

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

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Judgment Reserved on: 20th April, 2015

Judgment Delivered on: 06th July, 2015

+ **FAO(OS) 154/2015 & EFA (OS) 10/2015**

NTPC

.....Appellant

Versus

HINDUSTAN CONSTRUCTION COMPANY LIMITED

...Respondent

Advocates who appeared in this case:

For the Appellants:

Mr Tushar Mehta, ASG, with Mr Tarkeshwar Nath
and Mr Param Kumar Mishra, Advocates

For the Respondent:

Mr Dayan Krishnan, Sr Advocate with Mr Rishi
Agrawala, Advocate

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. FAO(OS) 154/2015 is an appeal impugning the order dated 03.02.2015 in OMP No.626/2014 whereby the learned Single Judge relying on the order passed in Execution Petition No. 151/2014 has held that the challenge in the objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the

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‘Act’) petition registered as OMP No.626/2014 would not include a challenge to the award of the Arbitral Tribunal to the extent it has allowed the respondent’s claims (i), (v) & (vii) under Claim No.2 and has restricted the challenge to the remaining part of the impugned award dated 29.09.2013.

2. EFA(OS) 10/2015 impugns order also dated 03.02.2015 whereby the learned Single Judge has held that the appellant has no objection to the Arbitral Tribunal having allowed the respondent’s claims at serial no. (i), (v) & (vii) and has, thus, held that the challenge under Section 34 of the Act to the award (OMP 626/2014) does not include a challenge to the aforementioned claims of the appellant and the further direction to the appellant to pay to the respondents the amount as determined by the Arbitral Tribunal in respect of the aforesaid claims.

3. The order dated 03.02.2015 passed in Execution Petition No. 151/2014 has been passed on the ground that there is a clear admission on the part of the appellant that the respondents are entitled to the claims at serial nos. (i), (v) & (vii). The learned Single Judge has held that the said admission amounts to an admission of liability and as such has directed the payment of the awarded amount with respect to the said claims and has and restricted the challenge under section 34 to claims other than the said claims. Since the order dated 03.02.2015 passed in OMP 626/2014 is passed solely on the basis of

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the order dated 03.02.2015 passed in Execution Petition No.151/2014, both the appeals involve a common question of fact and law and as such are being disposed of together.

4. The question that arises for consideration is: Whether the appellants have made a categorical, unambiguous and unequivocal admission of liability with regard to the claims at serial nos. (i), (v) & (vii) or whether the statement attributed to the appellants is qualified and does not amount to an unequivocal admission of liability?

5. To resolve the controversy, it would be appropriate to briefly refer to some of the relevant facts.

6. The Arbitral Tribunal passed the impugned award on 29.09.2013. On 16.10.2013, back-up calculation sheets were provided to both the parties and subsequently on 18.10.2013, the Arbitral Tribunal carried out certain corrections to the award. An application under Section 33 of the Act for correction of certain categorical and typographical errors in the award was moved before the Arbitral Tribunal by the respondents. During pendency of the said application, the appellants on 22.11.2013 also filed an application under Section 33 of the Act for correction of the award.

7. On 29.11.2013, the application under Section 33 of the Act filed by the respondents was allowed. However, on the said date, no

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order was passed on the applications filed by the appellant, which were subsequently dismissed on 25.01.2014.

8. The respondents filed an execution petition seeking execution of the award passed by the Arbitral Tribunal. Pending the said execution petition, the appellant filed the petition under Section 34 of the Act objecting to the award as well as impugning the order of the Arbitral Tribunal rejecting the application under Section 33 of the Act filed by the appellant.

9. The learned Single Judge referred to paragraph nos. 5.1.3 and 5.1.4 of the petition filed by the appellant to hold that the said paragraphs amounted to a clear admission of liability. Paragraphs No.5.1.3 and 5.1.4 of the petition filed by the appellant under Section 34 read as under:

"5.1.3. The Ld. Tribunal, however, has allowed the claim of HCC on following heads.

