



2024:DHC:7521-DB



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

+ LPA 968/2024, CM APPL. 57001/2024, CM APPL. 57002/2024
&CM APPL. 57003/2024
CS CONSTRUCTION COMPANY PVT LTD & ANR.

.....Appellants

Through: Mr. Sudhir Nandrajog, Senior
Advocate alongwith Mr. Chaitanya
Mahajan, Ms. Payal Kakra, Mr.
Ehraaz Zafar, Ms. Padamja
Sharma, Ms. Astha Agrawal and
Mr. Devang Sharma, Advocates.

versus

EXCELLING GEO AND ENGINEERING CONSULTANT PVT
LTD & ORS.

.....Respondents

Through: Mr. Rakesh Kumar and Mr. Ankit
Kumar, Advocate for R-1.

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Date of Decision: 27th September, 2024**CORAM:****HON'BLE THE ACTING CHIEF JUSTICE****HON'BLE MR. JUSTICE TUSHAR RAO GEDELA****JUDGMENT****MANMOHAN, ACJ : (ORAL)**

1. Present appeal has been filed challenging the order dated 25th August, 2024 passed by the learned Single Judge in W.P. (C) 10027/2024 titled "*CS Construction Company Pvt Ltd & Anr vs. Excelling Geo & Engineering Consultant & Ors*", whereby the learned Single Judge held that no exceptional circumstances or perversity has been demonstrated to warrant the exercise of the extraordinary jurisdiction of the Court under Article 226 or 227 of the Constitution of India and dismissed the



underlying writ petition with costs.

2. Mr. Sudhir Nandrajog, learned senior counsel appearing for the appellants submits that the appellants have invoked the writ jurisdiction for issuance of appropriate direction for quashing the orders dated 27th March, 2024, 24th May, 2024, 5th July, 2024 and 9th July, 2024, passed in the ongoing arbitration proceedings by respondent no.2/sole arbitrator as well as an order dated 22nd March, 2024 passed by respondent no.3/coordinator, Delhi International Arbitration Centre (for short 'DIAC').

3. Learned senior counsel for the appellants, at the outset, states on instructions, that the appellants are restricting their appeal only *qua* the order dated 22nd March, 2024 of the respondent no.3/coordinator, DIAC. He states that the controversy has arisen in respect of the fee payable to the respondent no.2/sole arbitrator regarding the counter claim filed by it. He states that *vide* order dated 12th March, 2024, the respondent no.2/sole arbitrator had directed the parties to deposit their individual share in respect of the claim as also the counter claim. He states that in the meantime, the respondent no.1/claimant moved an application dated 21st March, 2024 to the DIAC expressing its inability to pay its share of the deposit with respect to the counter claim. He states that the respondent no.3/coordinator, DIAC, *vide* order dated 22nd March, 2024 directed reassessment in accordance with the proviso to sub-section (1) of section 38 of the Arbitration & Conciliation Act, 1996 (for short 'Arbitration Act').

4. He states that the respondent no.3/coordinator, DIAC, without having any jurisdiction and contrary to the authority vested in him, passed



the order dated 22nd March, 2024 thereby directing separation of assessment of fee in respect of the claim and the counter claim. He states that the respondent no.3/coordinator, DIAC, has misdirected himself of the exercise of the power by relying on Rule 3 (ii) of the DIAC (Administrative Costs & Arbitrator's fee) Rules, 2018 (for short 'DIAC Rules, 2018'). He states that this order is not only without jurisdiction but also contrary to the order passed by the respondent no.2/sole arbitrator on 12th March, 2024. He states that the respondent no.3/coordinator, DIAC is not an appellate authority sitting in an appeal over the respondent no.2/sole arbitrator, particularly, in respect of the fee determined by the respondent no.2/sole arbitrator.

5. Learned senior counsel for the appellants refers to order dated 27th March, 2023, passed by the respondent no.2/sole arbitrator, directing the respondent no.1/claimant deposit the whole of the fee with respect to its claim and simultaneously, further directed the appellants deposit the whole of the fee with respect to its counter claim as per the assessment order dated 22nd March, 2024 passed by the respondent no.3/coordinator, DIAC.

