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

\+ O.M.P. (COMM) 571/2016

MKU LTD ..... Petitioner

Through: Ms Geeta Sharma, Advocate.

versus

UNION OF INDIA ..... Respondent

Through: Ms Sunieta Ojha, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **19.12.2016**

VIBHU BAKHRU, J

<u>IA No.15673/2016</u>

1. Allowed, subject to all just exceptions.

2. The application stands disposed of.

<u>O.M.P. (COMM) 571/2016& IA No. 15672/2016</u>

3. Issue notice. The learned counsel for the respondent accepts notice.

4. With the consent of the parties, the matter is taken up for final hearing.

Introduction

5. The petitioner has filed the present petition under Section 34 of the

Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the order dated 09.09.2016 (hereafter 'the impugned award') passed by the sole Arbitrator under Section 33 of the Act, modifying the Interim Award dated 12.02.2016.

6. The dispute between the parties relates to a contract dated 27.04.2010 (hereafter 'the Contract') for supply of Bullet Proof Jackets (BPJs).

7. In terms of the Contract, the petitioner had furnished bank guarantees aggregating a sum of ₹5,18,71,250/- (hereafter 'the BGs'); the details of which are as under:-

DATE OF ISSUANCE	**BANK GUARANTEES NO.**	**AMOUNT**	**VALID UPTO**
27.08.2010	0061IGPER003110	Rs.8,77,500/-	23.08.2013
22.01.2011	0061IGPER000211	Rs.4,38,750/-	31.03.2013
28.01.2011	0061IGPER000311	Rs.8,77,500/-	24.03.2013
01.02.2011	0061IGPER000511	Rs.8,77,500/-	30.03.2013
30.06.2011	0061IGPER003011	Rs.4,88,00,000/-	30.08.2013
TOTAL		**Rs.5,18,71,250/-**	

8. The controversy involved in the present petition concerns the questions, (i) whether the petitioner is entitled to release of the said BGs since the period for which they were submitted has since expired; and, (ii) whether the impugned award, whereby the Interim Award dated 12.02.2016 directing release of the BGs was modified, is lawful and valid.

Context of the disputes

9. Admittedly, certain disputes have arisen between the parties in relation to the Contract. The respondent, *inter alia*, alleges that the deliveries of BPJs were delayed. Accordingly, the respondent has also imposed liquidated damages for a sum of ₹5,01,60,825/-. This levy is disputed by the petitioner and the said matter is pending adjudication before the Arbitral Tribunal.

10. The respondent has withheld a sum of ₹7,00,91,080/- with a view to recover the liquidated damages levied by it. In addition, the respondent also refused to release the BGs and has been insisting that the same be kept alive. It is the petitioner's case that the BPJs as contracted, have been supplied and the defect liability period of two years from the date of delivery has also elapsed. Thus, according to the petitioner, there was no requirement for the BGs to be kept alive.

11. The aforesaid claim was contested by the respondent before the Arbitrator. The relevant extract from the response filed by the respondent is quoted below:-

"**Claim No.2: For return of bank guarantees** Direct the Respondent to return the Bank Guarantees retained by the Respondent for a sum of Rs.5,18,71,250/- as liquidated damages (Annexure C-43 Colly).	Bank Guarantees/PSD amounting to Rs.5,18,17,250/- are being kept alive by the Claimant as order passed by the Hon'ble High Court vide OMP No.615/2012 dated 11/07/2012 on the subject matter stating that Claimant i.e. M/s MKU Pvt. Ltd. should keep above BG renewed and valid during the pendency of the petition."

12. As is apparent from the above, the only reason given by the respondent for insisting that the BGs be kept alive was that petitioner had agreed to do so as recorded in the order dated 11.07.2012 passed by this Court in OMP No.615/2012. It was also contended before the Arbitrator that the BGs were required to secure the respondent to effect recovery of the liquidated damages.

