IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 29.07.2024

\+ **FAO (OS)(COMM) 36/2024**

M/S PLUS91 SECURITY SOLUTIONS ..... Appellant

versus

NEC CORPORATION INDIA PRIVATE LIMITED (ERSTWHILE NEC TECHNOLOGIES PRIVATE LIMITED) ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Jayant Mehta, Senior Advocate with Ms Ritu Bhalla, Mr Arindam Ghose, Mr Ankit Jain, Ms Nikita Sethi and Ms Kaveri Rawal, Advocates.

For the Respondent : Mr Ramesh Singh, Senior Advocate with Mr Aashish Gupta and Ms Chandni Ghatak, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MS JUSTICE TARA VITASTA GANJU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant (hereafter *Plus91*) has filed the present intra-court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 18.12.2023 (hereafter *the impugned judgement*) delivered by the learned Single Judge in *OMP(COMM) 244/2023* captioned *NEC Corporation India*

Private Limited (Erstwhile NEC Technologies Private Limited) v. M/s Plus91 Security Solutions.

2. The respondent (hereafter *NEC*) had filed the aforementioned petition under Section 34 of the A&C Act impugning an arbitral award dated 17.03.2023 (hereafter *the impugned award*) rendered by an Arbitral Tribunal comprising of three members (hereafter *the Arbitral Tribunal*). In terms of the impugned award, the Arbitral Tribunal had awarded a sum of ₹8,43,07,904/- in favour of Plus91 along with interest at the rate of 6% per annum on the awarded amount with effect from 23.08.2019 till the date of payment. In addition, the Arbitral Tribunal had also awarded a sum of ₹1,27,30,625/- as costs in favour of Plus91.

3. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with a Memorandum of Understanding dated 16.05.2019 (hereafter *the MOU*).

4. The Arbitral Tribunal had held that NEC had breached the MOU by not awarding works for a value of ₹84,30,79,040/- to Plus91. Although, the Arbitral Tribunal rejected the evidence led by Plus91 for establishing the profits that it would have earned if the works had been awarded, however, the Arbitral Tribunal held that 10% of the value of such works would be a reasonable estimate of the net profits that would have accrued to Plus91 had NEC performed its obligations under the MOU. Accordingly, the Arbitral Tribunal awarded a sum of ₹8,43,07,904/- as loss of profits to Plus91.

5. The MOU included a Clause (Clause 10) that stated that "*Neither Party is liable for any indirect, special or consequential loss or damage or any loss or damage due to loss of goodwill or loss of revenue or profit arising from or in connection with this MOU*." The Arbitral Tribunal referred to the decision of the learned Single Judge of this Court in ***Simplex Concrete Piles (India) Ltd. v. Union of India***[1] and held that Plus91 would be entitled to damages notwithstanding the said Clause 10 of the MOU.

6. The learned Single Judge found that the decision in case of ***Simplex Concrete Piles (India) Ltd. v. Union of India***[1] was inapplicable as it was rendered in a different context. The learned Single Judge held that the conclusions drawn by the Arbitral Tribunal were patently illegal. The learned Single Judge also examined the MOU and found that the MOU was a statement of intent and an agreement to enter into a definitive agreement, on a project-to-project basis.

7. In view of the above, the principal question that arises for consideration is whether the impugned award is vitiated by patent illegality on the face of the record.

FACTUAL CONTEXT

8. Plus91 is a registered partnership firm and claims to be engaged in the business of aggregating and customizing various software and hardware products/solutions to the bespoke security needs of its clients.

[1] 2010 SCC OnLine Del 821

It claims to be specialized in safety and security-oriented information technology services solutions. Plus91 claims that it has completed several prestigious projects in India for entities like the Airports Authority of India, Government of Rajasthan, Eastern Railways, amongst others.

9. NEC is a private limited company incorporated in India and is engaged in the business of providing a range of IT and telecommunication products/solutions and services. NEC claims that it is a pioneer in the field of biometric solutions and has implemented such technology in various projects such as '*Aadhar*'.

10. Plus91 claims that being desirous of showcasing its Facial Recognition System (FRS) technology, NEC had approached Plus91 in the year 2014, for collaborating in executing the future projects. The parties had, accordingly, entered into a Memorandum of Understanding dated 25.09.2014, which was for the purpose of preparing and submitting a response/proposal for System Integration Project requiring Biometric Solutions. It claimed that since the year 2014, the parties had jointly pursued more than 15 (fifteen) projects including deployment of FRS technology systems for use in the Prime Minister's Special Protection Group (SPG).

11. On 23.10.2018, the Airport Authority of India (hereafter *AAI*) floated a 'Request for Proposal' (hereafter *RFP*) inviting proposals for the purpose of selection of Managed Service Providers (hereafter *MSP*) for providing a pilot E-Boarding-Biometric Boarding System (hereafter

also referred to as *BBS* in short) project to be deployed at four airport locations at Pune, Kolkata, Varanasi and Vijayawada (hereafter *the AAI Project*). Plus91 claims that NEC had approached it with the proposal and the assurance to jointly work for the execution of the AAI Project. Plus91 claims that, thereafter, it had provided all requisite assistance and support to NEC to ensure that NEC secures the contract for execution of the works under the RFP. It claims that it had also made efforts in formulating the bid documents, providing technical and logistical advice including holding meetings with the AAI officials and Original Equipment Manufacturers (hereafter *OEMs*). It claims that the parties had extensive discussions with regard to Plus91's share of work under the RFP and its value, and NEC had assured that the purchase orders amounting to approximately ₹84 crores would be issued to Plus91.

12. Plus91 claims that the parties had entered into the MOU for formalizing their relationship and the aforementioned understanding.

