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

+ **O.M.P. (COMM) 327/2016 & IA 8565/2016**

M/ S. K. S. S. PETRON PVT. LTD.

..... Petitioner

Through : Mr K.K. Sharma, Senior Advocate
with Mr Vinod Wadhwa, Mr Ajay
Saroya and Ms P. Tripathi,
Advocates.

versus

M/S. GYPSUM STRUCTURAL INDIA PVT. LTD..... Respondent

Through : Dr Anurag Kumar Agarwal and Mr
Umesh Mishra, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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05.09.2016

VIBHU BAKHRU, J

1. The petitioner, M/s K.S.S. Petron Pvt. Ltd (hereafter 'KSS'), has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the award dated 18.03.2016 (hereafter 'the impugned award') passed by the Sole Arbitrator in respect of the disputes between the parties in relation to execution of works described as "Horizontal Directional Drill (HDD) for laying of main line of OD 24" and 6" CS conduit pipe for OFC duct at NH-17."

2. The only ground urged by KSS for setting aside the impugned award is that the Arbitrator had no jurisdiction to adjudicate the claims made by

Gypsum Structural India Pvt. Ltd. (hereafter 'GSI') in relation to execution of the works in question. According to KSS, there is no arbitration agreement between the parties in relation to the contract for execution of the aforesaid works.

3. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

3.1 KSS is an engineering and construction company and was awarded a project by Gas Authority of India Limited for "Pipeline Laying and Terminal Works (Spread-D)" pertaining to the Dhabol Bangalore Pipe Line. The said contract included the work of design, engineering and execution of Horizontal Directional Drill (HDD) for laying of the main line of OD 24" and 6" CS conduit pipe for OFC duct at NH-17. The work for execution of HDD for laying main line of 24" and 6" CS conduit pipe for OFC duct at NH-17 Crossing Area and associated work was awarded by KSS to GSI and a Work Order dated 12.07.2012 (hereafter "the Work Order") was issued.

3.2 The said Work Order contained an arbitration clause. GSI was not willing to execute the works at the rates as specified in the Work Order in case, Hard Laterite was countered and mud motors and rock openers were

required to be used. The said issue was subject matter of e-mails exchanged and discussions held between the parties. KSS accepted that the rates as specified in the Work Order would not be applicable to HDD in Hard Laterite Strata and issued a Letter of Intent dated 14.08.2012 (hereafter 'the LOI') which specified the rate of ₹43,000/- per meter for providing services with mud motors and rock openers in Hard Laterite strata (Rock). Further, KSS called upon GSI to immediately execute the works - HDD with mud motors and rock openers (hereafter 'the works'). It was agreed between the parties that 90% of the payment would be made on completion of the works and 10% would be paid after the defect liability period of one year. GSI sent several communications requesting KSS to issue the work orders, but no further work orders were issued by KSS. Nonetheless, KSS insisted on expeditious completion of the works.

3.3 GSI completed the works and raised invoices for the work done at the rate of ₹43,000/- per meter as specified under the LOI. Admittedly, the works were carried out to the satisfaction of KSS as well as the principal employer (Gas Authority of India Limited). After the works were completed, certain disputes arose with respect to the amounts payable by KSS to GSI for execution of the works. According to KSS, GSI did not

encounter Hard Laterite and therefore, was entitled to be paid at the rates specified in the Work Order and not the LOI. GSI disputed this and asserted that drilling had been done in Hard Laterite Strata using mud motors and therefore, the rates as specified in the LOI were applicable.

3.4 In view of the disputes, GSI invoked the arbitration clause contained in the Work Order dated 12.07.2012 and thereafter, approached this Court by way of a petition being Arbitration Petition no. 36 of 2014 under Section 11 of the Act for appointment of an Arbitrator. KSS concurred with the appointment of an Arbitrator and the Arbitrator was appointed with the consent of the parties. The parties were referred to arbitration under the aegis of Delhi International Arbitration Centre (DAC) and, in accordance with its rules.

