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

+ **ARB.A. 25/2014**

Judgment reserved on: 17.09.2014

% Judgment pronounced on: 01.10.2014

ARAVALI POWER COMPANY PVT LTD Appellant

Through: Mr. Vikas Singh, Senior
Advocate with Mr. Bharat,
Ms. Deepika Kalia and
Ms. Anasuya Choudhary,
Advocates.

versus

M/S SUBHASH INFRA ENGINEERS LTD. Respondent

Through: Mr. Sandeep Sharma and
Mr. Vatsal Kumar, Advocates

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. The present petition has been filed against the orders dated 10.07.2014 and 08.08.2014 of learned arbitrator. It is submitted that these orders are the interim order relating to the interim measures and therefore, appeal is maintainable. It is further submitted that the order of release of bank guarantee has been passed on the application of the respondent dated 21.04.2014. It is further submitted that order dated 10.07.2014 regarding release of final bill payment, is bad in law as

there was no such request before the learned arbitrator in the application dated 21.04.2014 filed by the respondent and therefore, the said order is bad in law. It is further submitted that the order of release of bank guarantee could not have been passed in violation of Clause 9.7 of General Conditions of Contract (in short 'GCC') as it was refundable on the expiry of defect liability period or on payment of the amount of final bill in accordance with Clause 52, whichever is later. Clause 52 of GCC clearly contemplates that the final bill cannot be paid until the respondent records his unconditional acceptance of the measurements and submits the final bill. It is further submitted that although the period of defect liability had expired on 14.01.2014, the respondent had not yet submitted the final bill. It is submitted that the learned arbitrator has further erred in holding that final bill had been submitted by the claimant/respondent and that the same was processed by the appellant as 22nd RA bill (by cutting the word final bill) especially when, admittedly, the 23rd and 24th RA bills were submitted thereafter by the respondent. It is further submitted that the orders dated 10.07.2014 and 08.08.2014 be set aside.

2. The application is contested by the respondent. They have filed their written submissions although no reply has been filed. It is argued on behalf of the respondent that the orders under challenge are in the form of interim award and the same cannot be challenged under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') by way of an appeal.

3. I have given careful consideration to the arguments of both the parties.

4. The brief facts necessary for disposal of present appeal are recorded hereinafter.

5. The appellant had entered into an agreement with the respondent for Ash Dyke Package For Indira Gandhi Super Thermal Power Project (IGSTPP), Jhajjar for a value of Rs.29,48,63,000/-. Pursuant to Clause 8 of the Letter of Award (LOA), the respondent was to submit the bank guarantee in the nature of security deposit for execution of the contractual work. As per Clause 9.6 of GCC, 50 % of the security deposit was to be released on the completion of the said work. As per Clause 9.7 of GCC, the remaining amount of security deposit was to be released on the expiry of the defect liability

period or on the payment of the amount of the final bill payable in accordance with Clause 52 of GCC whichever is later. On completion of work, the appellant had released 50 % of the security deposit in terms of Clause 9.6 of GCC. Meanwhile, the dispute had arisen between the parties and the claim petition was filed by the respondent. During the pendency of the arbitral proceedings the period of defect liability had expired and thereafter the respondent/claimant had moved an application dated 21.04.2014 for release of the bank guarantee on the ground that defect liability period had expired on 14.01.2014. Further issue was raised that in order to avoid the release of the bank guarantee the appellant had issued, as an afterthought, a letter dated 04.03.2014 wherein the appellant had alleged that the final bill was ready since 16.10.2013. The respondent/claimant in this application has also mentioned that though the final bill prepared by the respondent/present appellant was without including other payments but the present appellant had admitted entitlement for payment. On these facts it was prayed that the bank guarantee be released.

6. This application was taken up by the learned arbitrator on

10.07.2014 and following directions were issued:

“In view of the above and final bill being in positive and no claims raised by the respondent up to the expiry of the defect liability period, I decide to make immediate interim relief to the claimant through this order that the respondent to release the final bill payment as accepted by them as well as release of the bank guarantee before the next date of hearing.

The other claim of claimant as well as counter claim will be decided on its merits in final award after hearing the parties.”

7. Subsequently, the appellant moved an application before the learned arbitrator to keep the operation of the interim order for release of bank guarantee pending till the end of September, 2014 and accordingly, the learned arbitrator vide its order dated 08.08.2014 gave the respondent time to release the bank guarantee by 15.09.2014.

8. The sole contention of the respondent/claimant is that order dated 10.07.2014 is in the form of interim award as by granting an amount of Rs.401000/- towards final bill amount, the learned arbitrator has given a finding on Claim 10 of the respondent/claimant. It is further submitted that by the release of the bank guarantee the arbitrator has granted the part of the relief of claim 6 of the respondent/claimant. This argument is controverted by the appellant stating therein that the order itself shows that *“this order dispose of*

the application dated 21.04.2014 and therefore this order cannot be termed as an interim award but is an interim relief given to the respondent.” Learned counsel for the respondent/claimant has submitted that observation of the learned arbitrator to the effect that *“the other claim of claimant as well as counter claim will be decided on its merit in final award after hearing the parties”*, clearly shows that this order is in the form of interim award.

9. The first controversy therefore is whether the orders dated 10.07.2014 and 08.08.2014 are in the form of an Award? Award has not been defined anywhere in the Arbitration and Conciliation Act except that the award includes the interim award. There is no dispute to the settled law that an order of the arbitrator can be termed as an award only when it determines the rights of the parties finally, on the claims whether by way of interim award or by way of final award. The question to be seen therefore is whether vide these orders the learned arbitrator has finally determined the rights of the parties. Contention of the respondent/claimant is that the findings of the learned arbitrator to direct the respondent to pay an amount of Rs.401000/- towards the final bill amount to a finding on Claim 10 of

the respondent. Two reliefs have been given to respondent/claimant by the learned arbitrator vide his order dated 10.07.2014. First is release of the final bill payment as accepted by them and other is release of the bank guarantee.

