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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM) 417/2016

SHIV-VANI ENERGY LIMITED

..... Petitioner

Through: Mr. B. Shravanth Shanker, Advocate.

versus

STERLING AND WILSON LIMITED

..... Respondent

Through: Mr. Hari, Mr. Sanjeev Tyagi and
Mr.Praveen Bhatia, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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17.11.2016

IA No. 11518/2016 (for condonation of delay in re-filing the petition)

1. The Court is satisfied that the delay of 17 days in re-filing the petition has been satisfactorily explained.

2. The application is allowed.

O.M.P. (COMM) 417/2016

3. This is a petition challenging the impugned Award dated 19th March 2016 passed by the learned Arbitrator in the disputes between the parties arising out of a work order dated 16th September 2011 placed by the Petitioner on the Respondent for completion of engineering, procurement and construction ('EPC') on turnkey basis for 2 IMW Solar PV plant at village Ganeshpura, District Rajgarh, Madhya Pradesh.

4. For the purposes of the present petition, the principal ground on which the Award has been assailed being that the award was passed ex-parte, it is not necessary to discuss the other facts in detail. It is, however, necessary to set out the sequence in the arbitration proceedings.

5. The learned Arbitrator was appointed by an order passed by this Court and the arbitration was directed to be held under the aegis of the Delhi International Arbitration Centre ('DAC'). The Respondent filed its statement of claim on 27th February 2015. The Petitioner herein filed both a statement as well as a counter claim on 25th April 2015. A rejoinder was filed on 25th June 2015 and a copy of statement of defence was also filed to the counter claim on the same date. A letter was sent by the DAC to the Petitioner herein on 24th August 2015 pointing out that it had neither deposited the share of the Arbitrator's fees nor the miscellaneous expenses and that without doing so the counter claim was not to form part of the record. On 11th September 2015, the Petitioner addressed a letter to the DAC enclosing a cheque for Rs.2,43,346 after deducting TDS @ 10% of the fee of Rs.2,64,892 along with Rs.5,000 towards miscellaneous expenses.

6. This was declined to be accepted by the DAC. Learned counsel appearing for the Petitioner wrote to the DAC on 15th October 2015 pointing out that under Section 194J of the Income Tax Act, 1961 the Petitioner was obliged to deduct TDS and assured that the TDS certificate for the deducted amount will be issued in due course. It appears that the cheque was not accepted by the DAC. On 5th January 2016 a communication was addressed to both parties by the DAC informing them that the date for hearing has been fixed

for 25th January 2016 at 2 pm at DAC.

7. On 8th January 2016 an email was sent by the DAC to the parties pointing out that the matter which had been fixed for 25th January 2016 had been re-scheduled for 6th February 2016 at 2.15 pm. On 5th February 2016, learned counsel for the Petitioner sent an email to the DAC stating that “Due to a personal inadvertence I am compelled to seek a adjournment on 06.02.2016 in the subject matter Arbitration, as I would be able to return to Delhi on 14th February, 2016 only.” It was further requested that “As I am the only Advocate on Record for the Respondent in the subject Arbitration matter herein, therefore may I most humbly request the DAC to fix any date convenient to all from 15th February, 2016 onward.” On the very day i.e. 5th February 2016, an email was sent by the DAC to the counsel informing him that the Arbitrator had declined the request for adjournment. At this stage, it requires to be noticed that the re-scheduling of the hearing from 26th January 2016 to 6th February 2016 was at the request of learned counsel for the Petitioner who was outside India at that time. The personal inadvertence referred to by the counsel in the email of 5th February 2016 was that he had missed his flight and the next cheapest flight available to him was such that he would be able to return India only after 14th February 2016.

8. The learned Arbitrator then held the hearing on 6th February 2016 and passed the following order:

“Present:

For the Claimant. Mr. Hari Advocate, with
Mr. Sanjiv Kumar Tyagi, Advocates and
Mr. Jaydeep Ghosh, AR.

For the Respondent. Mr. Ashraf, clerk of
Mr. B. Shravanth Shanker, Advocate

ORDER

On behalf of Claimant concise statement of facts, proposed issues and affidavit of admission/denial of documents filed.

