and the delay in completing the punch points was on account of the respondent*". The respondent thus, contended that the learned Arbitrator had no jurisdiction to continue with the arbitration proceedings.

18. The *Application under Section 16 of the Act was contested by the appellant/claimant* who reiterated that the disputes raised by it were covered under the two Purchase Orders for Civil Work and Electrical Work respectively and that these Contracts do not stand superseded by the subsequent Settlement Agreement dated 23.01.2015. It was asserted that the two Purchase Orders continued to be valid and in force for the disputes arising under the two Contracts which contained the Arbitration clause. The claimant denied that the Settlement Agreement was subsisting or valid or binding on the parties. It was reiterated that only the Contracts under the two Purchase Orders were the valid and binding Contracts and the claimant had the right to resort to arbitration for resolution of its disputes.

19. The claimant further claimed that once the *Statement of Defence had been filed by the respondent along with the Counterclaim*, the Application under Section 16 of the Act filed by the respondent, was not maintainable. It was further asserted that the objections under Section 16 of the Act was raised for the first time only on 19.11.2018 along with the Statement of Defence after three dates of hearing and thus the application was not

maintainable.

20. The appellant/claimant further asserted that the Agreement dated 23.01.2015 was executed under coercion/force brought upon the Claimant by the respondent and the Settlement was expressly repudiated by the claimant vide letter dated 17.02.2015. The letters and emails issued by the respondent and payments made thereafter show that the respondent accepted the repudiation. The Settlement Agreement ceased to have force and thus, Arbitral Tribunal had jurisdiction to entertain the disputes between the parties in respect to the two Purchase Orders. It was submitted that the application under Section 16 of the Act was liable to be dismissed.

21. A Rejoinder was filed by the respondent reaffirming its assertions made in the application.

22. The *learned Arbitrator considered the rival assertions of the parties* and referred to Clause 23 of GCC and observed that in terms of this Clause, the parties opted for an amicable settlement which was arrived at by way of Settlement Agreement dated 23.01.2015, wherein the final executed quantity of works and the rates were agreed by the Authorized Representatives of the parties. Pursuant to this Settlement, the follow up action on behalf of the appellant for the implementation of the settlement started from 27.01.2015. Various emails were written by the appellant to the respondent which when read together with the annexed invoices **Ex. R-3** collectively along with the emails sent by the respondent to the claimant collectively **Ex. R-4,** indicate that both the parties accepted the Settlement Agreement dated 23.01.2015.

23. The correspondence also reflected that the intention of the appellant was more positive, expressive and the terms were acceptable to the claimant. The change in the attitude of the claimant for the first time became evident

in the letter dated 17.02.2015, wherein the claimant for the first time characterized the terms of the Settlement Agreement as "*unfair demand thrusted upon us"*. Even in this letter the expression *"coercion" or "repudiated" were not used.* In fact, the Claimant mentioned that it accepted the Minutes of the Meeting dated 23.01.2015 considering it was in their business interest and on account of good business relationship with the respondent for years to come.

24. The Appellant had tried to explain that in the letter dated 17.02.2015 the claimant admitted the content of Minutes of Meeting (*hereinafter referred to as 'MoM*') dated 23.01.2015 in good faith believing that respondent would honour the contents of the Settlement. However, the respondent failed to honour the obligations under the MoM and to provide timely clarifications as sought by the appellant. It was thus, asserted in the letter that the MoM does not stand in the way of the claimant to seek the outstanding amounts due from the respondent.

25. This explanation of the appellant did not find favour with the learned Arbitrator who, after referring to the various emails exchanged between the parties, concluded that all the disputes inter-se the parties in respect of which the Claims were filed by the appellant, already stood settled vide Settlement Agreement dated 23.01.2015.