4. Before the Arbitrator, KSS filed an application under section 16 of the Act, claiming that there was no arbitration agreement between the parties as no Work Order was issued pursuant to the LOI. It was urged that the LOI expressly recorded that it "*does not reflect contractual commitment*" and in view of the express language of the LOI, the same could not be construed as a contract and in any event, LOI did not include an arbitration clause and, therefore, the Arbitrator had no jurisdiction to decide any claims arising

from the said LOI.

5. The Arbitrator considered the aforesaid contention and found that KSS had itself claimed that the LOI was issued "*in supplement to the previously issued LOI*" in its letters dated 28.03.2013 and 14.11.2013 appended as Annexure-A-18 and A-29 to the documents filed by GSI before the Arbitrator. After examining the aforesaid letters, the Arbitrator held as under:-

“59. A bare perusal of letter dated 28.3.13 Annexure A-18 read with Annexure A-29, establishes the following things:

a. LOI was provided in supplement to the Work Order. As per dictionary meaning supplement is a thing or part added to remedy deficiencies, to provide further information.

b. Since it is a supplement to W.O. there is no need to issue any fresh W.O.

c. There is an admission that LOI was issued demolishing the stand taken that the same was obtained by the claimant after exerting pressure and that too by an unauthorised signatory.

d. LOI lays down the new rates, since hard rock was encountered.

e. There is an admission that the work was stopped by the claimant solely for the reason that instead of soft strata regarding which the work has been awarded, hard rock was encountered which requires use of mud motors etc. which are not used for soft strata.

f. Parties have agreed after discussions to Issue LOI. So it

cannot be said that simply on representations, the stand taken for the first time as an afterthought vide letter dated 12.7.13 Annexure A24, by the claimant and without ascertaining the ground realities, LOI was Issued. It also rules out the concept of Geo Technical Report which stand had been taken as an afterthought in letter dt 14.11.13 Annexure A-29.

g. There is an admission that hard rock was drilled. The averment that it was bare minimum, is of no significance as once the equipments mud motor and rock hole opener are used the entire work is to be carried out by using the same technology.

h. Admits mud motors and rock openers used by the claimant.

i. To submit fresh invoice, mentioning the rates in work Order and not the rates as per LOI. The stand is not that invoice should be as per Work Order. Rather it is stated that it should be as per rates mentioned in Work Order, clearly depicting that LOI is in a way an amendment to the Work Order.

j. In terms of letter dated 1.4.13 by the respondent to the claimant, the only plea of the respondent that the invoice is improper, is that it should have mentioned the rates as per W.O., and that bentonite removal is only in respect of Quellsium area, not a subject matter of present dispute.

k. No other deficiency is there in the Invoice.

60. It is thus clear that LOI has in effect amended the relevant terms of the work order only, thereby extending the time for completion of the work as hard rock was encountered and enhancing the rates. The same has been the stand of the respondent and so far as the claimant is concerned it has been insisting only a work order incorporating the terms of LOI, but the respondent replied that the same is not required."

6. The Arbitrator also examined all the material and evidence produced

by the parties and concluded that the defences raised by KSS were unsustainable. The Arbitrator returned a finding of fact that GSI had executed the works through Hard Laterite strata and was entitled to be paid at the rates as specified in the LOI.

7. Although KSS has averred, in its petition, that the impugned award is in conflict with the public policy of India, no such contention was canvassed by Mr K.K. Sharma, the learned senior counsel appearing for KSS. He restricted his arguments to contend that the impugned award is liable to be set aside on the ground specified under Section 34 (2) (iv) of the Act since according to him, the disputes were not arbitrable.

8. Admittedly, the scope of interference with arbitral awards is restricted. Arbitral Awards are not amenable to judicial review except on the grounds as set out under Section 34 of the Act. And, KSS has sought to place its case under Section 34(2) (iv) of the Act, which reads as under:-

"34. Application for setting aside arbitral award. –

XXXX XXXX XXXX XXXX
(2) An arbitral award may be set aside by the Court only if-

XXXX XXXX XXXX XXXX
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters

beyond the scope of the submission to arbitration."

