2026:DHC:6041-DB

$~8

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

% *Date of Decision : 28.07.2026*

# **CNR No. DLHC010467732019**

\+ **FAO(OS) (COMM) 345/2019**

STEEL AUTHORITY OF INDIA LTD .....Appellant

Through: Mr. Sharat Kapoor, Mr. Shubh Kapoor and Ms. Bhavyah Garg, Advocates.

versus

PSYSTEME GERMANY & ANR .....Respondents

Through: None.

**CORAM:**
**HON'BLE MR. JUSTICE V. KAMESWAR RAO**
**HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA**

**V. KAMESWAR RAO, J. *(ORAL)***

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ("the Act") filed by the Steel Authority of India ("SAIL") lays a challenge to the order of the learned Single Judge dated 26.08.2019 whereby the learned Single Judge has disposed of the petition filed by the SAIL under Section 34 of the Act by stating in paragraph 24 onwards as under:-

> *"24. The letter of credit, by its very nature, is a document which merely secures the payments for the Supplier once the supply has been effected from German shores. The letter of credit is a financial instrument, which safeguards the payment to the Supplier and depending upon the nature of the letter of credit, the same is negotiated through the respective banks of the parties and upon presentation of necessary documents, the banks honour the payments to the Suppliers. The letter of*

*credit is a consequence of the contract but does not stipulate the terms and conditions of the contract. It is a result of the contract for supply, and an assurance for payment, but does not replace the contract in any manner. The creation of any ambiguity in the letter of credit or the performance guarantee in respect of the kind of insurance to be obtained does not obviate the onus upon the Suppliers to conform to the terms and conditions of the contract. Clearly, the second letter dated 7th October, 2002 relied upon by the Suppliers has been termed by the Ld. Arbitrator as an alleged letter, which was never delivered to SAIL. Therefore, the ld. Arbitrator disbelieved the second letter dated 7th October, 2002. Admittedly, the contract condition for obtaining CME insurance was never changed. Even going by the Suppliers" own argument that the officers in SAIL accepted the letter of credit and performance bank guarantee without a CME clause, the same cannot be said to free the Suppliers from complying with the said obligation. The general conditions of the contract, which contains the non-waiver clause being Article 44 of the general conditions has been extracted above. The said clause is completely clear in its intent and purport, that there cannot be any waiver even if there is a failure to insist upon strict performance of the terms and conditions of the contract. It specifically provides that the delivery of the equipment or receiving of the equipment would not be deemed as "waiver of the right for any prior failure" by the Supplier. Clearly, once the equipment was supplied and 80% of the payment was released, SAIL did not have any option but to go ahead and get the same installed at its plant. Ld. Arbitrator's finding that the waiver clause supports the case of the Suppliers is clearly contrary to a bare reading of the clause itself. Ld. Arbitrator's observation is that SAIL was* *seeking to take advantage of its own wrong and that it was barred by the principle of estoppel after having waived the condition for providing CME insurance. This, according to the ld. Arbitrator, was supported by Article 44 of the General Conditions of the contract whereas a reading of Article 44 establishes the contrary. Failure of SAIL or its officers in insisting upon strict performance of the CME clause, cannot be deemed to be a waiver of any rights of SAIL, as per Article 44. Ld. Arbitrator's interpretation is glaringly incorrect and thus, is not sustainable. The observation of the Ld. Arbitrator extracted below is, thus, contrary to a reading of the clause itself.*

> *"The Respondents cannot take advantage of their own wrong, their own conduct, acts, omissions and commissions. The Respondents are barred by the principle of estoppel to raise a claim after unilaterally waiving the condition of providing CME insurance and accepting the Marine insurance policy without demur and protest. This view further supported by Clause 44 of the General conditions of the contract which talks of waiver, which clause has been reproduced hereinabove in para no. 53."*