10. As regards release of final bill payment is concerned, the respondent/claimant had raised a demand of payment of final bill in the form of Claim 10.

11. Claim 10 of the respondent/claimant is as follows:

CLAIM NO.10 – FINAL BILL

The final bill amounting to Rs.410000/- which is admitted payment has not been released and is therefore required to be released with interest @ 18% per annum.

12. The appellant in his reply to this claim had taken the plea that the claim was not tenable as the claimant had not submitted the final bill and the final bill could not be paid till the claimant recorded his unconditional acceptance of the measurement and submit the final bill.

13. In the rejoinder, the respondent/claimant qua their Claim 10 had alleged that there was no dispute in the measurement and that it was on the accepted measurement that an amount of Rs.4,10,000/- is payable by the claimant. It is further stated in the rejoinder that the

claimant had informed the appellant vide letter dated 20.12.2012 of the completion of the work and had requested them to prepare the final bill and release the payment. It is further submitted that the letter dated 04.03.2014 had been issued with ill motive by the appellant and that the claimant were entitled for this sum.

14. From this factual position it is clear that the release of the money towards final bill was one of the claim and vide this order dated 10.07.2014 the arbitrator has determined the said claim of the respondent/claimant. The observation of the learned arbitrator to the effect that the other claims of the claimant as well as counter claim would be decided on this merit in final award further confirms that this part of the order dated 10.07.2014 is by way of an interim award. Hence, cannot be challenged by way of an appeal.

15. Vide this order dated 10.07.2014, the arbitrator has also ordered release of the bank guarantee while disposing of an application of the claimant dated 21.04.2014 for that relief. No claim has been made by the respondent/claimant in his claim petition before the learned arbitrator for release of the bank guarantee. The only claim qua bank guarantee, which had been put up as claim 6 relates to claiming of

charges incurred on account of extension of bank guarantee.

16. In the rejoinder, however, the respondent/claimant has also stated that the bank guarantee has been illegally withheld and requested for issuance of necessary directions for release of bank guarantee. Along with this rejoinder, the claimant had also moved a separate application dated 21.04.2014 for release of the said bank guarantee.

17. From the perusal of order dated 10.07.2014 it is apparent that although the claimant had contended that withholding of a bank guarantee is illegal, no finding had been given by the learned arbitrator. The learned arbitrator has simply ordered for the release of the bank guarantee. The entitlement of the claimant for charges on account of the extension of the bank guarantee is also left to be determined in the final award. No finding on Claim 6 of the claimant has been given in this order. The order for release of the bank guarantee is in the form of an interim order passed as an interim measure on an application of the claimant, without determining the claim and contentions of the parties. It is apparent that while moving an application dated 21.04.2014, the claimant has not mentioned any

provision under which the said application had been moved. The title of the application is simply for release of the bank guarantee on the ground that defect liability period has expired. This part of the order of the learned arbitrator therefore is not in the form of an award but is an order in the form of interim measure. Both the directions of learned arbitrator are separable as they are not interconnected. Hence, challenging the findings relating to release of bank guarantee is appealable under Section 37 (2) (b) of the Act.

18. It is argued on behalf of the appellant that the order for release of bank guarantee is violative of Clause 9.7 read with Clause 52 of GCC.

19. It is argued on behalf of the respondent/claimant that the order of the learned arbitrator does not suffer with any infirmity as the same has been passed in terms of the said clauses.

20. Clause 9.7 of GCC deals with the release of the bank guarantee.

The clause is reproduced as under:

“9.7 On expiry of the Defects Liability Period (referred to in Condition 33 hereof) or on payment of the amount of the Final bill in accordance with condition 52 whichever is later, the Engineer-in-Charge shall on demand from the Contractor, refund to him the remaining portion of the security deposit provided the Engineer-in-Charge is

satisfied that there is no demand outstanding against the contractor.”

21. From the perusal of the relevant clause it is apparent that this clause is in three parts i.e. (a) on expiry of defect liability period, (b) on payment of amount of final bill in accordance with condition 52, (c) whichever is later. The said clause also contains a ‘proviso’ which clearly provided that “*the engineer-in-charge is satisfied that there is no demand outstanding against the contractor*”.

22. Learned arbitrator has defaulted in releasing the bank guarantee on the ground that the defect liability period had expired and a final bill had been issued by the engineer-in-charge and no claim raised till expiry of period of defect liability. However, it is clear that there is no certificate of the engineer-in-charge to the effect that there is no demand outstanding against the contractor. It is not disputed that the appellant has also filed a counter claim before the learned arbitrator, which requires determination by the learned arbitrator during arbitral proceedings. It, therefore, is clear that all the conditions of Clause 9.7 of GCC are not satisfied. From the order it is clear that bank guarantee has been ordered to be released by the learned arbitrator only on the submission of the claimant that there has been no demand

regarding any claim/amount due, without discussing the counter claim of the appellant and also without giving any finding on this issue.

23. In view of this orders of the learned arbitrator dated 10.07.2014 and 08.08.2014 relating to release of the bank guarantee are hereby set aside.

24. The relief for setting aside the order for payment of amount of Rs.4,01,000/- towards payment of final bill cannot be granted in view of the above discussion as the said part of the order is not appealable.

DEEPA SHARMA, J.

01st OCTOBER, 2014