13. According to NEC, it had submitted its pre-bid queries to the AAI pursuant to the RFP in November, 2018. It claims that around the same time, Plus91 had approached NEC for accessing the pre-bid queries (which were already submitted) for obtaining a better understanding of the AAI Project and to ascertain if there was any scope for NEC to source some products/services from Plus91. NEC claims that since the parties were collaborating with each other since 2014, it was open for considering potential quotations from OEMs for such products and services and in the process, it had also shared pre-bid queries submitted

to the AAI, with Plus91. It claims that it had shared the template forms containing particulars, which were required to be filled in by the prospective OEMs. Whilst Plus91 claims that NEC had secured the contract on the basis of the assistance rendered by Plus91, NEC disputes the same. According to NEC, it had submitted its technical bid on 06.02.2019 and financial bid on 20.02.2019 on the basis of its own efforts and had secured the contract with the AAI.

14. NEC claims that Plus91 was unsuccessful in providing suitable quotations from OEMs prior to submission of the bid but had thereafter approached NEC for execution of the MOU, which would enable it to secure suitable quotations. NEC claims that since it was open to securing better rates and advising its list of vendors/OEMs in case the need arose, it entered into the MOU with Plus91. NEC was awarded the AAI Project on 23.08.2019.

15. Thereafter, Plus91 sent an email calling upon NEC to enter into a project specific agreement in respect of the AAI Project. However, NEC did not enter into any such agreement.

16. On 14.05.2020, Plus91 issued a legal notice alleging that NEC had breached the terms of the MOU on account of its failure to issue purchase order in regards to the AAI project. NEC responded to the said legal notice by a letter dated 03.06.2020 stating that the MOU did not create any binding obligations to issue any purchase orders to Plus91 for executing the works covered under the AAI Project.

17. Thereafter, by its letter dated 29.06.2021, Plus91 invoked the Arbitration Agreement (embodied in Clause 14 of the MOU), appointing its nominee arbitrator. NEC responded by a letter dated 16.07.2021 nominating its arbitrator. The nominated arbitrators appointed the presiding arbitrator and the Arbitral Tribunal was constituted.

THE ARBITRAL PROCEEDINGS

18. Plus91 filed its Statement of Claim before the Arbitral Tribunal. It alleged that NEC did not have any intention of working with Plus91, but had used Plus91's industry expertise and contacts to source information and proposals on pricing and logistical aspects of various hardware and software requirements from OEMs with whom Plus91 had good relations. Plus91 alleged that the pricing and logistical information provided by it was used by NEC as a benchmark to give it an advantage in negotiating pricing and other terms with OEMs that would ultimately be engaged for the AAI Project. It alleged that NEC being aware of Plus91's relationship with OEMs and other key players had developed a plan to cheat and deceive Plus91 by making false a promise that if it succeeds in its bid, it would give a huge purchase order to Plus91 for the AAI Project.

19. Plus91 alleged that it was actively involved at the Proof of Concept presentation (hereafter *the POC*) and had assisted NEC for preparing the POC. Plus91 claimed that in terms of the MOU, the parties were obligated to create a working relationship and work jointly

to pursue the opportunities with the AAI. And, NEC was obligated to issue purchase orders of an approximate value of ₹84,30,79,040/-. In addition, Plus91 claimed that NEC had gained and benefited by winning the RFP for the AAI Project at the expense of Plus91's assistance and support; therefore, NEC had unjustly enriched itself at the expense of Plus91.

20. Plus91 relied on Section 70 of the Indian Contract Act, 1872 (hereafter *the Contract Act*) and claimed that NEC was liable to pay for the losses caused to Plus91.

21. Plus91 claimed a sum of ₹1,32,60,00,000/- on account of direct and indirect losses suffered by it and interest at the rate of 18% per annum on the said amount.

22. A tabular statement indicating the claims made by Plus91, as set out in the Statement of Claim, is reproduced below:

> "5.15 Therefore, in light of the above facts, circumstances and the contractual obligations of the Parties, the Claimant has quantified its claims as under:

S. No.	**Particulars**	**Amounts (INR)**
1.	Loss of Profit	₹45,00,00,000
2.	Loss of Opportunity/Business loss	₹75,00,00,000/-
3.	Damages for breach of Contract	₹10,00,00,000/-
4.	Reputational Damage	₹2,00,00,000/-

5.	Cost of proceeding and Legal Costs	₹60,00,000/- (as on date)
6.	Total	₹132,60,00,000/-
Grand Total		₹132,60,00,000/- + interest @ 18% per annum"

23. NEC filed a Statement of Defence disputing the claims made by Plus91. NEC claimed that the MOU was entered into only for the purposes of empowering Plus91 to obtain quotes from various vendors and there was no binding obligation on the parties to work together.

24. Both the parties led evidence in support of their stands. Plus91 examined two witnesses – Mr. Samir Kukreja (CW-1), a constituent partner of Plus91 and Mr. Rajiv Singh (CW-2) as an expert witness. NEC examined Mr. Pradeep Kushwaha (RW-1), who was employed as a General Manager with NEC.

IMPUGNED AWARD

25. The Arbitral Tribunal framed following two broad points for determination:

> "(1) Whether the Claimant is entitled to the reliefs as sought in the prayer of the Statement of Claim dated 14 October 2021?
>
> (2) Costs of the arbitration."

26. For the purposes of determining the question whether Plus91 was entitled to relief as sought, the Arbitral Tribunal returned findings on various points, which are briefly noted hereafter. First, the Arbitral

Tribunal found that NEC had not approached Plus91 in the first instance for seeking its assistance, and it was Plus91 that had approached NEC. Second, the Arbitral Tribunal found that there was no material to establish Plus91's claim that it had assisted NEC in answering the pre-bid queries.