*25. The submission of Mr. Mehta that SAIL did not insist upon the issuance of CME insurance policy, implying that it had acquiesced to non-performance would be, therefore, incorrect in the light of the clauses applicable. While under Section 63 of the Indian Contract Act, the promissee may dispense with, or remit performance of contractual obligations, in the present case, the mere act of an individual officer cannot constitute, dispensing or remitting of performance. In case of organizations such as SAIL, the conduct of one officer cannot bind the organization until and unless the dispensing or* *remitting was done in writing, superseding the contractual conditions. The judgment in Sutlej Construction (supra) would not be applicable on facts. In the said case, the Court found that there had been waiver by one of the parties by conduct for a long period despite being notified by the other party. In the present case, the Suppliers" obligation was not limited to mere supply of equipment. The fact that 10% of the consideration was to be paid only after issuance of commissioning certificate and thereafter successful commissioning, remaining 10%, six months' after the commissioning, subject to regular and reliable working of the system and issuance of the final acceptance certificate, shows that the Suppliers" obligation continued even after the equipment had reached the port at Kolkata. A large part of the local work was to be executed by Mantri Enterprises – Respondent No.2, and was to be supervised by the German company. Clearly, in the facts of this case, successful erection and commissioning did not take place. No commissioning certificate was issued. Part of the equipment was also destroyed due to fire, and no final acceptance certificate was issued. Thus, the Ld. Arbitrator's finding that the Suppliers" were entitled to the remaining 20% of the consideration is clearly not sustainable. The Suppliers did have an obligation to obtain CME for the entire equipment. There was no installation and commissioning, and hence the remaining 20% is clearly not payable.*

*26. Coming to the counter claim of SAIL, a mere perusal of the events, which transpired once the equipment had reached Kolkata port, clearly, shows that SAIL took up upon itself to transport the equipment, contrary to the stipulation in the contract, that required M/s Mantri Enterprises to undertake transportation. When the equipment reached the port, SAIL did not notify the Suppliers,* *and even storage of the equipment was done by SAIL under its own supervision. The manner in which storage of the equipment was undertaken was also not communicated to the Suppliers. There is no doubt that the fire took place in SAIL"s factory and the same resulted in destruction of the equipment. The timelines, which were to be adhered to as per the contract, were not adhered to. The officers, who were cross-examined, did not have any explanation as to why the letter of credit and the performance bank guarantee were not as per contractual terms and conditions. The fire occurred on 25th May, 2004 and by then, sufficient time had elapsed. The equipment remained without insurance cover right from the port at Kolkata, and all through the time when it remained in SAIL"s premises. Under these circumstances, this Court finds that SAIL had, in fact, acted in a callous manner. Considering that the equipment was lying in SAIL"s premises since October /November, 2003 till May, 2004, there was no reason why the equipment was not installed. Clearly, there was a breakdown of the relationship between the Suppliers and SAIL.*

*27. The counter claim of SAIL prays for a refund of the entire payment made to the Suppliers. SAIL did not adhere to the terms and conditions of the contract in respect of receiving of equipment, transportation, storage, erection, installation and commissioning. Under such circumstances, the Suppliers cannot be blamed for SAIL"s own fault. SAIL, having not insisted at any point for CME insurance, after taking the delivery of the equipment and also having failed to take care of the equipment, cannot seek refund of the amounts paid to the Suppliers. Thus, the counter claim by SAIL has been rightly rejected. While the Suppliers are clearly in default for not obtaining CME insurance, and non-release of the remaining 20% payment is as per the* *contract as the Suppliers failed to carry out the successful installation and commissioning of the equipment, release of 80% in terms of the contract and thus the counter claim, is not liable to be allowed."*

2. The submission of Mr. Sharat Kapoor, learned counsel for the appellant is primarily that on 20.10.2000, the appellant had floated a global tender for the design, engineering, supply of plant and equipment and installation and commissioning and testing of width - measurement system in its Hot - Strip Mill of Rourkela Steel Plant ("RSP").

3. On 28.08.2002, the tender was accepted to be awarded to the respondents. On 27.10.2003, the equipment which is the, subject matter of the tender was dispatched from Germany to Kolkata. On 27.11.2003, the equipment reached port at Kolkata and was transferred to the plant site. On 25.05.2004, fire broke out at RSP damaging part of equipment and disputes arose between the parties as the respondents sought replacement of equipment from the appellant and compliance of the conditions.

4. The appellant/SAIL averred that the respondents breached the contract by not conforming to the Comprehensive Marine - cum - Erection ("CME") policy for the equipment, till the erection and commissioning stage. This resulted in the invocation of the arbitration clause under the contract and the learned Sole Arbitrator, was appointed who rendered the award on 04.09.2013 whereby allowing the claim of the respondents, while dismissing the counter-claim of the appellant by observing that the requirement of CME was waived by the appellant.

5. The learned Single Judge in the impugned order held that it was the

obligation of the respondents to provide for CME. The learned Judge also held there was no waiver on the part of appellant on the aspect of CME, but the learned Judge did not grant counter-claim of the appellant and had also set aside the award to the extent of 20% of the consideration as granted by the learned Arbitrator in favour of the respondents.

