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

\+ **<u>O.M.P. (COMM) 186/2017</u>**

MONNET ISPAT AND ENERGY LIMITED ..... Petitioner
Through: Ms Malavika Lal, Advocate.

versus

M/S ANEJA CONSTRUCTION (INDIA) LIMITED ..... Respondent
Through: Mr Bahar U. Barqui, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

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

% **13.04.2017**

<u>VIBHU BAKHRU, J</u>

<u>IA Nos. 4381 & 4382/2017</u>

1. Exemptions are allowed, subject to all just exceptions.

2. The applications are disposed of.

<u>IA No. 4383/2017</u>

3. For the reasons stated in the application, the delay of 12 days in re-filing is condoned.

4. The application stands disposed of.

<u>O.M.P. (COMM) 186/2017</u>

5. Monnet Ispat and Energy Limited (hereafter 'Monnet') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for setting aside the arbitral award dated 23.11.2016 (hereafter 'the impugned award') delivered (by majority) by the arbitral tribunal constituted by Justice R.C. Chopra (Retired), Col. G.S.

Sandhu (Retired) and Justice Anil Dev Singh (presiding arbitrator). The dissenting note was entered by Col. G.S. Sandhu (Retired).

6. By the impugned award, Monnet was directed to refund the retention money amounting to ₹98,03,644/- advanced by the respondent, M/s Aneja Construction (India) Ltd. (hereafter 'ACL').

7. Brief facts necessary to address the controversy are as under:-

7.1 Monnet had invited proposals '*for construction of Civil Works at its Sponge Iron, Power Plant and Steel Plant located at Raigarh in Chhattisgarh*' (hereafter 'the works'). ACL's bid was accepted and the first work order was placed on ACL on 31.08.2005. Thereafter 31 work orders were issued by Monnet upto 04.04.2008. These included work orders relating to (i) construction of roads; (ii) civil construction works at railway siding;(iii) construction of boundary wall; (iv) construction of iron ore yards;(v) construction of development yards; and (vii) supply of materials.

7.2 On 14.04.2008, Monnet filed a FIR against the Site In-charge appointed by ACL as well as the Site In-charge and the Assistant General Manager appointed by Monnet. It was alleged that although ACL had not used '*morrum*' (the specified material) in execution of the works, it had raised bills for the same, which were cleared by the said officers of Monnet as they were in collusion with ACL. Monnet claimed that it had suffered a loss of ₹30 lacs.

7.3 Monnet further alleged that ACL had abandoned the works. ACL disputed the same and claimed that Monnet had barred its entry to the site and had also prevented ACL from removing its equipment. By its letter dated 28.04.2008, ACL called upon Monnet to release a sum of ₹3 crores against the work done and further put Monnet to notice that if it did not allow ACL to remove the machinery from the premises, Monnet would be liable to pay demurrage charges at the rate of ₹2 lacs per day.

7.4 Monnet terminated the contract with ACL by its letter dated 07.05.2008 and called upon ACL to reimburse the amount of ₹11,26,57,884/- paid to ACL. In addition, Monnet claimed compensation for the loss allegedly suffered on account of sub-standard work. Monnet also threatened that if ACL did not clear its liability, it would be constrained to dispose of ACL's machinery to set off the amount against ACL's liability.

7.5 Thereafter, with the intervention of Court, the machinery was released to ACL on 09.06.2008. Subsequent thereto, ACL sent a letter dated 17.06.2008 disputing the allegations made and called upon Monnet to release a sum of ₹1,14,00,000/- for illegally retaining ACL's machinery for 57 days.

7.6 ACL also responded to Monnet's termination letter dated 07.05.2008, by a letter dated 22.06.2008 disputing the allegations and raising various claims.

8. After further exchange of correspondence, Monnet invoked the arbitration clause by its letter dated 09.08.2008, pursuant to which, the arbitral tribunal was constituted.