13. The Arbitrator considered the rival contentions and concluded that the amount withheld by the respondent on account of liquidated damages and the aggregate value of the BGs exceeded the quantum of liquidated damages claimed by the respondent. Accordingly, by an Interim Award dated 12.02.2016, the Arbitrator held as under:-

> "**4. <u>Conclusion:</u>**
>
> I have heard the arguments of both the parties. After considering respective contention of the parties, examining the documents and pleadings, it reveals that the Respondent has imposed Liquidate Damages of Rs.5,01,60,825/- on the firm due to late supply of the stores as per provisions of AT. The respondent has withheld amount of Rs.7,00,91,080/- from the pending bills of the Claimant and also withheld bank guarantees of an amount of Rs.5,18,71,250/- of the Claimant.
>
> In view of the above, I am of the view that the Respondent has withheld Rs.1,99,30,225 (from pending bills) and Bank Guarantee for an amount of Rs.5,18,71,250/- which are over and above of its claim i.e. Rs.5,01,60,825/-.
>
> **5. <u>Interim Award</u>**
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> After considering respective contention of the parties and on perusal of claims and para wise reply filed by the parties, my interim award on the application filed by the

Claimant is as under:

(i) The Respondent (UOI) is directed to release the Bank Guarantee of the Claimant (M/s MKU Pvt. Ltd.) for an amount of Rs.5,18,71,250 (ii) The Respondent is further directed to release Rs.1,99,30,225/- in favour of Claimant from withheld amount of the pending bills of Rs.7,00,91,080/- within 45 days from the receipt of this award."

14. The respondent did not challenge the said Interim Award dated 12.02.2016 within the time specified under Section 34(3) of the Act. However, the respondent filed an application under Section 33 of the Act seeking correction/modification of the Interim Award dated 12.02.2016. The respondent claimed that in addition to the liquidated damages, the respondent also was required to be secured for due performance of the Contract, which included the condition that the petitioner would service the products, BPJs, for a period of 10 years. It was pleaded by the respondent that the Arbitrator had not considered Clause 23 of the Contract, the performance of which was secured by the BGs. The Arbitrator accepted the aforesaid contention and passed the impugned award, modifying the Interim Award dated 12.02.2016. The operative part of the impugned award is set out below:-

> "Having heard rival contentions of both the parties and having regard to the vital provisions of the Agreement vis-a-vis the pleadings submitted by the parties and keeping in view the spirit of review as contained in Order 47 rule 1 of CPC and the fact the important and crucial evidence pertaining to clause 23 of the accepted tender which could not be produced by the respondent at the time of hearing on account of some mistake/error which appears to be sufficient reasons to review the impugned interim award. I am of the view that the interim

> award dated 12.02.2016 unless corrected the same shall run contrary to the terms of agreement entered into between the parties hereto. I therefore, to meet the end of justice hereby modify the interim award dated 12.02.2016 to the following extent:
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> That the Respondent (UOI& Ors) shall not be required to release the Bank Guarantee of the Claimant for the amount of Rs. 5,18,71,250/- till the final disposal of this dispute when this issue will be finally decided.
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> The application of the Respondent is disposed of accordingly."

15. Aggrieved by the impugned award, the petitioner has filed the present petition.

Submissions

16. Ms Sharma, the learned counsel for the petitioner rested the case essentially on three grounds. First, that the application filed under Section 33 of the Act was beyond the period as specified under Section 33 of the Act inasmuch as the Interim Award dated 12.02.2016 was received by the respondent on 23.02.2016 and the application for rectification was filed on 19.08.2016.

17. Second, that the impugned award is beyond the scope of Section 33 of the Act inasmuch as the impugned award in effect reviews the Interim Award dated 12.02.2016, which is not permitted. She submitted that an arbitral award could be corrected for computational errors, any clerical or typographical errors or other error of a similar nature but the same could not be reviewed on account of any contentious issue. She submitted that the modification sought by the respondent was a substantial modification and

raised contentious issues. She earnestly contended that it is not permissible for an Arbitral Tribunal to re-hear the matter or decide any contentious issue under the guise of entertaining an application under Section 33 of the Act.