6. Learned senior counsel for the appellants refers to section 37 of the Arbitration Act to state that only those orders, specified in the said section alone, are open to challenge and none others. He states that evidently, the order passed by the arbitrator fixing the fee in respect of the counter claim also does not fall within the ambit of section 37 nor can the respondent no.3/coordinator, DIAC arrogate to himself any such power not vested in law. He contends that the exercise of jurisdiction not available with the respondent no.3/coordinator, DIAC would render the order dated 12th



March, 2024 *non est* in law. Predicated on the above, he states that the impugned order dated 22nd March, 2024 of the respondent no.3/coordinator, DIAC be quashed and set-aside.

7. Learned senior counsel for the appellants forcefully submits that if such order is permitted to stand, it would lead to an incongruous and anomalous situation. According to him, any order passed by the arbitrator fixing the fee and the schedule could be interdicted by any party seeking to delay the proceedings on such procedural matters. He states that this ought not to be encouraged and be nipped in the bud. On this basis too, he states that the order is palpably illegal and overreaching of the jurisdiction of respondent no.3/coordinator, DIAC and ought to be set-aside.

8. This Court has heard Mr. Sudhir Nandrajog, learned senior counsel for the appellants and Mr. Mr. Rakesh Kumar, learned counsel for the respondent no.1/claimant and perused the record.

9. This Court notices that the issue raised before this Court pertains to deposit of the sole arbitrator's fee to the extent of 50% on the counter claim filed by the appellants and the refusal to deposit the same by the respondent no.1/claimant on the grounds of inability to arrange for such fee. Though the learned senior counsel for the appellants argues that the impugned order dated 22nd March, 2024 of the respondent no.3/coordinator, DIAC amounts to overreaching the jurisdiction vested upon the respondent no.3/coordinator, DIAC, yet we find that the respondent no.3/coordinator, DIAC has premised his reasoning on the basis of Rule 3 (ii) of the DIAC Rules, 2018. This Court finds that the respondent no.3/coordinator, DIAC, while examining the application filed by the respondent no.1/claimant describing its inability to pay the 50% of



the fee of the counter claim, had not interdicted or sat in appeal over that of the order dated 12th March, 2024 of the respondent no.2/sole arbitrator. The respondent no.3/coordinator, DIAC has noted the order passed by the respondent no.2/sole arbitrator and without making any observations or comments, has exercised the power vested on him under Rule 3 (*supra*). The respondent no.3/coordinator, DIAC appears to have been driven by the inability of the respondent no.1/claimant to arrange for the 50% fee in respect of the counter claim filed by the appellants and has applied his mind in accordance with the rules with cogent reasons. It is apposite to extract the relevant paragraphs of the impugned order hereunder:

“9. I have also gone through the application placed before the undersigned as well as the order dated 22nd March, 2024 of the Hon’ble Arbitrator. It transpires that in Para No. 12 of the application so filed, the Claimant has in no unclear terms, expressed that he is unable to arrange the balance amount of Rs. 10,95,042/-, so found to be deficient. The relevant para of the application is reproduced as under:

“12. It is submitted that the claimant is unable to arrange the amount of their part in respect of Counterclaim i.e. Rs. 10,95,042/-. The claimant undertakes that to deposit entire amount of administrative cost & arbitrator fee only in respect of claim as per whatever payment schedule will be given by the DIAC. The Respondent/ Counter Claimant may be directed to deposit the entire amount of administrative cost & arbitrator fee in respect of their counter claim.”

10. The Claimant, on the basis of the above, has sought separate assessment of claim and counter claim undertaking to pay the entire balance amount as may be found due on the basis of assessment of the claim separately.