26. In this regard, a reference was made to *Union of India vs. Kishori Lal Gupta & Brothers* (1961) SCR 493, *Nathani Steel Limited vs. Associated Construction* 1995 Suppl.(3) SCC 324 and *New India Assurance Company Limited vs. Genus Power Inf. Ltd.* (2015) 2 SCC 424, to observe that since the matter already stood amicably settled between the parties vide Settlement Agreement dated 23.01.2015, the claimant was estopped from

invoking the *arbitration clause* under the original Purchase Order.

27. The Ld. Arbitrator, in the Impugned Orders concluded that the claimant was unable to establish any coercion in arriving at the Settlement Agreement and the plea of alleged coercion was an after thought in order to get over the terms of the Settlement Agreement. The learned Arbitrator, therefore, observed that in view of the Settlement there was no dispute that was surviving and thus the preliminary objection taken by the respondent in regard to the jurisdiction of the learned Arbitrator was accepted and *the application under Section 16 was allowed vide Order dated 26.04.2019.*

28. Aggrieved by the said Order, the present Appeals under Section 37(2)(a) of the Act have been filed.

29. The *main ground for challenge of the Impugned Orders* is that the learned Arbitrator has wrongly come to the conclusion that all the disputes inter-se the parties in respect of the two Purchase Orders were settled by the parties vide Settlement Agreement dated 23.01.2015 or that the two Purchase Orders stood superseded by the subsequent Settlement Agreement.

30. It is asserted that it is evident from the various correspondences exchanged between the parties that *the Settlement was repudiated by the appellant and such repudiation was accepted by the respondent.* The Settlement Agreement was no longer in force, and it were the original contracts containing the arbitration clauses continued to subsist between the parties and the proceedings before the learned Arbitrator were maintainable. It was further asserted that the Arbitrator erred in not adverting to letter dated 05.04.2017 written by the respondent in response to the appellant's Notice dated 30.03.2017 by which the respondent had acknowledged the subsistence of two original Contracts when the respondent stated that "*all*

outstanding matters pursuant against your PO can be resolved with mutual discussion". It is only these two Contracts which governed the rights and obligations of the parties, and the disputes could have been adjudicated only in terms of such Contracts by way of arbitration.

31. The learned Arbitrator ought to have appreciated that the *Settlement Agreement has been forced, thrusted and coerced upon the appellant and had been repudiated and cancelled by the appellant.* The learned Arbitrator ought to have held that the Settlement Agreement ceased to have effect and thereafter by their contract the two original Purchase Orders stood revived. The learned Arbitrator has wrongly concluded that the allegations of coercion has been raised by the appellant as an afterthought.

32. It is claimed that the Impugned Orders are perverse and bad in the law, are unconscionable, absolutely one sided and that the Settlement Agreement was thrusted upon the appellant under economic duress. The appellant was in dire need of money at the time, and squeezed as its resources were from nonpayment of the money owed by respondent and thus, under coercion had signed the Settlement Agreement on the terms as proposed by the respondent, who otherwise faced hideous prospect of nonpayment.

33. Moreover, t*he Settlement Agreement further stipulated a number of conditions* that were to be complied with by the appellant viz. (a) signing of one sided Indemnity Bond, promising to indemnify the respondent in respect of any future claim that may be made by any person in relation to civil work (b) submitting of no dues certificates from all sub-contractors, vendors (c) submitting a certificate declaring compliance with all labour laws, although these certificates had been submitted even while the work was being

performed and several such other conditions, and (d) withdraw the police complaint against the Respondent.

34. The learned Arbitrator has overlooked the various letters exchanged between the parties and the conclusion of the learned Arbitrator is contrary to the facts of the case. The findings of the learned Arbitrator that the parties by entering into the Settlement Agreement intended to put an end to the Contracts vide two Purchase Orders is illegal, perverse and contrary to the law of the land. The respondent was fully aware that the appellant was strapped for financial resources and knew that denying timely release of payment under the two Contracts and the settlement of all final dues only upon the completion of works could drive the appellant to financial ruin. The respondent was aware that the appellant would accept lesser amount under the two Contracts, and this was precisely the reason why the Settlement Agreement was thrusted upon the appellant by the respondent.