6. Mr. Sharat Kapoor, contests the findings of the learned Single Judge for rejecting the counter-claim of the appellant only on the ground that the appellant took upon itself to transport the equipment contrary to the stipulation in the contract and also the appellant was callous, as erroneous.

7. He also states that the conclusion of the learned Single Judge that there was a breakdown of the relationship between the appellant and the respondents, is a perverse finding. He states even if the appellant had transported the equipment to the site and not insisted upon the respondents to discharge its obligation, the same would not absolve the respondents of taking CME insurance and to indemnify the appellant of the loss, caused to the equipment because of fire.

8. At the outset, we say, no one appeared on behalf of the respondents to contest this appeal.

9. Having heard Mr. Sharat Kapoor, we note the learned Arbitrator had framed the following issues for consideration: -

> *"1. Whether there was a concluded contract between RSP & Psysteme for Design, Manufacture, Supply, Testing & Installation and guarantee of width, Measurement System of Hot Strip Mill of the Rourkela Steel Plant (RSP)? OPR*
> *2. Whether the contract provided for comprehensive Marine - cum - Erection Insurance Policy for the total job valid till commissioning of the Width*

*Measurement System and handing over the facilities to the RSP. If, so whether the claimant was obliged to take comprehensive Marine Insurance? OPR*
*3. Whether Clause 17 of the AT document stipulated that M/s Psysteme, Germany shall undertake comprehensive marine cum erection insurance policy for transit, storage, watch and ward, workmen compensation including 3rd party for the total job upto commissioning and handing over of the facilities to Rourkela Steel Plant? OPR*
*4. Whether the claimant had modified, amended its offer vide second letter dated 07.10.2002 to provide Marine Insurance Policy only? OPR*
*5. Whether the second letter dated 07.10.2002 sent by the claimant addressed to the Respondent was received by the Respondent? And if so, its effect on the contract? OPP*
*6. Which party was responsible as per the contract for taking the port clearance of the equipment, sent by the claimant from Germany at Kolkata Port by the respondent? OPP*
*7. Whether the respondent was justified in doing the port clearance, if so, its effect? OPP*
*8. Whether the respondent were justified in keeping the equipment in its custody at its stores for two months? OPR*
*9. Whether the respondent was under any obligation to intimate & inform the claimant about the same? OPR."*

10. The submission of Mr. Kapoor primarily relates to issue nos. 2 to 5. At this juncture, we deem it apposite to refer to the findings of the learned Arbitrator in paragraphs 93 to 97 which read as under:-

*"93. It is further pertinent to mention that the shipping documents including the insurance policy was received by the Respondents from the Claimant No.1 in*

Germany, one month prior to the receipt of the imported equipment at the Kolkata Port. Had the officials of the Respondent being vigilant, the defect in the insurance policy not inconformity with the clause 17 of the AT could have been noticed and pointed out. The Respondents failed to do the same. Getting the imported consignment cleared at Kolkata Port from port and custom authorities and taking the imported equipment to their factory at Rourkela after due inspection, through their own staff and associate company, and not raising any objections even after few months transportation of the equipment to their works by the Respondents, would show that the Respondents had waived the condition of the clause 17 of the AT of the Claimant to provide CME insurance. The Respondents cannot take advantage of their own wrong, their own conduct, acts, omissions and commissions. The Respondents are barred by principle of estoppel to raise a claim after unilaterally waiving the condition of providing CME insurance and accepting the Marine insurance policy without demur and protest. This view further supported by Clause 44 of the General conditions of the contract which talks of waiver, which clause has been reproduced hereinabove in para no.53.

94. Therefore, I am constraint to observe and hold that the officials of the Respondent in different departments whether in sales, marketing, finance or other department, may be due to lack of coordination, inadvertently, even after acquiring knowledge and becoming aware that the Claimants had only provided for Marine Insurance and not for CME insurance in terms of AT, remained indifferent and silent. It was well within the knowledge of the Respondent that only Marine Insurance was asked for in the Global Tender and that only this fact was discussed during discussions for finalizing the commercial terms and based on this the respondent on its own instructed their

