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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 1096/2013

**HINDUSTAN STEELWORKS CONSTRUCTION
LTD**

..... Petitioner

Through: Ms. Shipra Ghose, Advocate.

versus

M/S GARG ASSOCIATES

..... Respondent

Through: Mr. Raman Kapur, Senior Advocate with
Mr. Dhiraj Sachdeva, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER

20.02.2017

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1. Hindustan Steelworks Construction Ltd. ('HSCL') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging an Award dated 20th May, 2013 passed by the sole Arbitrator in the disputes between HSCL and the Respondent, M/s. Garg Associates ('GA'), arising out of an Execution Agreement dated 28th August, 2003 whereby HSCL awarded GA a sub-contract for the construction of 128 LIG houses in Sector 42 Noida for a total value of Rs. 430.82 lakhs.

2. Preceding the above sub-contract, HSCL was awarded the main contract by the New Okhla Industrial Development Authority ('Noida') for construction of 248 LIG houses and related pocket development works in Sector 42, Noida. For that purpose, a written Agreement dated 16th August, 2003 was executed between Noida and HSCL.

3. *Inter alia* the sub-contract i.e., the Execution Agreement dated 28th August, 2003 between HSCL and GA provided that all terms and conditions agreed between Noida and HSCL were binding on GA on a back-to-back basis. HSCL advanced to GA a sum of Rs. 36,80,000 as mobilisation advance after GA furnished a bank guarantee dated 5th September, 2003. _

4. By an Office Order dated 20th October, 2003, Noida rescinded the contract entered into with HSCL. According to HSCL as a consequence thereof the sub-contract with GA “got automatically rescinded”.

5. The case of GA on the other hand was that it never got to know of the above development and that it was in fact kept in dark about Noida having rescinded the main contract. On the contrary, it states that it mobilised its resources i.e., labour and material and made arrangements at the site for which it spent a huge amount. It also got a survey and soil testing done at the site for which it spent a sum of Rs. 4,44,000. It was only on 23rd June, 2005 that HSCL first informed GA that the main agreement between HSCL and Noida had been rescinded. HSCL called upon GA to refund the mobilisation advance of Rs. 36,80,000. By that time, according to GA, it had already incurred a sum of Rs. 8,40,000 towards execution of the contract apart from the sum spent on the survey and soil testing.

6. Subsequently, GA came to learn that HSCL had challenged the rescinding of the contract by Noida by filing Writ Petition (C) No. 53242/2003 in the High Court of Allahabad. Pursuant to the certain orders passed in the said writ petition, a meeting was held between HSCL and Noida on 12th April, 2004 whereby they decided to cancel the main contract itself.

7. Before the learned Arbitrator, GA filed a statement of claims where it raised four claims. Claim No. 1 was for a sum of Rs. 4,44,000 towards the amount spent on survey, soil testing, drawings and designs; Claim No. 2 was for a sum of Rs. 8,40,000 towards expenditure on idle establishment of staff and idling of T&P etc; Claim No. 3 was for Rs. 64,62,300 for loss of profit @ 15% of the value of the contract; and Claim No. 4 was for interest of 18% pre-claim, *pendente lite* and future interest. It was mentioned in the statement of claim that GA had with a letter dated 7th July, 2005 returned the entire mobilisation advance by cheques which were encashed by HSCL.

8. HSCL filed a reply to the statement of claims and also raised three counter-claims. Counter Claim No. 1 was for interest accrued due to the delay in return of mobilisation advance in the sum of Rs. 12,56,429.59; Counter Claim No. 2 was for a sum of Rs. 2 crores on account of loss of goodwill; and Counter Claim No. 3 was for litigation costs amounting to Rs. 5 lakhs.