Representation by a clerk cannot be taken to be appearance of an authorised representative of the Respondent. More particularly, because of the reason that the centre in its correspondence with the parties do ask to submit the names of the representatives authorised by the parties who will be appearing on their behalf during the proceedings and the name of clerk has not been given by the Respondent in this regard.

Vide e-mail dated 05.02.2016, sent at 1.41AM. Adjournment has been sought by the Counsel for the Respondent mentioning the ground that due to personal inadvertence, he is compelled to seek an adjournment as he would be able to return to Delhi only on 14.02.2016 and he is the only advocate on record for the Respondent. The said request was conveyed to the undersigned on telephone but was declined by the undersigned and the centre also informed accordingly the Id. Advocate for the Respondent regarding declining of the request vide e-mail sent on 05.02.2016 at 4.50PM itself.

It is also to be taken into account that earlier the date conveyed for the first hearing was 25.01.2016 to the Counsel for parties but at the request of the Counsel for Respondent, it was changed to 06.02.2016 as he specifically stated that he will be returning back India before that date and as such with his consent today's date was fixed.

From the record of the pleadings of the parties it transpires that the Respondent has claimed a set off and has raised Counter-claims but the fact remains that despite several opportunities

had failed to deposit the arbitrator's fee on the set off and Counter-claim. Since already sufficient time has been availed of by the Respondent in this regard and still has not paid the arbitrator's fee on the Counter-claim and set off as such no further time can be granted in this regard and it is held that the Counter-claim and the set off will not be a subject matter of adjudication in the present proceedings.

Needless to say, on account of non payment of arbitrator's fee on the set off and Counter-claim by the Respondent after availing, sufficient opportunities, the Claimant had suffered because of delay in adjudication of its claim on which the entire arbitrator's fee has been paid by the Claimant including the share of the Respondent as the Respondent has neglected to deposit its share of the arbitrator's fee on the claim.

Since there is no presence on behalf of the Respondent, the Respondent is proceeded ex-parte. Centre to inform the Respondent in accordance with its rules regarding proceeding of ex-parte in respect of Respondent and to send a copy of today's proceeding to the Respondent.

Now to come up for filing of affidavit by way of evidence by the Claimant in support of its claim. Ld. Counsel for the Claimant seeks four weeks time to file the requisite affidavit.

To come up for further proceedings on **19.03.2016 at 11.30AM** as requested.”

9. There are two things that emanate from the said order. The learned Arbitrator did not take into account the circumstance of “personal inadvertence” put forth by the counsel who was not requesting for a very long date but only up to 14th February 2016 which was within eight days of the date already fixed. The second factor was that the counsel was in fact outside India which has not been able to be disputed. Clearly, therefore, the

request was personal to the counsel and not on account of the party.

10. The second factor that emanates is that the Arbitrator was under the impression that “despite several opportunities”, the Petitioner herein had failed to deposit the Arbitrator’s fee on the set-off and counter claim. What was not noticed was that the payment by cheque has in fact been sent but after deducting TDS which cheque has been refused to be deposited by the DAC. It has been stated by learned counsel for the Petitioner that the Petitioner is under the Corporate Debt Restructuring (‘CDR’) mechanism and cannot make payments but before deducting tax as it has to strictly adhere to the guidelines of the Reserve Bank of India (‘RBI’) in that regard. Perhaps learned Arbitrator’s attention was not drawn to the correspondence exchanged between the DAC and the Petitioner on this aspect.

11. The Petitioner herein was set ex parte and the DAC was asked to inform it and send a copy of the proceedings. A copy of the said proceedings was in fact sent to the Petitioner herein by email as well as post.

12. The difficulty that is now explained by the counsel for the Petitioner is that although he did receive the copy of the said order which stated that the next date of hearing would be 19th March 2016 at 11.30 am, he noted the date on his mobile phone as 19th April 2016. He then explained that he shifted his office with effect from 1st March 2016. He has placed on record a copy of the lease deed that he entered into for that purpose.