(i) Cost of the works executed- Rs.1,80,78,874/-

(ii) Release of amounts retained from RA Bills- Rs.71,35,385/-

(iii) Cost for extension of BGs related to Mobilization and Equipment Advances- Rs.12,36,463/-

(iv) Cost for extension of BGs related to Performance – Rs.23,51,116/-

(v) *Demobilization cost- Rs.231,36,401/-*

(vi) *Loss of Profit- Dropped.*

(vii) *Preliminary site expenses- Rs.9,30,72,526/-*

5.1.4. It is submitted that in terms of Clause 65.8 of FIDIC, HCC is not entitled to the claim as mentioned at Sl. No.(ii), (iii), (iv) & (vi) above [though Claim (vi) was dropped]. They are entitled to Claim at Sl. No. (i), (v) & (vii) only. Thus, the Tribunal has exceeded its jurisdiction by allowing other claims. More so, the HCC has not been able to substantiate their claims through documentary evidence and the value of the claims have been derived on the basis of CWC guidelines which is not the mandate of Clause 65.8.3 of COPA.”

10. The learned Single Judge relying on the averments made in paragraph 5.1.4 by the appellants has come to a conclusion that the said averments amount to an admission, on the part of the appellant, that the respondent is entitled to the claims at serial nos. (i), (v) and (vii) and has thus restricted the challenge of the appellant by way of an application under Section 34 to the claims other than claims at serial nos. (i), (v) and (vii) and has further directed the appellant to pay the amount as awarded by the Arbitral Tribunal in respect of the said claims.

11. It is settled that for an admission to be acted upon, the admission has to be categorical, unequivocal and unambiguous. If the admission is either qualified or not unequivocal, then the admission cannot be acted upon. The Court has to examine the document as a

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whole and cannot read bits and pieces of a document to come to a conclusion that there is an admission of liability. If, on a reading of the document as a whole, it cannot be inferred that there is a categorical, unambiguous and unequivocal admission, then it cannot be acted upon. It may be possible that a part of a document/pleadings may give an impression that there is an admission of liability but when the document is read as a whole, that impression may be dispelled. In the present case, if the petition filed by the appellant under Section 34 is examined as a whole, it would be clear that there is no admission of liability. Reference may be had to the following paragraphs of the petition:

“5.1.1. The Ld. Tribunal, while deciding the Issues as framed under Claim No. 2 has categorically held that that the invocation of Clause 66.1 of FIDIC, under the circumstances, as valid. Therefore, the HCC was held to be entitled for all claims as set out in Clause 65.8.2 of GCC. However, additionally the Ld. Tribunal has come to a conclusion that the invocation of Clause 66.1 of FIDIC by NTPC on the directions of the Govt. of India is a Breach of Terms of Contract and therefore Section 73 of Indian Contract Act would be applicable. In fact, this is not a case of the Breach of Contract for the reason that Clause 66.1 of FIDIC provides a mechanism to compensate the parties in case the circumstances so warrants. In the present case, circumstances arose during the execution of the work which certainly was not in the control of both the parties as also concluded by the Ld. Tribunal and therefore the invocation of Section 73 of Indian Contract Act is contrary to Contractual

provisions. The HCC therefore, is entitled to the payments under Clause 65.8 only.

(i) Clause 65.8.1 bars to grant any profit or advantage which he might have derived from the execution of the works in full but which he did not derive in consequence, of the foreclosure of the contract.

(ii) Clause 65.8.2 entitles the contractor to the following:

- full amount for works executed at site.*
- a reasonable amount as certified by the Engineer for items herein under mentioned which could not be utilized on the work to the full extent because of the foreclosure:*

(a) Any expenditure incurred on preliminary site expenses.

(b) Any materials brought to site and which could not be utilized due to foreclosure of the contract. Either the cost of the material is to be paid after taking over the materials or reasonable cost for transportation of such material is to be given.

(c) Any material issued by NTPC is to be taken back after reasonable deduction for wastage.

(d) Reasonable compensation for transfer of Plants and Equipment from Site to Contractor's Permanent Stores or to his other works; whichever is less.

(iii) The Contractor is obliged to furnish the book of accounts, wage books, time sheets and other relevant

documents as may be necessary to enable the Engineer to certify the reasonable amount payable under this condition.

5.1.2. In the present case, HCC has claimed for the following costs on account of

Closure of the contract:

- (i) Cost of the works, executed;*
- (ii) Release of amounts retained from RA Bills.*
- (iii) Cost for extension of BGs related to Mobilization and Equipment Advances*
- (iv) Cost for extension of BGs related to Performance.*
- (v) Demobilization cost.*
- (vi) Loss of Profit*
- (vii) Preliminary site expenses*

5.1.3 The Ld. Tribunal, however, has allowed the claim of HCC on following heads.

- (i) Cost of the works executed- Rs.1,80,78,874/-*
- (ii) Release of amounts retained from RA Bills- Rs.71,35,385/-*
- (iii) Cost for extension of BGs related to Mobilization and Equipment Advances- Rs.12,36,463/-*
- (iv) Cost for extension of BGs related to Performance – Rs.23,51,116/-*