8.1 Before, the arbitral tribunal, Monnet raised the following claims: claim no.1 - ₹15,82,08,032/- as refund of the total amount paid to ACL against the work orders along with interest quantified as ₹6,97,94,017/-; claim no. 2 - ₹18.4 lacs for rectification of railway siding; claim no.3 -

₹14,06,000/- for rectification of iron ore yard and yard development (power); claim no. 4 - ₹9.22 lacs for rectification of water reservoir; claim no. 5 - ₹1,50,96,000/- being amount spent on reconstruction of roads; claim no.6 - ₹41 lacs towards rectification of boundary wall; and claim no.7 - ₹2 crores for loss of opportunity and damages for delay in the works. Monnet also claimed *pendente lite* and future interest at the rate of 24% p.a. and costs.

8.2 ACL also filed its counterclaims aggregating ₹6,78,57,306/-, which included a sum of ₹2,66,53,662/- against pending bills as counterclaim no. 1; ₹98,03,644/- being retention money not released to it as counterclaim no. 2; ₹1,14,00,000/- for the period ACL's machines remained idle as counter claim no. 3; interest at the rate of 18% p.a. compounded annually on the aforesaid amounts; ₹50,00,000/- as loss in profits being counterclaim no. 4; ₹1,00,00,000/- towards loss of reputation being counterclaim no. 5; ₹20,00,000/- for harassment caused to ACL as counterclaim no. 6; and ₹30,00,000/- as arbitration expenses being counterclaim no. 7.

8.3 Before the arbitral tribunal, Monnet advanced contentions to the aforesaid effect:-

> "(i) The Respondent executed substandard and defective work assigned to it under the work orders;
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> (ii) Though the Respondent unauthorisedly used soil excavated from the site in the construction of the road in place of morrum, it charged for morrum at the full rate specified in the work orders;
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> (iii) Mr. N.K. Mandal and Mr. L.K. Joshi, officers of the Claimant, connived with Mr. R.N. Thakur

alias Raju Bhai Thakur, an employee of the Respondent and passed the bills for defective work executed by the Respondent. They also assisted the Respondent in securing payments of the said bills;

(iv) In the RA bills the Respondent claimed quantities of morrum, stone chips and stone dust far in excess of the quantity used by it in the works; and

(v) The Respondent abandoned the work on April 14, 2008."

8.4 The above controversy was considered by the arbitral tribunal. The arbitral tribunal observed that no communication was issued to ACL before 07.05.2008 (date on which contract was terminated) pointing out any defects in the works executed. It was noted that the enquiry report prepared by Monnet's representative verifying Monnet's allegations regarding the fraud played on the part of ACL by using sub-standard material, was not sent to ACL; it was also not placed on record. Apparently, ACL was also not issued any notice to participate in the aforesaid enquiry.

8.5 The arbitral tribunal rejected the contention that ACL was not willing to continue the works. It noted that by its letter dated 22.06.2008, ACL had called upon Monnet to indicate if it wanted ACL to continue the works; thus, indicating its willingness to complete the work orders. Further, it was noted that ACL had also offered to conduct a joint inspection of the works by the letter dated 03.08.2008; however, the same was not undertaken.

8.6 The arbitral tribunal also did not accept the contention that ACL had charged for material, in excess of what was brought at the site; *inter alia*, for the reason that in the FIR dated 14.04.2008, Monnet had not mentioned any other loss except the non-use of '*morrum*' in the works. In its pleadings, Monnet had averred that all the bills of ACL were verified against the "*registers maintained at the main gate of the plant in which all the entries are being recorded for all the material which is being passed through the main gate to the plant*". Thus, Monnet was aware of the details but none were provided.

8.7 The arbitral tribunal, after examining the evidence and material on record, concluded as under:-

> "62. In view of the aforesaid discussion, we find that:-
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> i) the Claimant has failed to prove that the Respondent had used sub-standard and inadequate quantity of material in execution of the work;
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> ii) the Claimant has failed to prove that the work executed by the Respondent was defective;
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> iii) the Claimant has failed to prove that the Respondent used morrum/soil excavated from the site without permission of the Claimant;
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> iv) the Claimant has failed to prove that the Respondent had charged for material in excess of what was brought at site or used in the execution of the work;
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> v) the Claimant has failed to prove the fact that material of the Respondent on its arrival in the factory was recorded in the register; and
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> vi) No worthwhile evidence has been brought on record by the Claimant to prove conspiracy and connivance between Raju Bhai Thakur and the aforesaid two employees of the Claimant."