35. It is claimed that the practice of getting a *No Demand Certificate* by the Contractor before paying the money to the Contractor has come under heavy criticism by the Apex Court in the case of *NTPC Limited vs. Reshmi Construction Builders and Contractors* AIR 2004 SC 1330.

36. The appellant has further asserted that the Order of the learned Arbitrator *is perverse* since it failed to take into account that the Settlement Agreement was never given effect to post its execution. The respondent itself was unable to given effect to the Agreement and therefore, neither party acted the said Settlement. As per this Settlement Agreement, the appellant was required to complete all punch points and site closure activity at the site "*without the engagement of Alstom employee"*. However, this condition was impossible for performance because CIL, the employer of the

Respondent, would not allow any work to be undertaken at the site without the presence of any of the personnel of the respondent to supervise the work.

37. The Settlement Agreement was a non-starter from the very beginning. The respondent was fully aware of this position of unwillingness of its client CIL, though it has claimed that it had attempted to persuade its client to have the respondent's representative present at the site during the performance of punch point works stating that the presence of Supervisor of the respondent's employee would not be necessary. The respondent claims to have extended every possible effort to assist the appellant in completing the punch point work as set out in the Settlement Agreement but, the claim of the respondent in this regard are totally untrue. The appellant attempted to enter the site on 27.01.2015 for completion of the *punch point work*, but its workers were not allowed by CIL to enter the premises in the absence of the representatives of the respondent. Similar attempt was made on 05.02.2015, but the workers were again prevented. The appellant had by this time, furnished a complete list of persons who would be present at the site to perform the work *vide* email dated 05.02.2015.

38. In view of conduct of the CIL, the appellant also stated that the work would be undertaken only in the presence of the respondent's representatives at the site. However, the respondent while forwarding the series of emails written by the appellant on this subject to Cairn India Limited had deliberately deleted this email from the trail of mails. The respondent is not honest in its assertions that it attempted to persuade CIL to have the work completed at the site by the appellant without the presence of the representatives of the respondent. The respondent, therefore, is guilty of failing to give effect to the Settlement Agreement.

39. It is claimed that neither party acted in furtherance of the Settlement Agreement, a position which is undisputed though now the respondent is attempting to put the blame on the appellant. It is thus claimed that the settlement ceased to have any force and the disputes between the parties arising out of the Purchase Orders could be settled only through arbitration, for which the learned Arbitrator has the jurisdiction.

40. In the end it is also asserted that along with the Statement of Defence the respondent had filed the counterclaim but because there was no arbitration clause in the Settlement Agreement, no counterclaim could have been filed by the respondent. The respondent, therefore, had to necessarily fall back on the two Purchase Orders for adjudication of its counterclaim thus making the claims of the appellant before the learned Arbitrator as maintainable. Further, it is submitted that the learned Arbitrator ought to have seen the documents relied upon by the respondent and the Settlement Agreement to ascertain that if the disputes had been settled between the parties. The Impugned Orders passed by the learned Arbitrator allowing the application under Section 16(2) is, therefore, not tenable and is liable to be set aside.

41. *Learned counsel on behalf of the appellant in its written submissions and even in the oral arguments* has submitted that the Settlement Agreement dated 23.01.2015 had been signed by the appellant under coercion/force exerted by the respondent. It was signed under economic duress and had been repudiated vide its letter dated 17.02.2015 and it called upon the respondent to pay the sums due under the two original Contracts. The repudiation of Contract was accepted by the respondent. It also refused to release the amounts under the two Contracts. Since the disputes had not

been resolved, the appellant sought the appointment of the Arbitrator, which was allowed by this Court vide Order dated 06.02.2018.