11. In terms of the Rule 3(ii) of Delhi International Arbitration Centre (Administrative Costs & Arbitrator’s fees) Rules, 2018 as reproduced hereinafter, the Centre can assess the claim and counter claim separately in the event of failure of party to pay its share;

“ 3. Arbitrator's Fee



(ii) *The fee shall be determined and assessed on the aggregate amount of the Claim(s) and Counter Claim(s):*

Provided that in the event of failure of party to arbitration to pay its share as determined by the Centre, on the aggregation of Claim(s) and Counter Claim(s), the Centre may assess the Claim(s) and Counter Claim(s) separately and demand the same from the parties concerned:

Provided further that for the purposes of valuation or quantification of the Claims, the Centre shall be governed by the laws of India, and the principles governing the valuation of claims before the Courts of Civil Jurisdiction:

Provided also that in case of undervaluation or where the value is not determinable in pecuniary terms, the Co-ordinator would be entitled to assess and demand the revised fee on the basis of assessment and to decide the objections, if any, relating to the quantification or valuation."

12. *It may be relevant here to mention that the claimant's application clearly records his inability to pay the balance and it shall be undesirable or a futile process to keep pressing for a deficit amount on the basis of assessment of aggregate amount of claim and counter claim, even if, the claimant might be taken to have wrongfully resiled from his earlier stand.*

13. *What factors in, significantly, is the fact that the Centre needs to collect the complete fee on the claim and counter claim, rather than going into the correctness of the stand of the parties. That process would totally be beyond the jurisdiction of the Centre.*

14. *Having regard to the specific averments made in the application, the Centre can assume that the expression of inability to pay, falls within the term of "failure" as mentioned in Proviso 3(ii) of the aforesaid Rules.*

15. *Thus, what is necessitated now, is separate assessment of claim and counter claim, without any further delay in order that the parties can be asked for the respective shares on the basis of the claim and counter claim.*

16. *Accordingly, the Deputy Counsel concerned is directed to immediately reassess the claim and counter claim separately, as per the schedule applicable and further to communicate the assessment to learned counsel for the parties as well as to the Hon'ble Arbitrator immediately, having regard to the fact that the next date is 27th March, 2024."*

10. This Court also finds that the respondent no.3/coordinator, DIAC



has appropriately assumed that the expression “*inability to pay*”, falls within the terms of “*failure*” as mentioned in proviso to Rule 3 (ii) of the DIAC Rules, 2018. Based thereon, a reassessment of fee in respect of the claim and counter claim were directed to be worked out separately. This Court also finds that while exercising such jurisdiction, the respondent no.3/coordinator, DIAC neither overreached the jurisdiction vested in him nor sat in appeal over the order dated 12th March, 2024 passed by the respondent no.2/sole arbitrator. All that was done, was to direct reassessment of fee separately so as to ensure that the claim and the counter claim can proceed in accordance with law.

11. Besides, this Court also finds it intriguing that it is the appellants/counter claimants who has challenged the order of the respondent no.3/coordinator, DIAC. If at all, anyone could be an aggrieved person, it could be the respondent no.2/sole arbitrator alone. No such application, appeal or a writ petition has been preferred by the respondent no.2/sole arbitrator.

12. Moreover, in arbitral proceedings, if a party chooses not to deposit its share of the arbitrator’s fee, the other party while making the deficit deposit, is kept safe and indemnified from any loss by the arbitrator while passing award in the form of costs of arbitration. The award, which is a deemed decree, would also take within its fold, apart from the costs of arbitration, the fee, if any, payable by a party and not paid. In other words, the 50% share of the arbitrator’s fee not being deposited by the respondent no.1/claimant may be decreed in favour of the appellants in the award itself. Thus, looked at it in any which way, the appellants shall not be at loss nor would the appellants be remediless.



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13. Thus, it is clear that the apprehension of the appellants is unfounded. Resultantly, there is no merit in the present appeal and the same is dismissed along with pending applications, without any order as to costs.

ACTING CHIEF JUSTICE

TUSHAR RAO GEDELA, J

SEPTEMBER 27, 2024/kct