18. Lastly, she submitted that the impugned award was perverse and unreasonable and thus opposed to the public policy of India. She submitted that in terms of the Contract, the defect liability period was specified as two years and the petitioner was required to service the BPJs for a period of 10 years. She further submitted that the term of the BGs were two years and the same corresponded to expiry of the defect liability period; that is, two years and sixty days from the end of the delivery period. She stated that it is not disputed that the petitioner had assured serviceability of the products for ten years, however, that was not required to be secured by the BGs. She claimed that this was clear from the fact that the BGs for a tenure of two years were duly accepted by the respondent as the same were admittedly in terms of the Contract. She pointed out that the Arbitrator had proceeded on the basis that the BGs were for purposes of securing the respondent in respect of the petitioner's obligation to service the products (BPJs) for 10 years and, therefore, in terms of Clause 23 of the Contract were required to be kept alive for a period of 10 years.

19. Ms Ojha, the learned counsel appearing for the respondent did not dispute that the Interim Award dated 12.02.2016 was received on 23.02.2016 and the application under Section 33 of the Act was filed beyond the period as specified under Section 33 of the Act. She, however, submitted that the respondent being a government organization is required to follow the process of obtaining the necessary instructions from the

concerned officers and in the present case this took a considerable time. She pointed out that the same was also noticed by the Arbitrator in the impugned award.

20. With respect to the contention that the impugned award was beyond the scope of Section 33 of the Act, she submitted that the correction carried out was only a technical correction inasmuch as only the direction for release of BGs had been modified. And, therefore, the impugned award fell within the scope of Section 33 of the Act.

21. Lastly, on merits, she submitted that the BGs are required to be kept alive till 2021 as the period of 10 years from the delivery of BPJs would end in 2021 and, therefore, it was essential that the respondent be secured on account of service to be rendered by the petitioner.

Reasons and Conclusion

22. I have heard the learned counsel for the parties.

23. At the outset, it is necessary to refer to Section 33 of the Act, which is set out below:

> "**33. Correction and interpretation of award; additional award.**—(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—
>
> > (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section."

24. A plain reading of Section 33(1) of the Act indicates that the time for filing the application provided under the Section is inflexible. An application for correcting errors under Section 33 of the Act can be made only within a

period of 30 days from receipt of the arbitral award subject to the parties agreeing otherwise. In the present case, admittedly, there is no agreement or arrangement between the parties for extension of the period as specified under Section 33 of the Act. The Arbitrator derives his jurisdiction to act as such from the agreement between the parties and the provisions of the Act. Thus, the Arbitrator did not have the jurisdiction to entertain an application under Section 33 of the Act beyond the period of thirty days from the date of receipt of the Interim Award dated 12.02.2016. In my view, the application made by the respondent was clearly incompetent and the Arbitrator could not have entertained the same.

25. The contention that the respondent being a government department requires to obtain necessary approvals from the authorities for taking any action, is also of no assistance to the respondent. The Act does not contemplate any distinction between a government agency and any other litigant. The time period specified under Section 33 of the Act is not subject to any exception in the case of a government agency.

26. The contention that the impugned award merely made a technical correction in the Interim Award dated 12.02.2016 is also unmerited. The issue whether the BGs were to be kept alive for a period of two years or for a period of 10 years is plainly a contentious issue. The said issue was admittedly never raised by the respondent before the Arbitrator while it was considering the dispute in the first instance. It is the petitioner's contention that the BGs in question are only performance bank guarantees and undisputedly, the same were only valid for a period of little over two years. It is also not disputed that the respondent had accepted the same. In the

circumstances, it is difficult to accept that the BGs were to be kept alive for a period of 10 years as contended by the respondent. Ms Ojha was also unable to point out any provision in the Contract which required the petitioner to do so.