13. Having wrongly noted the date, learned counsel for the Petitioner missed proceedings that took place on 19th March 2016. The Arbitrator on that day

passed the following order:

“Present:

For the Claimant: Mr. Hari, Mr. S.K. Tyagi and
Mr. Praveen Bhatia, Advocates with
Mr. Jaydeep Ghosh AR.

For the Respondent: None for the Respondent.

ORDER

It is already 1.30 P.M. but still none has appeared on behalf of the Respondent, though the proceedings were fixed for 11.30 A.M. As such in the claim the Respondent is treated as ex parte and in the counter claim, there is no representation on behalf of the Respondent.

CW-1 Mr. Jaydeep Ghosh examined and discharged.

Ld. Counsel for the Claimant has closed Claimant's ex-parte evidence.

Arguments heard.

Award in favour of the Claimant and against the Respondent passed separately. Counter claims and set off dismissed. Award announced.

A signed copy of the Award delivered to the Claimant. Centre to send a signed copy of the Award to the Respondent.

Claimant to deposit the requisite stamp paper with the Centre for drawing up of the Award.

Proceedings stand concluded.”

14. Learned counsel for the Petitioner proceeds to explain that as he sat

down to draft an application for setting aside the ex parte order dated 6th February 2016, he noticed for the first time the next date was 19th March 2016. He then addressed an email to the DAC on 1st April 2016 which read as under:

“Respected Ma'am,

In the subject matter Arbitration as I was away from India due to an inadvertence I could not appear in the matter on 6th February, 2016. Thereafter I could not follow the matter on 19th March, 2016 the next date of hearing.

May I most humbly request you to mail me the proceedings which took place in the matter on 19th March, 2016 in the subject matter Arbitration.”

15. On 1st April 2016 itself the DAC replied to counsel for the Petitioner as under:

“Please note that the Ld. Arbitrator has passed the Award in the captioned matter. The Award is being sent to the Respondent and further the order dated 06.02.2016 was also sent to the Respondent. This is for your information.”

16. On 2nd April 2016, learned counsel for the Petitioner sent an email to the DAC expressing the surprise about the Award having been passed but admitting that the default for non-appearance vests with him. He further sought to explain as under:

“I must admit that the default of non-appearance vests with me the Advocate on record in the subject matter inadvertently as I was in the process of shifting my office during the time when this inadvertence happened (Please find attached the said lease agreement).

No doubt that in the prior occasion as well I absent as I was out of India but it was preceed by my e-mail requesting for a short date followed by a representation on my behalf by Mr. Ashraf but the Ld. Arbitrator decided to proceed and termed the Respondent ex-parte.

I am duty bound to clarify that my successive non-appearance was merely coincidental and nowhere intentional and I believe that we as owe our duty to the Tribunal more than the Client himself.

I would request the Delhi International Arbitration Centre to provide me one last hearing in the interest of justice before actually delivering the Award and reinstate the rich jurisdiction which DIAC has enjoyed since its recent inception.”

17. It is in the above circumstances that the learned counsel for the Petitioner urges that the Court should interfere with the impugned Award and afford the Petitioner an opportunity of being heard in the arbitration proceedings. Learned counsel for the petitioner refers to Section 34(2)(a)(i) of the Arbitration and Conciliation Act, 1996 (‘Act’).

18. Learned counsel for the Respondent on the other hand refers to the repeated defaults of the counsel for the Petitioner. He points out that the order dated 6th February 2016 of the learned Arbitrator very clearly mentioned the next date as 19th March 2016. A copy of the order was also sent to counsel for the Petitioner. Therefore, there was no excuse that the date was wrongly noted as 19th April 2016. Secondly, it is pointed out that the date for 6th February 2016 itself had been fixed only on the request by counsel for the Petitioner to accommodate his ‘personal inadvertence’. Learned counsel for the Respondent also points out that while filing the

present petition, the Petitioner has not placed one page of the Award i.e. page 5. He has also not strictly adhered to Section 34(5) of the Act as amended with effect from 23rd October 2015 which requires the Petitioner to issue a prior notice to the Respondent and file an affidavit of compliance.