42. It is submitted that because the respondent accepted the repudiation of the Settlement Agreement, the same no longer subsisted or had any force in law, and that only the two Contracts survived under which the liabilities and rights of the parties were to be determined. It is therefore, submitted that there was no case of *Novation* pleaded by the respondent in its letter dated 05.04.2017. Even otherwise, the exchange of letters dated 30.03.2017 and 05.04.2017 provides for existence of an arbitration Agreement in terms of which the disputes are to be agitated. It is further submitted that respondent repeatedly invited the appellant for further negotiations to arrive at a settlement of their disputes. These efforts for fresh negotiation had begun after the Settlement Agreement dated 23.01.2015 which also reflect that there was no concluded final settlement. Therefore, the conclusion of the learned Arbitrator that there existed no arbitrable disputes in view of the Settlement Agreement dated 23.01.2015 is patently erroneous. Reliance has been placed on *Rickmers Verwaltung GMBH vs. Indian Oil Corporation* (1999) 1 SCC 1 and *Govind Rubber Ltd. vs. Louis Dreyfus Commodities Asia Pvt. Ltd* (2015) 13 SCC 477.

43. ***The learned counsel on behalf of the respondent in its note of written submissions*** has submitted that the case of the appellant is premises on three arguments viz. (i) it was entered into on account of *coercion*, (ii) it was *repudiated* due to coercion and (iii) the *respondent accepted* the repudiation. The learned Arbitrator held that coercion and consequent repudiation was not borne out from the letters dated 06.06.2015 and 17.02.2015 relied upon by the appellant as the letters of the appellant/

claimant did not use the expression *"coercion*" or "repudiation". Rather, the appellant accepted the MoM considering its business interest and to maintain a good business relationship. The learned Arbitrator has thus, rightly concluded that the plea of coercion was an afterthought to get over the terms and conditions of the Settlement Agreement.

44. The learned Arbitrator has similarly negatived the plea of *repudiation* by holding that the Settlement was implemented, and the appellant raised Invoices and received payments pursuant to the Settlement. It was observed that "*from 17.01.2015 onwards the follow up action on behalf of the claimant for the implement of the decisions arrived at, settlement had started...both the parties accepted the decision arrived at in the meeting held on 23.01.2015*". It was also observed "*...it is clear that the claimant had accepted and acted upon the Settlement Agreement...received the money by submitting various invoices*". It was also observed that "*...claimant has accepted and acted upon the Settlement... is estopped from invoking the arbitration clause under the original Contracts*". The learned Arbitration has thus, concluded that since the appellant have already accepted and acted upon and received the monies by submitting the invoices having taken advantage of the Settlement, it cannot now invoke the Arbitration clause under the Purchase Order.

45. Learned counsel on behalf of the respondent has thus, submitted that implicit in the finding of the Settlement Agreement being implemented, is the rejection of the claim of the appellant that it had repudiated the Settlement or that the repudiation was accepted by the respondent.

46. The appellant's contention that there was repudiation of the Agreement, does not meet the standard of perversity/patent illegality as

observed in the cases of *Raghuvir Buildcon Pvt. Ltd. Ircon International Limited* (2021) SCC OnLine Del 2491 and *Kwality Colonisers vs. Shiva S. Stripes Pvt. Ltd.* (ARB. A (COMM) 44/2021 decided on 23.11.2021. It is further borne out from the Letter dated 04.01.2017 that the respondent had not accepted the repudiation but had stated that the respondent denies that the agreed MoM dated 23.01.2015 stands cancelled or is ineffective in any manner. On the contrary, the parties have implemented the agreed MoM dated 23.01.2015.