27. Third, the Arbitral Tribunal also found that Plus91 was not fully aware of what was transpiring between NEC and the AAI as the cross-examination of CW-1 indicated that he was not aware of any material facts. However, the Arbitral Tribunal accepted that the representatives of Plus91 were present in Bengaluru, India and one of the representatives had attended the POC demonstration. The Arbitral Tribunal also concluded that the parties collaborated with each other and Plus91 was actively involved in preparation of the bid documents. The Arbitral Tribunal held that the draft of the MOU was circulated internally at various levels by NEC and Annexure A to the MOU, which was not signed, also formed a part of the MOU. The Arbitral Tribunal held that the MOU was a valid document.

28. Fourth, the Arbitral Tribunal rejected the contention that the MOU was signed only to enable Plus91 to obtain quotations from OEMs. The Arbitral Tribunal concluded that the MOU contained the complete and final understanding between the parties. And, Annexure A to the MOU not only described the scope of work to be done by the parties, but also set out the details of the work that was to be executed by Plus91 at an appropriate value of ₹84,30,79,040/-.

29. Fifth, the Arbitral Tribunal concluded that the MOU was a binding contract and in terms of the MOU, work of an appropriate value of ₹84,30,79,040/- was to be assigned by NEC to Plus91 in the AAI Project.

30. The Arbitral Tribunal also found that NEC had breached the MOU by not awarding work of an appropriate value of ₹84,30,79,040/- to Plus91.

31. The Arbitral Tribunal rejected NEC's contention that in terms of Clause 10 of the MOU, both parties were debarred from claiming any damages or loss of profit. The Arbitral Tribunal referred to the decision of the learned Single Judge of this Court in ***Simplex Concrete Piles (India) Ltd. v. Union of India***[1] and proceeded on the basis that Clause 10 of the MOU, which provided that the parties were not liable for indirect losses and loss of revenue in connection with the MOU, was not binding.

32. The Arbitral Tribunal rejected the evidence regarding the quantum of damages, however, assessed loss on account of net profits at 10% of the value of ₹84,30,79,040/- and awarded a sum of ₹8,43,07,904/- in favour of Plus91. However, the Arbitral Tribunal rejected the claim of loss on account of loss of opportunity, business loss, damage for breach of contract and reputational damages. The Arbitral Tribunal held that such losses were not covered under Section 73 of the Contract Act. In addition, the Arbitral Tribunal awarded interest at the rate of 6% per annum on the awarded amount with effect from 23.08.2019 as well as costs quantified at ₹1,27,30,625/-.

IMPUGNED JUDGEMENT

33. NEC assailed the impugned award primarily on the ground that the Arbitral Tribunal had completely misinterpreted the terms of the MOU and the award of loss of damages was contrary to the express terms of the MOU – Clause 10 of the MOU. NEC contended that the MOU was not binding on the parties. It also claimed that the MOU was void under Section 25 of the Contract Act as it was without consideration.

34. Insofar as the execution of the MOU is concerned, the learned Single Judge held that the findings of the Arbitral Tribunal to the said effect were plausible and were reasonably derived from the evidence led by the parties. Thus, the said finding could not be challenged under Section 34 of the A&C Act.

35. The learned Single Judge held that NEC's intent to collaborate with Plus91 was clearly established on the facts as held by the Arbitral Tribunal. However, the learned Single Judge accepted NEC's contention that the Arbitral Tribunal had misinterpreted the terms of the MOU. The learned Single Judge held that a reading of the MOU indicates that it was only a statement of intent and an agreement to enter into a definitive agreement on a case-to-case basis. More importantly, the learned Single Judge held that Clause 10 of the MOU was required to be read in the context of other Clauses of the MOU and it clearly indicated the intent that the parties were collaborating with each other without corresponding rights arising out of an unsuccessful association.

The learned Single Judge held that the parties had made no definite commitments to each other and concluded that the Arbitral Tribunal had erred in applying the ratio of ***Simplex Concrete Piles (India) Ltd. v. Union of India***[1], as the said decision was rendered in a completely different context which forbade a contractor from claiming damages even if the delay was attributable to the employer. The learned Single Judge held that in the present case, Clause 10 of the MOU re-enforced the intent of the parties of not permitting any claims for consequential loss as their association was exploratory, as was defined in Clause 1 of the MOU. Accordingly, the learned Single Judge set aside the impugned award on the ground that the same is vitiated by patent illegality.

SUBMISSIONS

36. The contentions advanced by the parties in these proceedings are essentially the same as advanced in proceedings under Section 34 of the A&C Act. The learned counsel appearing for Plus91 contended that the learned Single Judge had erred in interfering with the impugned award as the Arbitral Tribunal's view was clearly a plausible view, if not the correct view. He submitted that the question of interpreting a contract falls within the jurisdiction of the arbitrator and the Arbitral Tribunal had interpreted the terms of the MOU and found that NEC was obliged to place purchase orders in respect of items specified in Annexure A to the MOU. NEC had breached its binding commitment by not issuing the said orders.

37. It was submitted that Clause 10 of the MOU, which proscribed claims for breach of the MOU is contrary to public policy, and therefore, the Arbitral Tribunal had rightly proceeded to award damages. The decision in the case of ***Simplex Concrete Piles (India) Ltd. v. Union of India***[1] is squarely applicable to the facts of the present case and the Arbitral Tribunal had rightly relied upon the same.

38. It was contended that the learned Single Judge had erred in supplanting its view in place of that of the Arbitral Tribunal by holding that the MOU was only an expression of intent and does not give rise to any definite binding obligation.

