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

% Judgment delivered on: 21.07.2015

+ **FAO (OS) 385/2015**

M/S VIRENDER KUMAR JAIN

.... Appellant

versus

M/S. BHARAT HEAVY ELECTRICALS LTD.

..... Respondent

Advocates who appeared in this case:

For the Appellants : Mr Sanjay Bansal, Advocate.

For the Respondents : None.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.12648/2015 (exemption)

Exemption is allowed subject to all just exceptions.

CM Nos.12646/2015 (for condonation of delay in re-filing the appeal)

The delay in re-filing the appeal is condoned.

The appeal stands disposed of.

CM Nos.12647/2015 (for condonation of delay in filing the appeal)

The delay in filing the appeal is condoned.

The appeal stands disposed of.

FAO (OS) 385/2015

1. This appeal is filed against the order dated 10.03.2015 passed by the learned Single Judge of this Court in OMP No.524/2013 which was a

petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the said Act”), which in turn was directed against the Award dated 14.01.2013, passed by the Sole Arbitrator, in disputes between the appellant and the respondent.

2. The parties had entered into an agreement on 30.04.2007 for execution and handing over of civil works for yard and control room building of 220/33 KV S/Stn at Masjid Moth in New Delhi. We need not refer to the other details of the contract. The only point urged by the learned counsel for the appellant is that Claim No.3 raised by the appellant before the learned Arbitrator had not been considered and that even the agreed upon and accepted items were not paid for. The learned Single Judge has examined this aspect of the matter in detail in paragraphs 12, 13 & 14 which are reproduced herein below:-

“12. It was next submitted by Mr. Bansal that the learned Arbitrator erred in rejecting the claim for work executed under Claim No.3 and in particular for the extra work. It was submitted that the learned Arbitrator did not actually call for the records and the Respondent also did not produce the records deliberately before the learned Arbitrator. Since excavation was of a quantity more than what was contracted for, there would be corresponding increase in the backfilling. It was stated that as far as

extra item No.2 was concerned, the learned Arbitrator failed to consider the quantity as jointly measured for 159.60 sq.m. A balance further sum of Rs.25,584 was required to be paid to the Petitioner as regards extra item No.3 since what was executed was an extra item and not a BOQ item. The learned Arbitrator erred in calculating the rate @ Rs.93.55 per cubic meter instead of Rs.83.44 per RM.

13. In reply, it was submitted by Ms. Cherian that these were questions of facts and since the Court in exercise of its jurisdiction under Section 34 of the Act is not sitting in appeal, there is no question of interfering with the Award only because another view is possible to be taken. It is pointed out that the Petitioner itself subsequently filed a petition under Section 33 of the Act which was allowed by the learned Arbitrator. It was clarified that the amount accepted against all items of the final bill including Rs.891 against Item No.1 (a) worked out to Rs.4,47,674.53. This extra amount was in fact paid to the Petitioner.

14. The Court does find that the application filed by the Petitioner under Section 33 of the Act was in respect of Claim No.3 for which again a separate hearing was conducted by the learned Arbitrator. The extent to which the Petitioner had sought clarification was allowed since the Respondent did not object to it. It is also noted that the said extra amount which has been ordered in terms of the subsequent

order dated 9th May 2013 of the learned Arbitrator in the application filed under Section 33 of the Act by the Petitioner has already been paid to the Petitioner. Consequently, this Court does not find any merit in the contention of the Petitioner.”

3. Apart from this, we have also seen the order passed by the learned Arbitrator on the aforementioned application under Section 33 of the said Act whereby the appellant had sought clarifications in respect to Claim No.3. Paragraph 3 of the said order, which is dated 14.04.2013, is reproduced herein below:-

“03. Claimant submitted that against their claim no.3, order had been passed for disputed items only and other items of final bill which had been executed by them and also accepted by the Respondent and which were also a part of the said claim no.3 had remained overlooked in the AWARD.”

4. This is the exact point which the learned counsel for the appellant has raised before us inasmuch as he has submitted that the award overlooks even items which had been accepted by the respondent and form part of Claim No.3. But, in view of the application under Section 33 and the order passed thereon, we find that the submission which is being advanced before us that the learned Arbitrator had overlooked this aspect of the matter cannot be sustained. Clearly, the learned Arbitrator has

examined the same, at least, in the order under Section 33 of the said Act, even though the learned Arbitrator was, prima facie, of the view that the said application was time barred as the respondent had no objection to the application being considered. Ultimately the Arbitrator held as under:-

“05. In view of the above submissions of the Parties, final bill accepted by the Respondent for an amount of Rs 447,674.53 was discussed. It was observed that order had already been passed for item nos. 1(a), 3 & 4 of BOQ and the amount of claim accepted as per the AWARD against these items matched with the amounts shown in the final bill submitted by the Respondent. All other items of this bill with their quantities and amount were acceptable to both Parties. Under the conditions, claim against final bill is accepted for Rs 447,674.53. Since it includes the amount of Rs 18,964.29 against item 1(a) and NIL amount against items 3&4, this amount of Rs.18,964.29 is to be paid as a part of final bill of Rs. 447,674.53 and not in addition to it. In effect, amount accepted against all Items of final bill, Including Rs 18,964.29 against item 1(a), is Rs 447,674.53. In addition, amount accepted for Extra work Item nos. 1 to 5, which also form a part of claim no. 3, shall be paid as already given in the AWARD dated 14.01.2013.

06. The AWARD dated 14.01.2013 stands modified to the extent mentioned in clause 05 above.

07. It is also stated that although clause 18.0 of the AWARD contained order on final bill, above clarifications are issued to bring total clarity for the amount accepted against final bill and claim no. 3.”

5. It is in this context that the learned Single Judge observed that the petitioner, who had sought clarification under Section 33 of the said Act by virtue of the abovementioned application, had also received payment in respect of the amount which was awarded thereupon. Consequently, the learned Single Judge did not find any merit in the contentions of the appellant with regard to Claim No.3. We agree with the learned Single Judge.

6. All other aspects of the award and the order of the learned Single Judge pertain to factual findings in respect of which no interference is called for.

7. Consequently, the appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

JULY 21, 2015
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