IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision : 29.5.2015

FAO No. 2115 of 2013 (O/M)
M/s KMP Expressways Ltd. ..... Appellant

Versus

Haryana State Industrial and Infrastructure Development Corporation (HSIIDC) ...... Respondent

FAO No. 2899 of 2013 (O/M)
Haryana State Industrial and Infrastructure Development Corporation (HSIIDC) ..... Appellant

Versus

M/s KMP Expressways Ltd. ...... Respondent

CORAM: HON'BLE MR. JUSTICE KULDIP SINGH

Present:- Mr. Rajiv Atma Ram, Senior Advocate, with,
Mr. Saket Sikri, Mr. Jai Singh Brar and
Mr. Vikalp Mudgal, Advocates,
for the appellant in FAO No. 2115 of 2013 and
for respondent in FAO No. 2899 of 2013.

Mr. Amar Vivek, Advocate, for the appellant
in FAO No. 2899 of 2013 and
for respondent in FAO No. 2115 of 2013.

1. Whether the Reporters of local newspaper may be allowed to see the judgment ?
2. To be referred to the Reporter or not.
3. Whether the judgment should be reported in the digest ?

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KULDIP SINGH, J.

By this judgment, I shall dispose of FAO No. 2115 of 2013 titled as *M/s KMP Expressways Ltd. Versus Haryana State Industrial and Infrastructure Development Corporation (HSIIDC)* and FAO No. 2899 of 2013 titled as *Haryana State Industrial and Infrastructure Development Corporation (HSIIDC) Versus M/s KMP Expressways Ltd.,* arising out of judgment dated 6.4.2013, passed by the learned Additional District Judge, Chandigarh, whereby the petition filed by M/s KMP Expressways Ltd. (appellant/petitioner herein) under Section 9 of the Arbitration and Conciliation Act , 1996 (in short 'the Arbitration Act, 1996') was partly allowed and Haryana State Industrial and Infrastructure Development Corporation (in short 'HSIIDC') was directed to release Rs. 78.300 crores as per the terms and conditions of the Concession Agreement dated 30.1.2006. Further direction was given to HSIIDC not to take any penal action against the appellant/petitioner.

The case of the appellant/petitioner before the lower Court was that two projects, namely, Eastern Peripheral Expressway (in short 'EPE') and Western Peripheral Expressway (in short 'WPE') were initiated as per the orders of the Hon'ble Supreme Court of India. WPE is also known as Kundli Manesar Palwal Expressway. HSIIDC (respondent herein) was designated by the Haryana Government as project steering agency for development of the project on build, operate and transfer (BOT) basis. HSIIDC is the wholly owned subsidiary of Government of Haryana and the nodal agency for development of WPE. The said expressway is 135 kilometers in length. The contract was awarded to the appellant/petitioner after evaluating the bids. The Concession Agreement dated 30.1.2006 was executed on Private-Public-Partnership (PPP) model on build, operate and transfer basis. Some disputes arose between the parties on account of the change of scope i.e. additional works and services, which are beyond the scope of the project. Due to several delays and numerous instances of change of scope, the original cost of the project escalated from Rs. 1915 crores to Rs. 2826.43 crores. There were 33 events of change of scope, the amount of which is being claimed by the appellant/petitioner and the same is being disputed by the respondent.

Clause 17.3 of the Concession Agreement provides that notwithstanding a dispute regarding the cost and time for implementation of such change of scope order, the Concession Agreement was to proceed with the performance of such change of scope order promptly following HSIIDC's confirmation. Pending the resolution of such dispute, HSIIDC shall either pay the concessionaire, an amount equal to the cost certified by an Independent Consultant to be reasonable, plus/minus as the case may be, one half of the difference between the amount certified by the said Independent Consultant and the amount claimed by the concessionaire with the final adjustments to be made in accordance with the resolution of dispute under the Dispute Resolution Procedure. In case, HSIIDC has to recover from the concessionaire, the amount will be recovered directly from the Escrow account, for which the concessionaire expressly authorized HSIIDC and gave irrevocable instructions to Escrow bank and to make payment from the Escrow account in accordance with the instructions of HSIIDC under this clause. Undisputedly, the contract of the appellant/petitioner has been terminated and has been given to some other concessionaire. The case of the appellant/petitioner is that an amount of R. 78.300 crores is the 50% of the additional work as certified by the approved Independent Consultant, whereas respondent has right to withdraw the money from the said Escrow account. Therefore, the balance of convenience is in his favour.

In the reply, respondent took the plea that there was continuous non performance by the appellant/petitioner. Therefore, a show cause notice was issued to the appellant/petitioner in terms of Clause 15.4 of the said Concession Agreement. Vide letter dated 2.7.2012, damages for delay in the achievement of COD at the rate of 0.01% of the total project cost per week, effective from 30.7.2009 till the COD is to be achieved, was imposed. The amount of damages is calculated at Rs. 17.88 crores, which the appellant/petitioner was directed to deposit within 15 days with interest at the rate of 18% per annum. However, the same has not been deposited. The completion of work has been delayed. The work came to standstill. The Escrow bank i.e. M/s IDBI Bank informed the respondent that there is no inflow of funds from the appellant/petitioner into the Escrow account for the last 5/6 months. Therefore, the amount cannot be recovered from the Escrow account. It was further stated that the appellant/petitioner was able to achieve only 23.1% progress till 29.7.2009 and 58.47% by December, 2010. In the meeting held on 16.8.2010, the concessionaire was able to achieve the progress of 62.85%.