39. The learned counsel appearing for NEC countered the aforesaid submissions. He submitted that the Arbitral Tribunal had completely misread the terms of the MOU. He submitted that the Arbitral Tribunal had also erred in proceeding on the basis that Annexure-A of the MOU was agreed to between the parties. He submitted that Annexure-A of the MOU was not signed by NEC and could not be read as an agreement to issue purchase orders of the specified value. It was also contended on behalf of NEC that the impugned award was contrary to Clause 10 of the MOU, which expressly recorded the agreement of the parties to not be liable for any consequential loss or loss of revenue.

40. It was also contended that the decision in ***Simplex Concrete Piles (India) Ltd. v. Union of India***[1] is wholly inapplicable and the learned Single Judge had rightly interpreted Clause 10 of the MOU in its proper context. Lastly, it was submitted that the quantification of loss of profits

at 10% of the tentative value of products was without any evidence or basis as the report of the expert had been rejected by the Arbitral Tribunal. The Arbitral Tribunal had also not provided any basis for assessing the loss of profits at 10% of the value of purchase orders.

REASONS AND CONCLUSION

41. The disputes between the parties essentially relate to interpretation and import of the MOU. The recitals of the MOU indicates that the parties had decided to establish a working relationship for jointly pursuing the opportunity under the RFP issued by the AAI and had thus, decided to record their understanding. In terms of Clause 1 of the MOU, the parties had agreed that they would work together in the field of BBS and would share the prospects on regular basis for maximizing business through this relationship. Further, the parties had agreed that once the project is identified, both the parties shall work from initial stage for optimum solution of the project. It was stipulated that both the parties would enter into proper and specific agreements, project wise for any project undertaken jointly, which would clearly define their roles and responsibilities, and the terms and conditions applicable. It is important to note that the term of the MOU was only for the period of one year[2] from the date of signing of the MOU and could be extended further, as mutually decided by the parties in writing.

[2] **2. Term**
This MOU shall have an initial duration of 1 (one) year from the date of signature. This MOU may be extended further, as mutually decided by parties in writing. Any residual obligation at the time of such termination will be met by both the Parties including any specific programmes or projects already entered into between the two parties.

42. Clause 3 of the MOU expressly provides that each party would treat and maintain confidentiality in respect of all data or information shared by the other parties in any written or tangible form. Clause 7 of the MOU also specifies that the parties would enter into a proper and specific agreement project wise for any project undertaken jointly which would clearly define the roles and responsibilities of the parties. It was further stipulated in Clause 8 of the MOU that all matters, terms and conditions not specifically stipulated in the MOU would be discussed and settled in good faith.

43. Clause 10 of the MOU provides that neither party would be liable for any indirect, special or consequential loss or damages, or any loss or damage due to loss of goodwill, or loss of revenue or profit arising in connection with the MOU. Clause 11 of the MOU entitles either of the parties to terminate the agreement if the other party is in breach of the MOU and pursue any remedies available subject to provisions of the MOU. It is expressly stipulated that NEC could terminate the MOU without any cause by giving thirty days prior notice to the other party (Plus91) and no separate termination charges would be payable by any party to the other party.

44. The relevant Clauses of the MOU are set out below:

> "**MEMORANDUM OF UNDERSTANDING**
>
> This Memorandum of Understanding (MOU) is executed on this 16th day of May, 2019.
>
> By and Between

NEC Technologies India Private Limited (Erstwhile, NEC India Private Limited), a company registered in India under Companies Act 1956 vide corporate identification no.U72300DL2006FTC151472 and having its registered office located at 101 to 116, 1st Floor Splendor Forum 3, District Centre Jasola, New Delhi-110025 ("NECTI"), which term and expression shall unless repugnant to the meaning and context hereof shall mean and include its successors in business, legal representatives, executors, administrators and permitted assigns of ONE PART.

AND

Plus91 Security Solutions, a partnership concern and having its registered office located at Plot No.60, Ground Floor, Street No.2, Lalita Park, Laxmi Nagar, Delhi-110092 ("Plus91") which term and expression shall unless repugnant to the meaning and context hereof shall mean and include its successors in business, legal representatives, executors, administrators and permitted assigns of the OTHER PART.

NECTI and Plus91 are individually referred to as a "Party" and jointly as the "Parties".

Whereas

(a) ***

(b) ***

(c) It has been decided that a working relationship be established, under which both the Parties will work together for jointly pursuing the opportunity for Selection of Managed Service Provider (MSP) for Designing, Development, Testing, Implementation, and O&M of EBoarding - Biometric Boarding System (BBS) under RFP No.2018 AAI_16909_1 as issued by Airports Authority of Indie

(d) Both the Parties hereto would like to put on record the following understanding between the Parties.

1. Purpose of the MOU

NECTI and Plus91 shall work together in the field of Biometric Boarding System and both Parties will be sharing prospects on regular basis for maximizing the business through this relationship. Once a project is identified, both the Parties shall work from an early stage to work out the ideal & most optimal solution for the Project.

Plus91 & NECTI shall meet at regular intervals to review the situation and initiate actions as needed, for continued success of the association.

Both Parties shall enter into proper and specific Agreement project wise, for any projects undertaken jointly which would clearly define the roles and responsibilities and terms and conditions applicable to both the Parties. It is understood that neither party shall be precluded from its normal marketing efforts in connection with the sale or licensing of its products and services.

2. Term

This MOU shall have an initial duration of 1 (one) year from the date of signature. This MOU may be extended further, as mutually decided by parties in writing. Any residual obligations at the time of such termination will be met by both the Parties including any specific programmes or projects already entered into between the two parties.