47. Learned counsel on behalf of the respondent has submitted that while the petition under Section 11 of the Act, 1996 was allowed on the basis of original Purchase Orders, but it was made clear that the contention of the disputes having been settled was left open to be agitated before the learned Arbitrator. The appellant's reading of the paragraphs of the Impugned Orders in isolation is incorrect. Also, the challenge to the Settlement by the appellant on the ground of it not being signed by the Project Manager is incorrect as there was no such pleading taken before the learned Arbitrator. *It is submitted that these appeals have no merit and are liable to be rejected.*

48. **Submissions heard.**

49. The Appeals have been filed u/s 37(2)(a) against Orders of the Arbitral Tribunal, dated 26.04.2019, accepting the plea of the respondent u/s 16(2) of the Act, that the ld. Arbitrator has no jurisdiction as there is no arbitrable dispute *interse* the parties because of the Settlement between the parties. Before Considering the Appeals on merit, it is imperative to establish the contours within which this Court can interfere with the Impugned Orders**.**

50. The scope of interference under S.37 of the Act is statutorily minimal,

as has come to be charted out over the years through various judgements of the Hon'ble Supreme Court and this court as well. The scope of a challenge under Section 37 of the Act, 1996 is limited to the grounds stipulated in Section 34 as held in *MMTC Limited v. Vedanta Ltd.*, (2019) 4 SCC 163.

51. Now coming to the challenge in the present Appeals, admittedly, the parties arrived at a Settlement dated 23.01.2015, the terms of which are as under:

"***MINUTES OF MEETING***

MOM No.: -MOM/ALST-GAE/01

Purpose of Meeting/Title*: Claim settlement for Road works and NS items and amendment for Civil and Election executed work.*

Date & Time*: 23rd Jan 2015,*

Location*: Alstom T&D India Ltd. A-7, Sector-65, Noida.*

Attendees- Alstom	***Attendees-GAE***	***Additional Distribution***
1. *Mr. Prashant Kumar Singh* 2. *Mr. Devendra Harsola* 3. *Mr. Baleshwar Prasad* 4. *Mr. Vivek Pachuri* 5. *Mr. Darshit Dadhaniya*	1. *Ms. P. Kalaiyarsai* 2. *Mr. Ranjith* 3. *Mr. Shankar*	• *CIL* •

Sr. No.	***Subject***
1.	*Final executed quantity and NS Items rate for Electric works agreed by GAE and accepted the same as per attached annexure I & II and total value for Quantity amendment Value Rs.2,03,731/- and NS item value Rs.6,91,593.0.*
2.	*Final executed quantity and NS Items rate for Civil works agreed by GAE and accepted the same as per attached annexure III & IV and total value for Quantity amendment Value Rs.42,87,133/- and NS item value Rs.17,50,000/-.*
3.	*Road construction work (S770 and S780) settled with GAE and accepted the same as per attached annexure V and total Amendment Value Rs.30,00,000/-.*
4.	*Invoices payment for NS items and executed amendment quantity will be released after following condition,* 1. *Invoice will be received with all measurement sheets and in contractual format from GAE,* 2. *Payment against this invoice will be released as per provision of contract.*

