

**IN THE HIGH COURT OF MADHYA PRADESH**

**AT JABALPUR**

**BEFORE**

**JUSTICE SUJOY PAUL**

**&**

**JUSTICE AMAR NATH (KESHARWANI)**

**ON THE 16<sup>th</sup> FEBRUARY, 2023**

**ARBITRATION APPEAL No. 20 OF 2023**

**BETWEEN:-**

**M/S SHREE MANGALAM BUILDCOM PVT.  
LTD. SF – 58 TO 60, HEXZON ARCADE,  
JAJABEN MODI HOSPITAL, OPPOSITE  
SHALIMAR HOTEL, VALIYA ROAD, GTDC,  
ANKLESHWAR, DISTRICT BHARUCH  
(GUJARAT), THROUGH POWER OF  
ATTORNEY, SHRI JAYANTIBAHI G. PATEL,  
S/O GOVIND BHAI PATEL, AGED ABOUT 52  
YEARS**

**.....APPELLANT**

***(BY SHRI ATUL CHOUDHRI - ADVOCATE)***

**AND**

- 1. UNION OF INDIA THROUGH  
SECRETARY GENERAL MANAGER,  
OFFICER OF WEST CENTRAL RAILWAY,  
INDIRA MARKET JABALPUR (MP)**
- 2. CHIEF ADMINISTRATIVE OFFICER  
(CONSTRUCTION) WEST CENTRAL  
RAILWAY, GM OFFICER WEST CENTRAL  
RAILWAY, INDIRA MARKET, JABALPUR**
- 3. DEPUTY CHIEF ENGINEER  
CONSTRUCTION WCR-II/JBP WEST  
CENTRAL RAILWAY BHOPAL, NEAR  
DRM OFFICE, BHOPAL (MP)**

.....RESPONDENTS

**(BY SHRI PUSHPENDRA YADAV – ASSISTANT SOLICITOR GENERAL)**

.....

*This Arbitration Appeal coming on for hearing this day, JUSTICE SUJOY PAUL passed the following :-*

### **J U D G M E N T**

This appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (in short “Arbitration Act”) assails the order passed by learned Commercial Court in MJC AV No.249/2022 dated 03/02/2023, whereby the Court below has dismissed the application preferred by the appellant under Section 9 of the Arbitration Act,

#### **Facts and contentions :**

2. The admitted fact in this appeal are that the appellant pursuant to an offer dated 16/10/2018 submitted his candidature for grant of contract for construction of road over bridge including approaches in connection with up-direction single line flyover between Powarkheda – Jujharpur at NH-69. The Acceptance letter was issued to the appellant on 05/02/2019 initially for a period of 12 months. Indisputably, further 5<sup>th</sup> extension were granted upto order dated 01/04/2022. The last (6<sup>th</sup>) offer was given on 16/07/2022 (Annexure A/17). The appellant filed an application under Section 9 of the Arbitration Act on 21/07/2022 seeking stay of the order dated 16/07/2022.

3. In the said application, the appellant prayed for following relief :-

“(i) It is humbly and respectfully prayed to the Hon’ble Court may kindly be pleased to stay operation of order dated 16/07/2022 no. Pt.II/BPL/C/Cont/ROB/Up line

flyover, issued by respondent No.2 imposing the penalty on the applicant firm till the arbitration proceedings which not initiated such order may be passed in the interest of justice.

(ii) It is humbly and respectfully prayed to the Hon'ble Court may kindly be pleased to restrain the respondent from initiated from any regularly on the basis of order imposing penalty dated issued by respondent No.2 from the running bill and applicant firm in the interest of justice.

(iii) Any other relief deems fit which may also be granted.”

(Reproduced as such)

4. Shri Atul Choudhari, learned counsel for the appellant submits that learned Commercial Court was kind enough in granting the interim protection to the appellant on 22/07/2022. However, when other party entered appearance and opposed the prayer, the matter was finally heard and decided by impugned order dated 03/02/2023 (Annexure A/4).