3. Confidentiality

Each party hereto agrees to treat and maintain as confidential and proprietary throughout the term of this MOU and for a period of two (2) years thereafter, any and all data and other information of the other Party (referred to as Confidential Information) which is provided by such other Party hereunder in written or other tangible form and clearly marked with a legend identifying it as confidential, or in electronic form and clearly marked with such legend, or which is identified by such other Party as confidential at the time of oral or visual disclosure and, within thirty (30) days after the oral or visual disclosure, is provided by such other Party in written or other tangible form marked with such legend or in electronic form marked with such legend, with the same degree of care that it

would normally use in protecting its own confidential information of similar nature. Each Party further agrees not to use the other Party's confidential information for any purpose whatever, without the prior written permission of such other Party, except that each Party may use such information for the purpose of this MOU.

Confidential Information does not include information that:

(a) is available in the public domain through no fault of a Party or

(b) was properly known without restriction, prior to disclosure by a Party, or

(c) was properly disclosed by another third person without restriction on its use and disclosure; or

(d) is independently developed by the recipient Party or its representatives without use of Confidential Information; or

(e) was disclosed pursuant to any order from any statutory, governmental or regulatory authority or any law enforcement agency provided that recipient Party shall first notify disclosing Party of the order and shall provide full particulars relating to the requirement to disclose, and its extent, where possible, and use reasonable efforts to ensure that such disclosure is accorded confidential treatment and also to enable disclosing Party to seek a protective order or other appropriate remedy at the recipient Party's sole cost.

(f) has been approved for release by a written authorization from the disclosing Party.

4. Public Announcements

***

5. Intellectual Property Rights

***

6. Amendment of MOU

***

7. General

i. Both Parties shall enter into proper and specific Agreement project wise, for any projects undertaken jointly which would clearly define the roles and responsibilities and terms and conditions applicable to both the Parties.

ii. This MOU contains the complete and final understanding between the Parties hereto. This MOU supersedes and voids any prior understanding between the parties hereto.

iii Each Party shall act as an independent contractor. No agency, partnership, joint venture or other joint relationship is created by this MOU. Neither Party may make any commitments binding on the other, nor may a Party make any representation that they are acting for, or on behalf of the other Party.

iv. If any term in this MOU is found by competent judicial authority to be unenforceable in any respect, the validity of the remainder of this MOU will be unaffected, provided that such unenforceability does not materially affect the Parties rights under this MOU.

8. Good Faith of Parties

Any and all matters, terms and conditions related to but not specifically stipulated in this MOU shall be discussed by the Parties and settled in good faith by mutual agreement of the Parties.

9. Cost and Expense

***

10. No Consequential Damages

Neither Party is liable for any, indirect, special or consequential loss or damage or any loss or damage due to loss of goodwill or loss of revenue or profit arising from or in connection with this MOU.

11. Termination

In the event either Party materially breaches any term of this MOU, which breach is not cured within thirty (30) days after written notice specifying the breach is given to the breaching party, the non-breaching party may (i) terminate this MOU by giving written notice to the breaching Party; and (ii) pursue any and all remedies available subject to the provisions of this MOU.

Without limiting the foregoing, this MOU may be terminated by NECTI with or without cause at any time pursuant to thirty (30) days written notice to the other Party. In the event of termination of this MOU by either Party under any circumstances, no separate termination charge shall be paid/payable by any Party to the other Party under this MOU.

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12. Assignment

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13. Government Law

***

14. Arbitration

***

15. Data Protection

***

16. Export Control

***

17. Anti-Bribery

***

IN WITNESS WHEREOF, the parties hereto have caused this MOU to be executed by their duly authorized representatives on the day and year first above written.

NEC Technologies India Private Limited	**Plus 91 Security Solutions**
S/d	S/d
Name: Masaharu Hasegawa Title: Deputy Managing Director	Name: Shivani Gupta Title: CEO”

45. It is material to note that the MOU does not refer to any appendix. It also does not allude to other terms and conditions as forming a part of the MOU. However, notwithstanding the same, the Arbitral Tribunal had concluded that Annexure-A of the MOU, which was unsigned, was a part of the MOU and construed the same as a binding agreement. The Arbitral Tribunal found that the draft of the MOU had been circulated by NEC by an e-mail dated 22.04.2019 (Ex.CW1/13) and along with a draft of the same, a document was also circulated (referred to Annexure-A). The said Annexure A is set out below:

> "**Annexure-A**
>
> - ***Scope of NEC Technologies India Pvt. Ltd.***
>
> *NECTI would be lead bidder and will do SITC and O&M of entire project as per the RFP requirement.*
>
> ***Scope of Plus91***
>
> *Plus91 shall carry out the following as RFP requirements.*
>
> - *SITC of e-Gates at various checkpoints as described in the RFP.*
> - *Cloud services during Go-live and O&M Phase.*
> - *Manpower for implementation phase, Go-live and O&M Phase at all airport.*
>
> *The approximate value of the above items will be **INR 54,30, 79,040/-"***

46. Thereafter, another draft dated 22.04.2019 (Ex. CW-1/14) was exchanged between the parties and a 'revised Annexure-A' was also circulated. In terms of the revised Annexure-A, the items falling within the scope of Plus91 were increased to six items and their value was increased to ₹84,30,79,040/-. Thereafter, the MOU was signed by

NEC. However, Annexure-A of the MOU as revised was not signed by the parties.

47. It was NEC's case that it had signed the MOU only for enabling Plus91 to obtain quotations from OEMs and other suppliers. Plus91 had not signed the MOU. In any view, Annexure-A of the MOU was not signed and did not form a part of the MOU.