5.	*Debit note issued by M/s Alstom against the support service accepted by GAE as per annexure VI attached, if any observation will be there same will be revert with clarification on backup documents from debtors till that time debit note amount will be kept under hold.*
6.	*Debit note dated till 31st Oct 2014 issued by M/s CIL against the support service accepted by GAE as per annexure VI attached. If any observation will be there same will be revert with clarification on transparent communication from debtor, till that time debit note amount will be kept under hold. In case CIL issue additional debit note, related to scope of work as per contract, same will pass on to GAE with proper clarification detail.*
7.	*M/s GAE will surrender all the gate pass pertaining to their employee to CIL as per attached annexure VII list by Date 15th Feb, 2015.*
8.	*M/s GAE will complete all the punch points and site closure activity at site by 15th March 2015 as per the contract condition without engagement of Alstom employee, in case required GAE person will be authorized by Alstom for completion of balance activity, permit authorization and getting clearances from CIL.*
9.	*M/s GAE will submit the Indemnity bond and Detailed declaration by 3rd Feb. 2015 for all their subcontractors/ sub suppliers/vendors with their total outstanding against who have been involve in Alstom Project with declaration of their name and total outstanding with payment release plane with amount. On basis of clear outstanding from M/s GAE and acceptance of these documents' payment will be released after 3–4-week time.* *After payment confirmation from M/s Alstom, M/s GAE will submit the NOC and Undertaking letter to M/s Alstom which covers following points:* *1. M/s GAE will submit the signed NOC, Payment of outstanding amount from M/s GAE and Undertaking Letter from all their subcontractors/sub suppliers/ vendors, who have been involved in Alstom project and commitment for hassle free work environment to carry out balance site activity for Alstom employee.* *2. M/s GAE confirms that no other contractors/ sub-supplier/ sub-vendor were engaged at Alstom project except as mentioned in undertaking and declaration list.* *3. M/s GAE will keep Alstom indemnified and ensure that their subcontractor, Suppliers and vendors will not cause, hamper, stop and cause harm to Alstom's employee and facilitate activities for completion of the balance work at site till site completion.* *4. However, this NOC and/ or the list of due payment of subcontractor of GAE shall not bind ALSTOM to release any payment to GAE subcontractors. It remains the responsibility of GAE to settle with GAE subcontractors and get the final settlement statement/ NOC. Further ALSTOM liability towards GAE remains for the contractually payables only.*
10.	*M/s GAE will support in release of the material/ tools/ equipment of Alstom's subcontractors/ sub suppliers/ vendors from Alstom CIL site.*
11.	*M/s GAE will withdraw police complain against M/s ALSTOM from Nagna Police station and submit the same to M/s ALSTOM.*
12	*M/s GAE will complete labour and statutory compliance as required to close the project.*

13	*Retention of GAE will be released on following condition:* *1. After receipt of completion certification from client (CIL)* *2. Receipt of invoice in contractual format.* *3. Payment against retention invoice will be released as per provision of contract.*

52. While in the first three Clauses, the parties had agreed on the quantities and the payments to be made thereunder, but Clause 4 to 13 of the Agreement were only a road map for completion of the future work and the formalities to be completed by either party for work which was to be done in future and the payments thereof or the formalities that were required to be completed for the release of the funds. It is, therefore, evident that while there was an Agreement about settlement of certain issues in respect of the work which had already been done, but the Agreement itself visualizes certain other works which were to be completed in future raising of Invoices and payments on completion of certain formalities by either party. Therefore, it can be inferred that this is not an Agreement which settled all the disputes which had arisen under the two Purchase Orders. It cannot be said that this Settlement finally settled all the disputes or that nothing was left to be arbitrated by the learned Arbitrator.

53. While the execution of this Agreement dated 23.01.2015 has been accepted, but the appellant had sought to repudiate it subsequently by claiming that he had entered into this Agreement due to *economic duress*. While the learned Arbitrator has referred to the letters dated 06.06.2015 and 17.02.2015 to say that the appellant itself had stated that it had entered into the settlement on account of maintaining a good business relationship and in business interest and nowhere used the word *"coercion"* and *"repudiation"*. The appellant may not have used the word "*coercion"* or *"repudiation"* in

the two Letters which followed the Settlement dated 23.01.2015 but it is a matter of evidence whether in fact the appellant was prompted to enter into the Settlement because of the good business relations and in business wisdom or was it under the *economic duress* as has been alleged by it. It is a known fact that the Contractor is in a position of weakness and in an anxiety to realize their money, are often compelled to give in to the dominant position of the Petitioner.

54. In the cases of *Ambica Construction vs. Union of India* (2006) 13 SCC and *R.L. Kalathia & Co. vs. State of Gujarat* (2011) 2 SCC 475, wherein the contractor claimed to have been coerced to issue a "No Dues Certificate" without which no amount would be released. It was held that merely because a "No Dues Certificate" has been given by the contractor, it cannot be said that there is no arbitrable claim which may be referred to arbitration.