Learned Additional District Judge, Chandigarh, after hearing both the parties, passed the impugned order dated 6.4.2013.

Both the parties being not satisfied with the said impugned order filed the cross appeals.

I have heard learned senior counsel for the appellant/petitioner-M/s KMP Expressways Ltd., learned counsel for respondent-HSIIDC and have also carefully gone through the file.

Clause 17.3 of the said Concession Agreement is not denied, under which 50% of the additional cost, when certified by an independent consultant, could be recovered subject to final adjustment in the bills. There is also a dispute between the parties as to whether the said independent consultant has approved the said bills or not ? The stand of the respondent is that there are no bills, which have been approved, whereas according to the appellant/petitioner, such bills were approved and 50% of the amount, amounting to Rs. 78.300 crores is recoverable from the respondent.

First of all, this Court is to see whether the relief claimed by the appellant/petitioner, can be granted under Section 9 of the Arbitration Act, 1996. Section 9 of the Arbitration Act, 1996, provides as under :-

> "9. Interim measures, etc. by Court.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:—
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> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
>
> (b) securing the amount in dispute in the arbitration;
>
> (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question

> may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
>
> (d) interim injunction or the appointment of a receiver;
>
> (e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

Appellant/petitioner seeks to cover his case under Clauses (d) and (e) of Section 9 of the Arbitration Act, 1996. Undoubtedly, the said WPE is being monitored by the Hon'ble Supreme Court. Unluckily, it could not be completed and as admitted by the parties, the agreement with the appellant/petitioner has been terminated and a new company has been given said contract to complete the said project. It is also not disputed between the parties that the Arbitral Tribunal has since been constituted. One arbitrator each was appointed by the parties and third arbitrator has been appointed by the Chief Justice of this Court in September, 2013. Section 17 of the Arbitration Act, 1996 lays down as under :-

> "17. Interim measures ordered by arbitral tribunal.—

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

It goes to show that the interim measure of protection can be granted by the Arbitral Tribunal.

The appellant/petitioner had made the following prayers in his petition under Section 9 of the Arbitration Act, 1996 :-

"(i) direct the respondent-HSIIDC not to deduct the amount payable to the petitioner (herein) and consequently pay to the petitioner (herein) the undisputed amount payable as per Annexure-P-39 ;

(ii) direct that no penal action/or other action shall be taken against the petitioner (herein) till the constitution of the Arbitration Tribunal and commencement of proceedings before the Arbitration Tribunal ;

(iii) grant any other relief or direction to which the petitioner (herein) may be entitled to in the facts and circumstances of the case."

Now, the question would arise whether the Court, as an interim measure under Section 9 of the Arbitration Act, 1996, could direct the respondent to pay any amount, which is being disputed by the appellant/petitioner ?

I am of the view that the reply is in negative. The respondent disputed the 50% of the amount of the additional work. The bills for such work are also disputed. The respondent had also made certain monetary claim against the appellant/petitioner and as pleaded by the respondent, there is no money in the Escrow account, from which the respondents could recover their claim. In this way, respondents are to set-off their claim against the claim of the appellant/petitioner. In these circumstances, the question would arise whether the lower Court was justified in directing the respondent to pay a sum of Rs. 78.300 crores to the appellant/petitioner as an interim measure and also direct the respondent not to take any penal action ?

At the time of filing of the petition, the Arbitral Tribunal was not constituted. The appellant/petitioner has failed to prove that he has got prima facie case and that balance of convenience is in his favour. There is claim and counter claim, which is to be decided by the Arbitral Tribunal. In these circumstances, when the Arbtiral Tribunal has been constituted, it is proper that the appellant/petitioner should move the Arbitral Tribunal for interim relief, if any. The Arbitral Tribunal will be in a position to deal with the claim and counter claim and dispose of such interim claims. Under Section 31 (6) of the Arbitration Act, 1996, the Arbitral

Tribunal is always competent to pass interim award, if it considers necessary.

From the foregoing discussion, I am of the view that the impugned order is not sustainable in the eye of law. Hence, the impugned order dated 6.4.2013, passed by the Additional District Judge, Chandigarh, is set aside. Therefore, the petition filed by the appellant/petitioner under Section 9 of the Arbitration Act, 1996, before the district courts stands dismissed.

Consequently, the appeal filed by HSIIDC i.e. FAO No. 2899 of 2013 is allowed and the appeal filed by M/s KMP Expressways Ltd. i.e. FAO No. 2115 of 2013 stands dismissed.

(KULDIP SINGH)
JUDGE

29.5.2015
sjks