5. Learned counsel for the appellant submits that the Court below in the impugned order has taken pains to reproduce the factual backdrop of the matter in sufficient details. The rival contentions of the parties were also reproduced in great details in the impugned order. However, while analyzing the prayer for interim relief, the basic findings were given in para-19 & 20 of the impugned order. By placing reliance on the judgment of Supreme Court in **Welspun Specialty Solutions Limited vs. Oil and Natural Gas Corporation Limited, (2022) 2 SCC 382**, the Court below opined that time was the essence of the contract and in this backdrop, the Court below opined that there will be no irreparable loss

to the appellant because if appellant succeeds, the monetary loss by way of forfeiture of formal security of applicant may be compensated as per terms of contract by the concerned Arbitrator.

6. During the course of hearing, learned counsel for the parties fairly submitted that the extension of work offer was based on Clause 17(B) of Standard General Condition of Contract (GCC). The said Clause is pregnant with Annexure-VII (Proforma for time extension). During the course of hearing, it is agreed that the offer dated 16/07/2022 (Annexure A/17) is issued in consonance with Annexure - VII aforesaid, although the sentences/Clauses were rearranged in different sequence offer dated 16/07/2022 (Annexure A/17).

7. This document is relevant for the purpose of adjudication of the controversy, which reads as under :-

“No.Pt.II/BPL/C/Cont/ROB/Up line flyover/ Dated :16.07.202

M/s. Shree Manglam Buldeon (1) Pvt. Ltd.  
SF-58 to 60, Hexzon Areade,  
Nr. Jayaben Modi Hospital,  
Opp. Shalimar Hotel, Valiya Road, GIDC  
Ankleshwar – 393 002 Dist. Bharuch (Guj.).

**Sub:** Construction of Road Over Bridge including approaches at chainage 4590.55 of span (1x36.00 m composite steel girder span and 2x15.00 m RCC span) in conn. With Up direction single line flyover between Powarkheda-Jujharpur at NH-69 (at road km between 52-53) along with all other ancillary civil engineering works.  
CA No. Pt.II/BPL/C/Cont/ROB/Up line flyover/44 dt.30.07.2019.

**Ref:** Your letter No.Nil dated 15.06.2022.

Dear Sir(s),

The stipulated date for completion of the work mentioned about is **31.05.2022**. However, the work was not completed on this date.

1. Expecting that you may be able to complete the work, if some more time is given, the competent authority [CE/C-1/WCR], although not bound to do so, hereby extends the time for completion from **01.06.2022 to 31.07.2022** without PVC & with penalty of **Rs.15,23,115/-** per week under clause 17(B) of GCC.
2. The above extension of the completion date will also be subject to the further condition that no increase in rates on any account will be payable to you.
3. Please intimate within a week of the receipt of this letter your acceptance of the extension of the conditions stated above.
4. **Please note that in the event of your declining to accept the extension on the above said conditions or** in the event of your failure after accepting or acting upto this extension to complete the work by **31.07.2022, further action will be taken in terms of Clause 62 of the Standard General Conditions of Contract.**

Dy. Chief Engineer (Constn)-1  
West Central Railway, Bhopal.  
For and on behalf of the President of India”

**(Emphasis supplied)**

8. Shri Atual Choudhari, learned counsel for the appellant placed reliance on the judgment of Supreme Court reported in **AIR 1963 SC 1405 (Fateh Chand v. Balkishan Dass)** to bolster the submission that as per the legal position prevailing in India, the ‘penalty’ and ‘liquidated damages’ are almost one and the same thing. Next reliance is placed on **(2016) 11 SCC 720 (Gangotri Enterprises Limited v. Union of India and others)** which is based upon the *ratio decidendi* of **(1974) 2 SCC**

**231 (Union of India v. Raman Iron Foundry).** The crux of argument of Shri Atul Choudhari at the cost of repetition is that ‘penalty’ and ‘liquidated damages’ are one and the same thing in Indian Contractual Jurisprudence. The claim of appellant and protection prayed for in Section 9 of Arbitration Act proceeding was that the respondents be restrained from imposing any penalty till claims are decided in arbitration proceeding. Shri Choudhari informed that appellant has already invoked the dispute resolution/Arbitration clause and in due course of time, the Arbitrator will ultimately decide the question of ‘liquidated damages’ and ‘penalty’ etc. Till such time, the arbitration proceedings are finalized, the appellant may be protected from imposition of penalty of Rs.15,23,115/- as per Clause (1) of offer dated 16/07/2022 (Annexure A/17).