9. The learned Arbitrator framed the following issues for determination:

- “1. Whether the terms and conditions of agreement dated 16.8.2003 entered into between NOIDA and the respondent, were binding on the claimant? If so, to what effect?
2. Whether the claimant committed breach of agreement dated 28.8.2003 between the respondent and the claimant?
3. Whether the claimant is entitled to claim a sum of Rs. 4,44,000/- towards the amount spent on survey, soil testing, drawing & designs, as contained in claim No. 1?

4. Whether the claimant is entitled to claim Rs. 8,40,000/- on account of expenditure on the idle establishment of staff & idling of T & P etc as claimed in claim No. 2?

5. To what amount, if any, is the claimant entitled towards loss of profit (in terms of claim No. 3)?

6. Whether the respondent was entitled to refund of mobilization advance of Rs. 36,80,000/- as claimed in counter claim No. 1? If yes, whether with interest and at what rate?

7. Whether the respondent is entitled to claim any amount on account of loss of goodwill, as claimed in counter claim No. 2?

8. Whether the claimant is entitled to any amount towards interest? If yes, at what rate and for what period?

9. Costs & relief.”

10. On behalf of GA, its partner Mr. Mohan Swarup Garg filed an affidavit of evidence (Ex.P-1) and relied on documents (Ex.C-1 to C-17). There was cross-examination by learned counsel for HSCL. On behalf of the HSCL, Mr. U.K. Singh filed the affidavit of evidence as well as documents (Ex.R-1 to R-12). He, too, was cross-examined by learned counsel for GA.

11. As regards Issue No. 1, the learned Arbitrator held that as per the agreement dated 28th August, 2003 between GA and HSCL, all terms and conditions agreed to between Noida and HSCL were binding on GA “on back to back basis”. It was further noted that “every instruction given by Noida to the Respondent [HSCL] was to be passed on to the claimant [GA], if the claimant was affected by such instructions.”

12. As far as Issue No. 2 is concerned, the learned Arbitrator noted that RW-1 had admitted that by the letter dated 1st September, 2003, HSCL had written to Noida that the soil testing work had been completed at the site. The learned Arbitrator further noted that RW-1 sought to add that the said letter was written under the influence of GA but that “it was his own interpretation.” The learned Arbitrator also noticed that no other official of HSCL including Mr. S.N. Jha, who was supposed to have written the letter dated 1st September 2003, was examined to substantiate the plea that the said letter was written under the influence of the GA. The learned Arbitrator also noted the categorical admission by RW-1, the witness of HSCL, that a copy of the agreement dated 16th February, 2003 between Noida and HSCL was not supplied to GA. Further, HSCL did not supply the copy of the letter dated 23rd October, 2003 by which Noida rescinded its contract with HSCL. The learned Arbitrator further noted that even according to RW-1, HSCL “did not inform the claimant [GA] about filing of the writ petition in the Allahabad High Court.”

13. The learned Arbitrator referred to the fact that by a letter dated 3rd November 2003, HSCL informed Noida that “the primary work was in progress at a good pace.” In reply, by its letter dated 11th December, 2003, Noida pointed out to HSCL that till the said date “the site had not been handed over and there was no progress at the site.” The learned Arbitrator held the said letter to have absolutely no basis and as being “evidently an afterthought” since the letters dated 1st October, 2003 and 3rd November, 2003 of HSCL to Noida stated that the preliminary works had been carried out by GA.

14. The learned Arbitrator also found that despite Noida asking HSCL for refund of the mobilisation advance by its letter dated 27th October 2003, HSCL in turn did not ask GA to refund the mobilisation advance till 23rd June, 2005. In the absence of any such communication, GA could not have been expected to refund the mobilisation advance earlier.

15. On Issue No. 2, the learned Arbitrator noted that there is nothing placed on record to show whether HSCL had filed a suit against Noida. As it now transpires, it was GA which filed a suit initially against HSCL being CS (OS) No. 809/2006 for recovery of Rs. 77,46,300 along with interest. It is in those proceedings that the parties agreed to refer the disputes to arbitration. The learned Arbitrator noted that within 15 days of the letter dated 23rd June, 2005, GA refunded the mobilisation advance to HSCL. There was no inordinate delay in doing so. Therefore, the allegation of fraud against the GA became meaningless. The learned Arbitrator returned a specific finding that GA did not commit any breach of the agreement dated 28th August, 2003.