48. Mr. Pradeep Kushwaha (RW-1) was cross-examined extensively as to the manner in which contracts and agreements are dealt with by NEC. His testimony proved that NEC followed an elaborate procedure before an agreement was entered into by it. NEC's various departments / teams were required to consider the agreement, provide their inputs, and grant their approval. NEC would finally sign the agreement only thereafter. Based on the aforesaid testimony, the Arbitral Tribunal concluded that the draft of the MOU as well as Annexure-A of the MOU had been vetted at various levels. The Arbitral Tribunal concluded that Annexure-A of the MOU formed a part of the MOU as it was admitted by RW-1 in its cross-examination.

49. The conclusion of the Arbitral Tribunal to the aforesaid effect is based on testimony of witnesses and electronic communications. Thus, the same warrants no interference in proceedings under Section 34 of the A&C Act. It must be accepted that the MOU was executed by NEC and Annexure-A of the MOU was a part of the same.

50. The principal question that was required to be addressed is whether the said MOU could be read as obliging NEC to issue purchase orders for the value of ₹84,30,79,040/-.

51. Recital (c) of the MOU indicates that the parties had decided to establish a working relationship under which both the parties would work together for *"jointly pursuing the opportunity for Selection of Managed Service Provider (MSP) for Designing, Development, Testing, Implementation, and O&M of EBoarding –Biometric Boarding System (BBS) under RFP No.2018_AAI_16909_1 as issued by Airports Authority of India*".

52. The parties had thus, decided to record their understanding. Clause 1 of the MOU is the only operative term relevant for determining the rights and obligations, which were agreed to between the parties insofar as execution of any work is concerned. The other clauses of the MOU relate to the obligation for maintaining confidentiality, protection of intellectual property rights, data protection etc.

53. Clause 1 of the MOU indicates that parties had agreed to work together in the field of BBS and would be sharing prospects on a regular basis for maximizing the business through this relationship. The parties had agreed that once a project is identified, the parties would work from an early stage to work out the ideal and most optimal solution for the said project. The said clause expressly specified that the parties would enter into a specific agreement, project-wise for any project undertaken jointly. And, that agreement would *"clearly define the roles and*

responsibilities and terms and conditions applicable to both the Parties."

54. A plain reading of the language of Clause 1 of the MOU indicates that there was no express agreement between the parties that any purchase order would be issued in respect of any particular project or for specified work. However, it was expressly agreed that the parties would enter into a specific agreement in respect of a project, which would define their roles and liabilities as well as the terms and conditions applicable. Thus, even if it is accepted that the MOU was a binding agreement as was held by the Arbitral Tribunal, the only inference that can be drawn, from Clause 1 of the MOU, is that the parties had agreed that they would collaborate at an early stage to work out an optimal solution for a project once it was identified and the parties would in future enter into project-wise specific agreement which would set out the terms and conditions as applicable to both the parties. The said intent was expressly reiterated in Clause 7(i) of the MOU. In terms of Clause 7 (iii) of the MOU, the parties had agreed that they would act as an independent contractor and neither party could make commitments binding on the other. Plainly, the MOU does not read as specifically obliging NEC to issue purchase orders to Plus91. It indicates the intent of the parties to work together in the field of BBS and share prospects on a regular basis for maximizing business through their relationship.

55. Recital (c) of the MOU indicates that the parties had decided to establish a working relationship under which they would jointly pursue

the opportunity under the AAI RFP. This reflects the intention of the parties to jointly pursue an opportunity in terms of the understanding which was set out following the recitals.

56. It is important to note that the term of the MOU was only one year and in terms of Clause 11 of the MOU, NEC was entitled to terminate the MOU at any cause at any time by giving a thirty days' notice to Plus91. The parties had also agreed that in the event of termination, no separate termination charges would be payable.

57. Clause 10 of the MOU would necessarily have to be interpreted in the context of the other terms of the MOU which do not indicate that any rights had accrued in favour of any of the parties in respect of any project. It merely indicates the intent of the parties to enter into project-wise agreements after the same are identified.

58. As per Clause 10 of the MOU, the parties had expressly agreed that none of them would be liable to (i) any indirect, special, or consequential loss or damage; (ii) any loss or damage due to loss of goodwill; and (iii) loss of revenue or profit arising from or in connection with the MOU.

59. The learned Single Judge held that the agreement between the parties not to be liable for any such loss is in conformity with their understanding that the MOU merely records their express intent to enter into a project-wise agreement once the parties have identified and decided to pursue the project jointly.

60. Annexure-A of the MOU also does not record any obligation on the part of NEC to issue purchase orders or an agreement to pursue separate items of work. Annexure-A of the MOU sets out that NEC would be the lead bidder and Plus91 would carry out certain items as per the RFP agreement. This indicates, tentatively, that parts of the AAI project that could be carried out between the parties. However, the same does not record a definitive agreement as no specific terms and conditions for executing the projects, as would be necessarily required, are embodied either in Annexure-A of the MOU or in the main part of the MOU.

61. We concur with the learned Single Judge that the Arbitral Tribunal has misread the terms of the MOU as recording an agreement which obliged NEC to issue purchase orders.

62. It is necessary to bear in mind that construction of a contract falls within the jurisdiction of the arbitrator. Therefore, a possible interpretation of a contract would not be vulnerable to challenge under Section 34 of the A&C Act either on the ground of patent illegality or on the ground of the public policy exception. However, even if it is accepted that the view of the Arbitral Tribunal is a plausible one, the decision to award damages on account of loss of profit is clearly vitiated by patent illegality as it runs contrary to the express terms of the agreement entered into between the parties.

63. Clause 10 of the MOU expressly provides that none of the parties would be liable for any "loss of revenue or profit arising from or in

connection with this MOU". The claim for loss of profit awarded by the Arbitral Tribunal is plainly contrary to the express terms of the MOU. The Arbitral Tribunal has proceeded on the basis that the said clause is contrary to the public policy and is, thus, void. The said conclusion is patently illegal.