8.8 In view of the above, the arbitral tribunal rejected all the claims raised by Monnet. The arbitral tribunal also proceeded to disallow all the counterclaims of ACL except counterclaim no.2 whereby Monnet was directed to refund the retention money for the sum of ₹98,03,644/-. ACL was also awarded *pendente lite* and future interest at the rate of 18% p.a. along with costs of ₹15,00,000/-.

Submissions

9. Ms Malavika Lal, the learned counsel for Monnet assailed the impugned award essentially on five grounds.

10. First, she submitted that the arbitral tribunal had grossly erred in drawing an adverse inference on the basis that the report of defective works was not shared with ACL. She submits that since the officers of ACL and Monnet themselves were in collusion, the question of sharing the report with ACL did not arise and the same could not be held against Monnet.

11. Second, she submitted that prior to April 2008, there was no question of any defective works being pointed out to ACL as the officers deputed by Monnet at site (also named in the FIR) were in collusion with ACL.

12. Third, she submitted that the arbitral tribunal had failed to appreciate that Monnet had terminated the contract after ACL had abandoned the site.

13. Fourth, she submitted that the arbitral tribunal was in error in proceeding on the basis that Monnet had not provided the exact details of the quantity of '*morrum*' used at the time of filing the FIR. She stated that the exact details were only available after the independent report of the PWD testing labs was received in December 2008 and thus could not be provided earlier.

14. Fifth, she submitted that the register maintained at the site did not reflect the material ('*morrum*' and stone dust) stated to have been brought at the site and the arbitral tribunal erred in not appreciating that this clearly

evidenced that ACL had charged for material that was not even brought at site and could not have been used for execution of the works.

Reasoning and conclusion

15. This Court is unable to accept any of the contentions advanced by Ms Lal principally for the reason that the arbitral tribunal had examined in detail, the material and evidence available on record and none of their findings are without basis or unsupported by material on record.

16. The arbitral tribunal had noted that the works had commenced in 2005 and there was no allegation or complaint of any kind with regard to defective works, over a period of almost three years. The material and evidence on record clearly evidenced that Monnet did not share information regarding defective works with ACL at any stage. Monnet had lodged the FIR pursuant to an enquiry report claimed to have been submitted to Monnet in the first week of April 2008. Admittedly, the said report was neither shared with ACL nor was placed on record.

17. Monnet had sought to establish its case that the work executed by ACL was defective on the basis of the testimonies of two witnesses (CW1 and CW3). The said testimonies were examined by the arbitral tribunal at length and after appreciating the said testimonies, the arbitral tribunal had come to the conclusion that Monnet was unable to establish its case that the works executed by ACL were defective or sub-standard. The arbitral tribunal also noted that by a letter dated 03.08.2008, ACL had offered to carry out joint inspection but despite the same, no such inspection was carried out. Apart from the above, the arbitral tribunal also examined the

other material on record and has indicated sufficient reasons for rejecting Monnet's claim of defective works.

18. The contention that the arbitral tribunal has erred in drawing an adverse inference against Monnet for not sharing the enquiry report, is unpersuasive. First of all, the scope of the present proceedings does not entail re-appreciation of evidence or to evaluate whether the weightage placed by the arbitral tribunal on certain material was more (or less) than what was required. Secondly, this Court does not find any infirmity with the inference drawn by the arbitral tribunal. In the event Monnet found that ACL's work was defective, the least that it could have done was to point out the same to ACL; indisputably, this was not done. This Court is unable to appreciate as to what prevented Monnet to share the enquiry report with ACL as this would have given an opportunity to ACL to point out if there were any errors after the enquiry was completed. This would also have enabled Monnet to take an informed decision. There is no plausible reason for Monnet to have kept the enquiry report a secret. Interestingly, Monnet had also avoided placing the said report before the arbitral tribunal.