55. Likewise, in the case of *Oriental Insurance Co. Ltd. vs. Dicitex Furnishing Ltd.* (2020) 4 SCC 621, a similar plea of being coerced into signing clean discharge was taken. It was observed that the matter was required to be referred to the arbitration for determination if the said discharge was signed under economical and financial duress or tantamount to unconditional and affirmed acceptance of the payments towards Full and Final settlement. Therefore, it was not appropriate for the learned Arbitrator to out rightly reject this plea of the appellant without putting the matter to trial.

56. The Co-ordinate Bench of this Court in *M/s Thermal Engineers and Insulators Pvt. Ltd. vs. Delhi Tourism and Transportation Development Coporation Ltd.*, ARB.P. 1033/2021 decided on 25th February, 2022, in a

similar situation, observed that the circumstances under which such Undertaking was accepted and whether the same can be considered to be in complete discharge of the contractual obligations of the respondent absolving him from all liabilities is a disputes which requires adjudication and should be agitated before the Arbitral Tribunal.

57. Even if it is accepted that there was a Settlement Agreement dated 23.01.2015, but as already observed above, it did not concretise or settle all the disputes arising under the two Purchase Orders. There were many other issues which cropped up in regard to the work done by the appellant under the two Purchase Orders which is manifested from the various letters that got subsequently exchanged between the parties. The letter dated 11.01.2016 written by the appellant to the respondent conveyed the proposal in the sum of an amount of INR 1,16,00,000/-, arrived at after deducting various Debits but including the retention money, which was countered by the respondent vide letter dated 02.02.2016, wherein it gave a counter proposal in the sum of Rs.1,02,23,871/-; difference being Rs. 13,76,129/-, was proposed to be released in three instalments and the retention money was proposed to be released only on closure of pending issues. Further, this *counter proposal* given by the respondent was rejected by the Appellant vide email dated 19.02.2016. From the exchange of these letters, it is quite evident that the settlement arrived at on 23.01.2015 was not a complete Settlement which is evident from further negotiations between the parties and consequent proposed Settlement, though they could not arrive at any Agreement.

58. Not only this, but reference may also be made to the Letter dated 20.06.2016 that got subsequently written by the appellant to the respondent,

wherein it was highlighted that there were Measurement Sheets which were required to be signed by the respondent's representative, which was not done because of which some of the Bills could not be raised.

59. Furthermore, there was also a dispute raised about the payment agreed to be made for the *road work*. Not only this, but there were also disputes in regard to the *completion of the work at Punch Points* on account of the representatives of the respondent not being present and the owner M/s Cairn India Ltd. not having permitted the workers of the appellant to complete the work. There are also references made that while a sum of Rs.2,58,27,235/- was paid by the appellant but a balance of Rs.3,33,84,284/- including the retention money was still due from the respondent. It was further highlighted that despite the completion of all the work, the *Completion Certificate had not been issued by the respondent.* The statutory compliance of Labour Laws had already been done, though not accepted by the respondent, as is evident from the all the Letters so written by the appellant. There were issues which had arisen under the Purchase Orders, and it cannot be said that the matters stood completely resolved vide Settlement dated 23.01.2015.

60. That the disputes continued despite the Settlement dated 23.01.2015, is also borne out from the Letter dated 04.01.2017 which was written by the respondent in Reply to the Notice dated 20.06.2016 of the appellant. There was a reference made to the disputes in regard to the *laying of roads* and it was also clarified that all the *Punch Points* remained pending in the first place on account of the appellant's sub-contractor's detention of the respondent's employees. The respondent went out of the way to arrange for the permission from M/s Cairn India Limited for the work to be carried out

and even sent its own representatives with the employees of the appellant for the completion of the outstanding work.

61. It is further asserted that the appellant is yet to discharge its number of obligations which it had undertaken in terms of MoM; in particular completion of *punch points*, *surrender of all Gate Passes, submission of Indemnity Bond and Declaration, issuance of No Objection Certificate, release of material from site*, *compliance of Labour Law*, etc.