27. At this stage, it is also necessary to refer to Clause 23 of the Contract between the parties, which reads as under:-

23.	Guarantee/Warranty clause	GUARANTEE :	The Outer Carrier along with trauma padding shall be guaranteed for a period of 2 years against all manufacturing defects.
		SERVICEABILITY:	10 YEARS (HAP, SAP & trauma pad)

28. A plain reading of the aforesaid clause indicates that the petitioner was required to guarantee that the Outer Carrier and trauma padding would be free from all manufacturing defects for a period of two years. The period of 10 years was mentioned only in relation to the serviceability of the product. In other words, the petitioner had held out a warranty that the product would be serviceable for a period of 10 years. It is apparent that the BGs in question were furnished in relation to the guarantee against manufacturing defects.

29. In any view of the matter, it is clear that the aforesaid issue is a contentious one and thus under no circumstances could have been the subject matter of correction/modification under Section 33 of the Act. A

plain reading of Section 33(1)(a) of the Act indicates that the errors that can be corrected by the Arbitral Tribunal under the said section are errors of computation, clerical or typographical errors and other errors of similar nature. The question as to the period for which the BGs were to be kept alive clearly does not by any stretch fall within the scope of "*computation errors, any clerical or typographical errors or any other errors of a similar nature*". Thus, in my view, the Arbitrator had no jurisdiction to modify the Interim Award dated 12.02.2016 as has been done by the impugned award.

30. Lastly, I am also not persuaded that the decision of the Arbitrator on merits is a correct one. In this regard, it is necessary to refer to Clause 9(b) of the Contract, which reads as under:-

"(b) Performance Guarantee Bond	You are required to submit Bond Performance Guarantee Bond Rs.5,17,72,500/- (Rupees five Crore seventeen lacs seventy two thousand five hundred) valid beyond 60 days warranty/guarantee period in the shape of Bank Guarantee in the required Performa before release of Security deposit to you. The Performance Guarantee will come into force from the date of receipt of stores by consignee."

31. It is clear from the reading of the aforesaid clause that the BGs would come into force on the date the respondent received the BPJs at its stores and were required to be valid for a period of 60 days beyond that guarantee period. It is not disputed that the petitioner had submitted the BGs in terms

of the Contract and the same were duly accepted by the respondent without any objection as to their validity period. This was in conformity with the understanding that the BGs would be kept alive for a period upto the end of 60 days after the expiry of the guarantee period, which in terms of Clause 23 of the Contract was specified as two years. It is not disputed that the validity of the BGs more or less corresponded with the expiry of two years and sixty days from the scheduled dates of delivery of BPJs.

32. The learned counsel appearing for the respondent earnestly contended that the BGs were not kept alive to cover the defect liability period of two years but had been kept alive by the petitioner in compliance with the statement made by the petitioner in the Court. She submitted that but for such extension, the BGs would have been encashed. Therefore, the BGs are required to be kept alive till the claims of the respondent are duly adjudicated.

33. The aforesaid contention also does not appear to be merited as there is no dispute that the BPJs were received by the respondent and the defect liability period has since expired. Admittedly, no defects were pointed out during this period, which have not been cured by the petitioner.

34. Further, the learned counsel for the petitioner also pointed out that the respondent had not made any counter claim against the petitioner and in absence of such claims, there is no requirement to secure the respondent against any alleged dues as there are none. The only claim raised by the respondent is with regard to the liquidated damages and an amount equal to the liquidated damages has been withheld by the respondent. The Arbitrator

had considered this and, therefore, passed the Interim Award dated 12.02.2016 directing the release of the BGs as well as the sum of ₹1,99,30,225/- as the same was in excess of ₹5,01,60,825/- imposed by the respondent on account of liquidated damages (which is the subject matter of dispute before the Arbitrator).

35. In view of the aforesaid, the present petition is allowed and the impugned award is set aside.

36. The petition is disposed of. Pending application stands disposed of.

VIBHU BAKHRU, J

DECEMBER 19, 2016
MK