9. It is necessary to observe that it is KSS's case that the works were executed by GSI was under the Work Order and therefore, the GSI was only entitled to the rates as specified therein. Thus, essentially the disputes are confined only to the rates at which GSI had to be paid for the works executed by it. It is also not in dispute that KSS had agreed that GSI would be paid at the rate ₹43,000/- per meter for drilling in Hard Laterite using mud motors. It is also KSS's case that the LOI was issued '*in supplement*' to the Work Order and this is clearly evident from KSS's letter dated 28.03.2013, the relevant extract of which reads as under:

"In above context, we would like to place on record that initially work was awarded to M/s Gypsum (vide LOI cited 1 above), considering the soft strata HDD. At initial execution stage work was stopped by M/s Gypsum by stating that soil strata is Hard laterite. In this respect, parties agreed to a new rate for executing HDD work in Hard laterite. Considering the same we provided LOI (cited2) in supplement to previously issued LOI (cited 1) for executing work at Hard laterite stratum and subject to the understanding that HDD work is in Hard laterite strata for the proposed drilling alignment.

However, it shall be pertinent to note that M/s Gypsum did not actually encountered Hard laterite. It was also observed during the execution of the work that apart from the bare minimum Hard laterite small patch complete area constitute of soft strata. Same is evident from the fact that average drilling time per Drill Rod for pilot hole was around 12-15

minutes, as it should have been in the case of soft strata.

Keeping above paragraphs in mind, M/s Gypsum is required to submit its invoice considering the rate of executing HDD work as per WO No.24002071 dated 12.07.2012 for approved quantum of work and issuance of work order for Hard laterite stratum is not required.”

The above was also reiterated by KSS in its subsequent letter of 14.11.2013.

10. Admittedly, the Work Order dated 12.07.2012 provides a dispute resolution mechanism which reads as under:-

"39. Dispute Mechanism:

(a) Resolution/Settlement through mutual discussion and negotiation:

In the event of any dispute or difference arising out of or in connection with the work order/contract or with regard to performance of, any obligation by either party, the Parties hereto shall at the first instance use their best efforts to settle such disputes or differences amicably by mutual discussion and negotiation.

(b) Arbitration:

In case the amicable resolution or settlement is not reached between the parties within a period of 30 days from the day on which the dispute(s) or differences(s) arose, such dispute(s) or differences(s) shall be referred to a sole Arbitrator for settlement by way of arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any applicable law on arbitration that may be in force then, and any amendments made thereto. The sole arbitrator shall be appointed by the mutual consent of both the parties. The decision of the Arbitrator shall be final and binding on both the

Parties. The venue of such arbitration shall be at New Delhi. The Language of the arbitration proceeding shall be in English.

The existence of any dispute(s) or difference(s) or the initiation or continuance of the arbitration proceedings shall not permit the parties to postpone or delay the performance by the parties of their respective obligation under the indenture."

11. In view of the aforesaid stand of KSS, the disputes as to the quantum of payments due to GSI clearly arises in *connection with the work order* and is clearly with *regard to the performance of obligation* by KSS.

12. I also concur with the Arbitrator's finding that petitioner has been taking inconsistent stands. On one hand, KSS asserts that GSI executed the works in terms of the Work Order dated 12.07.2012 and the LOI was issued only in supplement thereto. It asserts that HDD was executed in soft Laterite strata and therefore, GSI was entitled to be paid only at the rates as specified in the Work Order. On the other hand, KSS asserts that there is no contract between the parties for execution of the works. At the same time, it is also not disputed that KSS had called upon GSI to immediately commence execution of works pursuant to the LOI. It does appear that the approach of KSS in the aforesaid matter is less than fair and honest.

13. It is relevant to state, at the cost of repetition, that Mr Sharma, the

learned senior counsel for the petitioner, did not argue that the Award was beyond the terms of the contract and therefore, was in conflict with public policy of India; he confined his arguments to urge that there was no contract between the parties. As stated earlier, in my view, the said contention is without merit.

14. In view of the above, the present petition is dismissed with cost of ₹50,000/-. The costs will be paid to the respondent within two weeks from today. The pending application also stands disposed of.

SEPTEMBER 05, 2016

pkv

VIBHU BAKHRU, J