62. It is also claimed that due to the detention of the respondent's employees by the appellant's Sub-Contractor, it decided to directly pay to the Sub-Contractor without prejudice and in good faith, for implementation of the MoM dated 23.01.2015. It is claimed that because of the conduct of the appellant, the liquidated damages were rightly levied upon the appellant. It was also claimed that the appellant had "*failed to remove the septic tank as was agreed.*"

63. The bonafide attempts were made by the respondent to resolve the disputes but because of the adamant attitude of the appellant and its arm-twisting tactics, the Settlement could not be implemented. It is further admitted that in an endeavour to further settle the matter, the respondent had given a *counteroffer* vide letter dated 02.02.2016, though it was rejected by the appellant. The respondent also asserted that it had acted in good faith to do its best to deal with the situation created due to the failure on the part of the appellant's Sub-contractor, and its bonafide efforts must not be misconstrued.

64. Further, the respondent has denied the averments made by the Appellant in its letter that the clarification and compliances of certain Clauses of the MoM dated 23.01.2015 was sought from the respondent

which remained pending. The respondent had averred that even if there was a delay in responding to any query of the appellant, that would hardly justify non-compliance of the agreed terms of MoM dated 23.01.2015.

65. The respondent thus, submitted that all the grounds raised in the Reply were without prejudice to the rights and contentions of the respondent to take appropriate action in accordance with law.

66. Subsequent thereto after the Notice of Invocation of arbitration, *vide* letter dated 30.03.2017, was served by the appellant, again various emails dated 05.04.2017, 21.04.2017, 28.04.2017, 29.05.2017 and 19.09.2017 have been written by the respondent proposing a *fresh Settlement* and in fact, new terms of Settlement were also proposed, thereby implying that there was no concluded comprehensive settlement.

67. The appellant has relied on *Rickmers Verwaltung Gmbh (Supra)* wherein the Supreme Court has held that, *"Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."*

68. From the aforesaid discussion, having reference to the various proposals, counter proposals and the letters exchanged between the parties, it is prima facie established that though the parties arrived at one Settlement

on 23.01.2015, but it was not a culmination of all the disputes inter se the parties arising under the two Purchase Orders. Subsequent events were to happen and works to be done, as evident from *Clauses 4 - 13 of the MoM, and both the parties were required to complete the formalities about which the disputes continued.* Therefore, to say that there remained no arbitrable disputes is incorrect interpretation of the Settlement Agreement, as it is evident from the averments and the corresponding exchange between the parties that the arbitrable issues under the two Purchase Orders continued which required adjudication. Even if some disputes were agreed vide Settlement dated 23.01.2015, there remained disputes which at least should have been undertaken for adjudication by the learned Arbitrator.

69. Pertinently, the respondent had filed a counterclaim, demanding Rs. 60,44,930/- towards liquid damages for delays and compensation for Debit Notes raised by CIL upon the Respondent and for the support services provided to the Respondent by the Appellant, before the learned Arbitrator which further prima facie demonstrates that all the disputes inter se the parties were not settled. This was against the respondent's own contention that there was *no arbitration clause under the MoM,* and consequently no arbitration proceedings can be undertaken. The Counterclaim was filed on 17.11.2018, well after the parties allegedly settled all of their disputes *vide* Settlement Agreement dated 23.01.2015.

70. It is thus, concluded that the finding of the learned Arbitrator that there were no disputes left to be arbitrated in view of the Settlement Agreement is patently against the agreed terms and against the correspondence exchanged between the parties. There still survive various arbitrable disputes under the two Purchase Orders in addition to the disputed

recession of the Settlement Agreement.

71. Thus, the Impugned Orders are set aside, and the Appeals are allowed.

72. The appeals along with pending applications, if any, stand disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

JULY 15, 2024
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