**Stand of respondents :-**

- 9.** Shri Pushpendra Yadav, learned Assistant Solicitor General on the other hand placed heavy reliance on the same offer letter dated 16/07/2022 and urged that the question of imposition of penalty would arise provided appellant accepts the extension on the conditions mentioned in offer letter dated 16/07/2022. Since appellant has failed to accept the said conditions within stipulated time which amounts to declining the offer, the Railway Administration is free to proceed against the appellant in terms of Clause-62 of Standard General Conditions of Contract (GCC) and penalty shall not be imposed at present.
- 10.** Faced with this contention, Shri Atul Choudhari, learned counsel for the appellant submits that if it is clarified by this Court that amount of penalty cannot be imposed, he will be fully satisfied.

**Findings :-**

**11.** A careful and conjoint reading of Clause-1 & 3 of offer letter dated 16/07/2022, shows that the respondents offered to extend the time of completion of contract from 01/06/2022 to 31/07/2022 without Price Variation Clause (PVC) and with penalty of Rs.15,23,115/- per week under Clause-17(B) of GCC. It was made crystal clear in Clause- 3 & 4 that in the event appellant declines to accept the extension on the above said condition, the Railway Administration will be free to take further action in terms of Clause-62 of GCC.

**12.** No doubt, Clause-4 of offer letter dated 16/07/2022 deals with yet another situation, where appellant accepts the conditions enumerated in offer letter dated 16/07/2022, but fails to complete the work by 31/07/20022, suffice it to say that indisputably, in the instant case the second condition is inapplicable because admittedly appellant has not accepted the extension on the conditions mentioned in offer letter dated 16/07/2022.

**13.** Thus, the pivotal question springs out is whether it is open to the respondent to levy penalty of Rs.15,23,115/- per week on the appellant. Shri Atul Choudhari, learned counsel for the appellant on more than one occasion fairly submitted that the whole purpose of approaching the Commercial Court by filing application under Section 9 of the Arbitration Act was to prevent the respondents from imposing the above penalty on him and such imposition can be after the outcome of arbitration proceedings.

14. As noticed above, Shri Pushpendra Yadav, learned Assistant Solicitor General fairly submitted that in the event of declining to accept the extension as per terms mentioned in the offer letter dated 16/07/2022, it is now open to the Railway Administration to take action in consonance with Clause-62 of the GCC. The question of imposing above penalty per week does not arise because appellant has not given the consent and has not accepted the offer dated 16/07/2022

15. In view of aforesaid stand of parties, it is clear like cloudless sky that 'penalty' mentioned in Clause-1 of offer dated 16/07/2022 cannot be imposed because appellant has not accepted the offer of extension dated 16/07/2022. Thus, there is no need for this court to pass any order protecting the appellant from the penalty of Rs.15,23,115/- per week as per Clause-1 of offer letter dated 16/07/2022. In view of clear Clauses of offer letter dated 16/07/2022 and stand of respondents, we do not find any reason to deal with the judgments of Supreme Court cited by Shri Atul Choudhari, learned counsel for the appellant.

16. With this observation, the appeal is **disposed off**. This order will not come in the way of the respondents to proceed against the appellant in accordance with law.

17. It is made clear that this Court has not expressed any opinion on merits of the case.

**(SUJOY PAUL)**  
**JUDGE**

**(AMAR NATH (KESHARWANI))**  
**JUDGE**