*bankers i.e. State Bank of India, Rourkela Branch to open an LC in favour of the Claimant No.1, calling for opening of an LC in favour of the Claimants calling for Marine Insurance. Therefore, by conduct and by principles of acquiescence and implied waiver, the Respondent cannot at a later stage, after a fire took place in the hot strip mill area on 25.05.2004, during erection process and damage equipment, state that it was only at that stage that they acquired knowledge of the claimants not providing for CME Insurance in terms of clause 17 of AT, that is not providing a back to back insurance policy, covering the entire equipment lying at the erection site in the premises of the Respondents and during erection process. I am of the opinion that this is an afterthought on the part of the officials of the Respondents to cover up the lapses on their own part. Therefore, the action of the Respondents calling upon the Claimants to replace the damaged equipment fully knowing that the same was not duly insured was incorrect. I am of the opinion that the Respondent had subsequently woken up after the enquiry was conducted by the officials of the Respondent themselves enquiring into the causes and incident of fire. During the enquiry, it must have come to the notice of the Senior officials of the Respondent that the damaged equipment supplied by the Claimants was not duly insured in terms of Clause 17 of AT of providing a Comprehensive Marine-cum-Erection Insurance Policy.*

*95. These issues are therefore accordingly decided. I accept the contentions of the Respondent that in terms Clause 17 of the AT dated 28.08.2008, the Claimants had to provide Comprehensive Marine-cum-Erection Insurance Policy for the total job valid till commissioning. That the amendment proposed by the Claimant No.2 vide letter dated 07.10.2002 was also an afterthought on his part. The Claimants have failed to prove the same. The Claimants were under legal* *obligation to take CME insurance in terms of AT. As observed herein above, the Respondent by their own conduct, action and inaction and by execution of the documents prior to and after confirmation of At, did not enforce the CME Insurance and had themselves issued LC in favour of the Claimant No.1 asking for a Marine Insurance Policy only. Further the Respondent accepted the equipment dispatched by the Claimant no.1 from Germany based on the shipping documents sent including the Bill of Lading and Marine Insurance, at Kolkata port and took custom and port clearance. The equipments were duly inspected by the officials of the respondent at Kolkata port before being dispatched and transported to the Rourkela Steel Plant without being challenged or objected to.*

*96. On Issue No.4 & 5, as observed earlier, I am of the opinion that the Claimants had failed to modify, amend its offer vide letter dated 07.10.2002 (Annexure C-5, which document is being disputed by the Respondent) to provide Marine Insurance Policy only. Further the Claimant has failed to prove the proper mode & proof of the dispatching and sending the letter dated 07.10.2002 by the Claimant No.2 to the Respondent. The Claimants have failed to examine any witness from the Postal Department to prove that the letter dated 07.10.2002 (Annexure C-5) was actually dispatched and the same was received by the Respondent. Though only postal Slip dated 19.10.2002 has been placed on record during the Cross Examination by confronting one of the respondent witness namely Mr. P.D. Padhee (RW2). The said witness has denied the receipt of the letter dated 07.10.2002 asking for amendment and modification of the Insurance Clause. The said witness was asked to produce the Dak Register during the Cross examination and the said witness could not produce the same. This was not the mode to prove the postal receipt and the mode to prove the delivery of letter dated 07.10.2002 (Annexure C-5) to the*

*Respondent. I am of the opinion that the Claimants have failed to prove the mode of delivery and dispatch of the letter dated 07:10.2002 by post and by fax. In terms of Section 27 of the General Clauses Act, the onus was on the Claimants to prove the actual dispatch and delivery of the letter dated 07.10.2002 to the Respondent. Though the said onus is rebuttable but the Claimants have failed to prove the delivery and dispatch of the said letter. Therefore these Issues are decided against the Claimants.*

*97. The counsel for the Respondent referred to certain judgments in his written submissions. The same has been considered by me, but I do not find them to be appropriate to the facts of the present case and therefore not referred to in the Award."*

11. The aforesaid would reveal that the learned Arbitrator has with regard to CME held that the appellant by its own conduct, through commission and omission did not enforce the CME insurance requirement of the contract. Rather it had issued Letter of Credit in favour of respondent no.1. It accepted the equipment dispatched by the respondent no. 1 from Germany, based on the shipping documents sent including the bill of lading and marine insurance at Kolkata port and took customs and port clearance, which depict a waiver on the part of the appellant and hence they cannot insist on CME aspect.

12. The learned Single Judge has in paragraphs 24 to 26 of the impugned judgement disagreed with the conclusion drawn by the Arbitrator, which we have already reproduce above. We agree with the said conclusion, which is primarily a factual finding, having some basis.

13. Insofar setting aside of the grant of claim of 20% of consideration, which was directed by the learned Arbitrator to be paid to the

respondents/suppliers is concerned, there is no challenge to the said conclusion by the respondents. Accordingly, there is no reason for us to comment on the said conclusion of the learned Single Judge.

14. We, accordingly, find no merit in the appeal. The same is dismissed.

**V. KAMESWAR RAO, J**

**MANMEET PRITAM SINGH ARORA, J**

**JULY 28, 2026**/sr