64. It is essential to maintain the bargain entered into between the parties. The parties agreed that they would not be liable for (i) any indirect, special, or consequential loss or damage; (ii) any loss or damages due to loss of goodwill; and, (iii) loss of revenue or profit arising from or in connection with the MOU. If the MOU is accepted as a binding agreement, this is clearly a part of the bargain struck by the parties. Disregarding the said stipulation would in effect amount to re-writing the bargain between the parties.

65. This Court has some reservations as to the decision rendered by the learned Single Judge in ***Simplex Concrete Piles (India) Ltd. v. Union of India***[1]. However, it is not necessary to examine the same as it is not applicable to the facts in the present case. Reliance on the said decision is clearly misplaced. In that case, the Court was considering a clause, which precluded a contractor from claiming loss on account of delay in execution of the contract even though the delay in execution of the contract was for the reasons attributable to the employer. The learned Single Judge observed that there was a conflict of decision between the Supreme Court in regard to award of damages notwithstanding such a clause. The learned Single Judge noted that whereas, in the case of ***Ramnath International Construction (P) Ltd.***

v. Union of India[3], the Supreme Court had held that even if the employer (Union of India) is at fault, the award of damages is barred. However, in a latter decision in ***Asian Techs Limited v. Union of India & Ors***.[4], the Supreme Court had held in the context of a similar clause, that it only prevented the department from granting damages but did not prevent the arbitrator from awarding damages. After noting the said conflicting decision, the learned Single Judge held that the decision in the case of ***Asian Techs Limited v. Union of India & Ors***.[4] furthered the object of the Contract Act. However, the learned Single Judge also observed that *"To permit a contractual clause having the object to defeat the very contract itself, is a matter of grave public interest. If such a clause is allowed to stand, then, the same will defeat the basis and existence of the Contract Act."* For the aforesaid reasoning the learned Single Judge held that the contractual clauses such as the Clauses in question in the said case [Clause 11(A) to 11(C)] which disentitle a party to the benefits of Sections 55 and 73 of the Contract Act would be violative of Section 23 of the Contract Act.

66. Clearly, the said decision has no application. The observations were made in the context of the said clauses. More importantly, the observations were based on the assumption that the contractual clauses would defeat the very contract itself. The said reasoning presupposes that a contractual clause is not a part of the contract between the parties. The said assumption is flawed.

[3] (2007) 2 SCC 453
[4] (2009) 10 SCC 354

67. It is essential to understand the contract between the parties. A clause limiting the liability is clearly a part of the contractual bargain and the same cannot be disregarded. The question whether a liability on account of breach of a contract can be limited in terms of the contract is not *res integra*. The decision of the Supreme Court in ***Asian Techs Limited. v. Union of India & Ors.***[4] rested on the interpretation of the relevant clauses. The Supreme Court had read the relevant clauses in that case as well as the facts of that case. The clause in question – which was similar to the clause considered by the Supreme Court in ***Ramnath International Construction (P) Ltd. v. Union of India***[3] – stipulated that "*no claim in respect of compensation or otherwise, howsoever arising, as a result of extension granted under Conditions (A) and (B) above shall be admitted*." Notwithstanding the said clause, the concerned officials of the respondent had represented that separate rates would be negotiated. The Supreme Court held that on the said specific assurance held out by the respondent, the contractor was persuaded to continue the work. In the given facts, the Supreme Court held that it was not open to the respondent to now contend that no further claim could be made due to Clause 11(C) of the contract in question and the Arbitrator had no jurisdiction to entertain such claims. The Supreme Court also interpreted Clause 11 of the contract in that case to mean that it only prohibited the department from entertaining a claim and did not curtail the jurisdiction of the arbitrator. Plainly, the decision in ***Asian Techs Limited. v. Union of India & Ors***.[4] rested on the interpretation of the relevant clause of the contract. It is also material to note that the earlier

decision in the case of ***Ramnath International Construction (P) Ltd. v. Union of India***[3] was not brought to the notice of the Supreme Court.

68. In ***Ramnath International Construction (P) Ltd. v. Union of India***[3], the Supreme Court found that the said Clause 11(C) of the contract in question barred claims for compensation as a consequence of delays. A similar view was upheld by the Supreme Court in an earlier decision in ***Associated Engineering Co. v. Government of Andhra Pradesh & Anr.***[5] and in ***Ch. Ramalinga Reddy v. Superintending Engineer & Anr.***[6], whereby claims of compensation on account of delays were rejected as being proscribed by the relevant clauses.

69. The decision in the case of ***Asian Techs Ltd. v. Union of India & Ors.***[4] is not an authority for the proposition that a clause which barred claims for damages of a particular nature would be inoperative as opposed to public policy. As noted above, the Supreme Court had interpreted Clause 11(C) as not debarring a contractor from making a claim for compensation before an Arbitral Tribunal. However, the decision in the case of ***Ch. Ramalinga Reddy v. Superintending Engineer & Anr.***[6] is a binding authority on a proposition that if a contractual clause bars certain claim of damages, the same would be binding on the parties.