(v) *Demobilization cost- Rs.231,36,401/-*

(vi) *Loss of Profit- Dropped*

(vii) *Preliminary site expenses- Rs.9,30,72,526/-*

5.1.4 It is submitted that in terms of Clause 65.8 of FIDIC, HCC is not entitled to the claim as mentioned at Sl. No.(ii), (iii), (iv) & (vi) above [though Claim (vi) was dropped]. They are entitled to Claim at Sl. No. (i), (v) & (vii) only. Thus, the Tribunal has exceeded its jurisdiction by allowing other claims. More so, the HCC has not been able to substantiate their claims through documentary evidence and the value of the claims have been derived on the basis of ewe guidelines which is not the mandate of Clause 65.8.3 of COPA.”

12. Reference may also be had to the grounds raised by the appellant in the Section 34 petition and, more particularly, to grounds nos. 5 and 6.

“(v) Because the Ld. Tribunal failed to appreciate that HCC is entitled to only following costs as given under Clause 65.8 in case of invocation of Clause 66.1 of FIDIC, Viz;

(a) Cost of the works executed.

(b) Demobilization cost.

(c) Preliminary site expenses.

(vi) Because the Ld. Tribunal erred in awarding the following costs:.

(a) Cost of the works executed- Rs.1,80,78,874/-

- (b) *Release of amounts retained from RA Bills- Rs. 71,35,385/-*
- (c) *Cost for extension of BGs related to Mobilisation and Equipment Advances - Rs. 12,36,463/-*
- (d) *Cost for extension of BGs related to Performance –Rs.23,51,116/-*
- (e) *Demobilization cost - Rs. 231,36,401/-*
- (f) *Loss of Profit – Dropped by HCC during Arbitral proceeding.*
- (g) *Preliminary site expenses- Rs.9,30,72,526/-*

(vii) Because the Ld. Tribunal ought to have seen that in terms of Clause 65.8 of FIDIC, HCC is not entitled to the claim as mentioned at SI. No. (ii),(iii), (iv) & (vi) above [though Claim (vi) was dropped]. They are entitled to Claim at SI. No. (i), (v) & (vii) only. Thus, the Tribunal has exceeded its jurisdiction by allowing other claims. More so, the HCC has not been able to substantiate their claims through documentary evidence and the value of the claims have been derived on the basis of CWC guidelines which is not the mandate of Clause 65.8.3 of COPA.”

13. Reading of the above paragraphs of the petition show that the case set up by the appellant is that the respondent was entitled to claims only in terms of Clause 65.8 of FIDIC and claims that were not covered by Clause 65.8 was not allowable. The case set up by the appellant, prima facie, appears to be that respondent has raised claims, some of which would be covered within the ambit of Clause 65.8 and

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some of which would not covered by the said clause. Reading of the petition creates an impression that the contention of the appellant is that claims nos. (ii), (iii) , (iv) and (vi) were not covered within the ambit of Clause 65.8 and it was only claims at serial nos. (i), (v) and (vii) that are covered within the ambit of Clause 65.8. The appellant has also disputed the quantification of the said claims by the Arbitral Tribunal. The reference by the respondent to the so called admission by the appellant that the respondent is entitled to claims at serial nos. (i), (v) and (vii) is in our view an admission only to the extent that the said claims are covered by Clause 65.8 and not an admission that the respondent are entitled to the amounts quantified under the said clause. The appellant has not admitted the adjudication and quantification by the Arbitral Tribunal of the said claims but has only admitted that the said claims are covered within the ambit of Clause 65.8.

14. In our view, reading the petition filed by the appellant under Section 34 does not amount to an unequivocal admission of liability. We are of the view that the learned Single Judge, accordingly, fell into an error in holding the same to be a clear admission of liability. The impugned orders are clearly not sustainable.

15. Accordingly, the order dated 03.02.2015 passed in OMP 626/2014 restricting the challenge to the award of the Arbitral Tribunal to claims other than at serial nos. (i), (v) & (vii) is set aside

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and it is directed that the said challenge would include a challenge to the claims at serial nos. (i), (v) and (vii) also. The impugned order dated 03.02.2015 in Execution Petition No.151/2014 is also set aside. The appeals are allowed in the above terms. There shall be no order as to costs.

SANJEEV SACHDEVA, J.

JULY 06, 2015
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BADAR DURREZ AHMED, J.