19. As far as the last two submissions are concerned, learned counsel for the Petitioner states that an advance copy was in fact sent to the Respondent and without such compliance the petition would not have been numbered. However, it appears that a copy of an affidavit in terms of Section 34(5) of the Act is not on record. However, learned counsel for the Respondent does not dispute having received a copy of the petition.

20. As far as missing out of page 5 of the Award concerns, learned counsel for the Petitioner again is apologetic that it is not deliberate and there is no advantage to be gained by leaving out one page of the Award.

21. However, as far as the main issue regarding the Petitioner having been set ex parte by the learned Arbitrator, there can be no doubt that the counsel for the Petitioner was not diligent in noting down the date of 19th March 2016.

22. To the Court it appears that at every stage the counsel for the Petitioner has been candid in admitting to his default. It seems unfair to let the party suffer for a mistake of the counsel which in this case does not appear to the Court to be deliberate.

23. Learned counsel for the Petitioner has been able to demonstrate that it is

only on account of his personal inadvertence i.e., missing a flight bound for India that he could not be present on 6th February 2016. He was only asking for an adjournment by 8 days which does not seem to be unreasonable. Perhaps that request could have been accommodated in the first instance itself. No doubt the failure to appear on 19th March 2016 cannot be easily excused but considering the fact that wrong noting of date by a counsel is not an unusual phenomenon and considering that the total length of time taken in the present proceedings is not so extraordinary as to defeat the very purpose of the Act which requires expeditious disposal of matters, the Court is of the view that subject to certain terms and time bound directions any prejudice caused to the Respondent can be mitigated.

24. The Court must at this stage also point out that the DAC was perhaps not justified, in the facts and circumstances, to refuse the cheque tendered by the Petitioner towards fees of the Arbitrator after deducting TDS. If this was a requirement as has been pointed out by the Petitioner in terms of the RBI guidelines considering that it was under the CDR mechanism, the cheque tendered towards the fees of the Arbitrator and the other charges ought to have been accepted.

25. The Court is also of the view that this is one of the cases where directions can be issued under Section 34(4) of the Act where the learned Arbitrator should resume the arbitral proceedings to eliminate the “grounds for setting aside the ex parte Award” namely that the Petitioner did not have an opportunity of presenting its case before the learned Arbitrator. In that way, a time bound disposal of the arbitral proceedings can be directed, and

thus any prejudice that is caused to the Respondent can be accounted for by requiring the Petitioner to pay costs for the inconvenience caused to the Respondent.

26. Accordingly, the following directions are issued:

(i) the impugned Award dated 19th March 2016 is hereby set aside.

(ii) the learned Arbitrator is requires to resume the arbitral proceedings for which both parties will appear before him on 12th December 2016 at 2 pm. If such date is not convenient to the learned Arbitrator, the DAC will inform the parties of the convenient date at least one week in advance.

(iii) both parties will cooperate with the learned Arbitrator to comply with any time bound directions that he may issue, in particular the Petitioner will not seek any adjournment whatsoever.

(iv) the above is subject to the Petitioner paying costs of Rs.20,000 to the Respondent through counsel on or before 12th December 2016 and placing on record to the learned Arbitrator the proof of payment of such costs.

(v) the DAC will accept the cheque tendered by the Petitioner towards the Arbitrator's fees after deduction of TDS including the administrative charges in view of the peculiar circumstances explained by the Petitioner which have been referred to hereinabove.

(vi) this will be done prior to 12th December 2016 and if so done, the counter claim and set off of the Petitioner will be taken on record by the learned Arbitrator.

(vii) CW-1 on behalf of the Respondent, i.e. the claimant, will remain present on 12th December 2016 for his cross-examination, if any, to resume immediately. The Petitioner herein will also be ready with list of witnesses as far as its counter claim is concerned and present it before the learned Arbitrator on the same day.

(viii) the learned Arbitrator will endeavour to complete the proceedings within a period of two months thereafter and pass a fresh Award on or before 1st March 2017.

27. Since a fresh Award will be passed there is no need to adjourn the present petition but leave it open to the parties to take appropriate action thereafter in accordance with law.

28. The petition is disposed of in the above terms.

S. MURALIDHAR, J

NOVEMBER 17, 2016

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