19. There was hardly any material on record which would establish that the works executed by ACL were defective. The contention that no objection or complaint regarding defective work was made because two of the officers of Monnet were in collusion with ACL, was also considered by the arbitral tribunal and rejected. The arbitral tribunal had also noted that in addition to the two officers who had allegedly colluded with ACL, there were other officers engaged by Monnet and deputed at site against whom there were no allegations of any collusion; thus, it was not plausible that they would have remained silent and no complaint would have been made in

case of defective works. This Court does not find the aforesaid reasoning to be perverse or patently illegal.

20. The contention that the arbitral tribunal had terminated the contract after ACL had abandoned the site is also unpersuasive; this is assuming that such a contention can be advanced in these proceedings. There is ample evidence on record to indicate that Monnet had barred ACL’s entry at site. It had also lodged a FIR against ACL’s officer. Admittedly, ACL had volunteered to continue the works on release of payment but Monnet had not pursued the same; on the contrary, Monnet had demanded refund of the entire monies paid to ACL for the work already done. Monnet had also declined to release ACL's machinery at site and ACL had to secure its release by intervention of Court. The contention that the arbitral tribunal had erred in not appreciating that ACL had abandoned the site is, thus, unmerited. Further, it is not open for Monnet to seek review of findings of fact on merits as the arbitral tribunal's decision in this regard is final and binding.

21. The contention that the register maintained at site also did not substantiate that the raw material claimed to have been used, had been brought in site was also examined by the arbitral tribunal. The arbitral tribunal came to the conclusion that Monnet could not establish that there was only one gate from which material was brought at site and all materials brought on site were recorded in the register maintained at site.

22. Insofar as the use of ‘*morrum*’ is concerned, the arbitral tribunal took note of ACL's contention that to save costs, *‘morrum’* excavated at site was also used. In regard to the allegation that ACL had charged for 26333.43 cubic metre of stone dust but had only brought 10541 cubic metre at site, the

arbitral tribunal noted that an FIR was lodged after complete enquiry had been done and was allegedly based on an enquiry report submitted to Monnet by the officers charged with conducting such enquiry. The arbitral tribunal also took note of Monnet's pleadings to the effect that inspection was carried out in the month of April 2008 and materials claimed to be used by ACL were verified with the other records such as registers maintained at the gate of the plant, wherein records of the material brought at site was recorded. In view of the above, there could be no dispute that Monnet was aware of sufficient details with regard to the stone dust brought at site as well as the payments made; yet, no allegation that ACL had overcharged was made in the FIR.

23. The contention that the exact details of quantity of material used at the time of filing of the FIR had not been provided on account of non-availability of the independent report of PWD, is also unpersuasive. As noted above, Monnet claimed that an enquiry was conducted by its officers and completed in the first week of April 2008. It was also pleaded that materials brought at site was verified from the records maintained. An FIR was also lodged on 14.04.2008 wherein the loss suffered by Monnet was quantified at ₹30 lacs. Thus, the contention that Monnet could not specify details of the alleged defective works, is unmerited.

24. It is also relevant to state that the arbitral tribunal rejected the report submitted by PWD as it found that (i) the alleged samples were drawn in absence of ACL's representative; (ii) the necessary process for ensuring the integrity of the samples such as sealing the sample, etc. was not complied with; and (iii) Monnet claimed that rectification work had already started in May-June 2008 and the samples were allegedly drawn in November 2008

and it could not be established that the samples were taken from the works executed by ACL.

25. At this stage, it may be mentioned that this Court does not sit as a court of appeal to re-appreciate and re-examine the evidence led before the arbitral tribunal. The scope of review under Section 34 of the Act is restricted; unless the grounds established under Section 34(2) of the Act are established, there would be no question for this Court to interfere with an arbitral award. Thus, even if it is assumed - although there is no reason to do so and this Court does not believe so - that any of the findings of the arbitral tribunal are erroneous, no interference with the same would be called for in these proceedings as this Court is not persuaded to accept that the views expressed by the arbitral tribunal are perverse, not based on cogent evidence or unreasonable as tested on the anvil of the *wednesbury* principle.

26. In the circumstances, the petition is dismissed. No order as to costs.

VIBHU BAKHRU, J

APRIL 13, 2017
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