70. The Supreme Court in a later decision in ***Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited***[7]

[5] (1991) 4 SCC 93
[6] (1999) 9 SCC 610
[7] (2010) 13 SCC 377

faulted the Arbitral Tribunal for awarding compensation by ignoring the express provisions of the contract. The relevant extract of the said decision is set out below:

> "6. …….But Clause 5-A of the contract pertains to extension of time for completion of work and specifically bars any claim for damages. The said clause is extracted below:
>
> > "In the event of delay by the Engineer-in-Charge to hand over to the contractor possession of land/lands necessary for the execution of the work or to give the necessary notice to the contractor to commence work or to provide the necessary drawing or instructions or to do any act or thing which has the effect of delaying the execution of the work, then notwithstanding anything contained in the contract or alter the character thereof or entitle the contractor to any damages or compensation thereof but in all such cases the Engineer-in-Charge may grant such extension or extensions of the completion date as may be deemed fair and reasonable by the Engineer-in Charge and such decision shall be final and binding."
>
> 7. In view of the above, in the event of the work being delayed for whatsoever reason, that is, even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs.9.5 lakhs……"
>
> [Emphasis added]

71. The Supreme Court in ***Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd***.[8] upheld the decision of the National Consumer Dispute Redressal Commission to reduce the damages awarded by the State Commission, Madras for deficiency of service by the respondent (the service provider). The National Consumer Dispute Redressal Commission had found that the terms and conditions included a clause for limitation of liability whereby, the liability of the respondent (the service provider) was limited to a specified amount and the consequential damages were expressly excluded. The relevant clauses considered by the National Consumer Dispute Redressal Commission are set out below:

> "6. *Limitation of liability***. –** Without prejudice to clause 7 the liability of DHL for any loss or damage to the shipment, which term shall include all documents or parcels consigned to DHL under this air bill and shall not mean any one document or envelope included in the shipment is limited to the lesser of
>
> a) US $ 100
>
> b) The amount of loss or damage to a document or parcel actually sustained or
>
> c) The actual value of the document or parcel as determined under Section 6 hereof, without regard to the commercial utility or special value to the shipper.
>
> 7 *Consequent damages excluded.* **–** DHL shall not be liable in any event for any consequential or special damages or other indirect loss however arising whether or not DHL had knowledge that such damage might be incurred including but

[8] (1996) 4 SCC 704

not limited to loss of income, profits interest, utility or loss of market."

72. In view of the aforesaid clauses, the National Consumer Disputes Redressal Commission had restricted the award of damages to US$100. The Supreme Court upheld the said decision.

73. In ***Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel & Ors.***[9], the Supreme Court had held that the absolute power granted to a party to cancel the contract could not be construed as interfering with the integrity of the Contract. It is relevant to refer the following passage of the said decision:

> "56. From the aforesaid, it is clear that this Court did not accept the contention that the clause in the insurance policy which gave absolute right to the Insurance Company was void and had to be ignored. The termination as per the term in the insurance policy was upheld. Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground. Such a broad proposition of law that a term in a contract giving absolute right to the parties to cancel the contract is itself enough to void it cannot be accepted."

[9] (2001) 5 SCC 101

74. In ***Indian Oil Corporation Ltd. v. Amritsar Gas Services & Ors.***[10] the Court had considered the case of award of compensation for termination of a contract which could be terminated by a party by giving thirty days' notice. The Supreme Court held that in these circumstances, the compensation was required to be restricted to loss of earning for the notice period of thirty days. The contractual clauses permitting unilateral termination of contract without any cause have been upheld in various decisions[11].

75. It is relevant to note that the Supreme Court in several decisions had held that the Arbitral Tribunal would have no jurisdiction to grant interest if the same was proscribed in terms of the contract between the parties. In ***Union of India v. Manraj Enterprises***[12], the Supreme Court set aside the arbitral award awarding *pendente lite* and future interest as well as the decision of the learned Single Judge and of Division Bench of the High Court upholding the same for the reason that the contract between the parties contained a specific clause, which expressly stipulated that no interest would be payable on amounts payable to the contractor under the contract. A similar view was also held by the Supreme Court in various earlier decisions[13].

[10] 1991 (1) SCC 533
[11] M/s Classic Motors Ltd. v. Maruti Udyog Ltd.: 1996 SCC OnLine Del 872 & Central Bank of India, Limited, Amritsar v. Hartford Fire Insurance Co., Limited: AIR 1965 SC 1288
[12] (2022) 2 SCC 331
[13] See: Ambika Construction v. Union of India: (2017) 14 SCC 323, Raveechee & Co. v. Union of India: (2018) 7 SCC 664, Garg Builders v. BHEL: 2017 SCC OnLine Del 12871, Union of India v. Bright Power Projects (India) (P) Ltd: (2015) 9 SCC 695

76. There is no ambiguity in the ratio of the aforesaid decisions. If the parties have agreed that a particular type of damages would not be paid, the said agreement is required to be implemented. In terms of Section 28(3) of the A&C Act, the Arbitral Tribunal is required to render a decision having regard to the terms of the contract.

77. In ***W.B. State Warehousing Corporation & Anr. v. Sushil Kumar Kayan & Ors.***[14], the Supreme Court observed as under:

> "11….. If there is a specific term in the contract or the law which does not permit the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point, then the award passed by the arbitrator in respect thereof would be in excess of his jurisdiction."

78. In ***Bharat Coking Coal Ltd. v. Annapurna Construction***[15], the Supreme Court reiterated the legal position in the following words:

> 22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

[14] (2002) 5 SCC 679
[15] (2003) 8 SCC 154

79. In the present case, the award of damages on account of loss of profits is contrary to the terms of the contract (MOU) and thus, the impugned award is vitiated by patent illegality.

80. It is also relevant to note that in the present case, Clause 10 of the MOU only stipulates that the parties would not be liable for certain kind of damages, which include damages for loss of revenue or loss of profits. It does not bar compensation for any direct expenditure or costs incurred by the parties. Thus, the contention that Clause 10 of the MOU extinguishes all remedies of damages, as earnestly canvassed on behalf of Plus91, is also unmerited.

81. In view of the above, we concur with the conclusion of the learned Single Judge in setting aside the impugned award as vitiated by patent illegality.

82. The appeal is accordingly dismissed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

JULY 29, 2024
RK/gsr