16. As regards Issue No. 3, the learned Arbitrator *inter alia* referred to the minutes of the meeting dated 12th April, 2004 where it was specifically mentioned that HSCL “should submit the details of the amount of expenditure along with full justification and after receipt of the same suitable administrative decision will be taken by Noida” regarding adjustment of the expenditure incurred by GA during the course of the contract. Therefore, it was the duty of HSCL to forward the details of expenditure raised by GA to Noida along with justification for adjustment of

the expenditure of GA. However, no such steps were taken and there was no valid explanation for the failure to do so. On merits, HSCL was unable to explain why GA would not be entitled to the sum actually spent on survey and soil testing. Accordingly, the learned Arbitrator held that GA would be entitled to receive Rs. 4 lakhs for the expenditure incurred on survey, soil testing etc.

17. As regards claim of Rs. 8,40,000 on account of expenditure on the idle establishment of staff and non-functioning of T&P which formed the subject matter of Claim No. 4, the learned Arbitrator allowed it to the extent of 50% i.e., Rs. 4,20,000.

18. As regards loss of profit, the learned Arbitrator was of the view that the ends of justice would be met if 2.5% of the value of the contract was allowed towards loss of profit, which worked out to Rs. 10,77,050.

19. Turning to the issue of mobilisation advance, the learned Arbitrator held that while HSCL was not entitled to any interest, the refund of the mobilisation advance by GA was a good and friendly relations act.

20. Turning to Question No. 7 i.e., whether HSCL was entitled to any amount on loss of goodwill, the learned Arbitrator answered it in the negative. Claim No. 8 was for interest, and the learned Arbitrator allowed it @ 6% per annum. Costs were quantified at Rs. 2,50,000.

21. This Court has heard the submissions of Ms. Shipra Ghose, learned counsel for the Petitioner and Mr. Raman Kapur, learned Senior counsel

appearing for the Respondent.

22. Ms. Ghose took the Court through the relevant clauses in both agreements i.e., the Agreement dated 16th August, 2003 between Noida and HSCL and the further sub-contract dated 20th August, 2003 between HSCL and GA. Nothing was able to be shown to the Court to dislodge the factual finding of the learned Arbitrator that GA was never told of the rescinding of the contract dated 16th August, 2003 between Noida and HSCL and that this happened for the first time only on 23rd June, 2005 i.e., nearly two years after the main contract had been rescinded. There is no valid explanation offered by HSCL except pointing out to the claim filed by GA before the learned Arbitrator where it said that it came to know of the writ petition filed in Allahabad High Court. This by no means is an admission by GA that it knew of the rescinding of the main contract any time soon after it happened. The further finding of the Arbitrator which is unable to be questioned is that it was only on 23rd June, 2005 that for the first time GA was asked to refund the mobilisation advance.

23. It also does appear that despite HSCL filing suits, it led the Arbitrator to believe that no proceedings had been initiated against Noida. The Court is also not persuaded to hold that the finding of the learned Arbitrator that GA was not in breach of the contract is not a plausible view to take based on the evidence placed on record. It cannot be said to be perverse. There was no tangible material placed on record by HSCL to counter the claim for a sum of Rs. 4,44,000 towards the amount spent on survey, soil testing, drawings and designs. Likewise, the claim in the sum of Rs. 8,40,000 on account of

the expenditure on idle establishment was allowed only to the extent of 50%. It is not as if the learned Arbitrator did not examine the evidence placed on record before coming to the above conclusion. Even loss of profit was allowed only to a limited extent of 2.5% of the value of the contract. The learned Arbitrator found that there was no undue delay in returning the mobilisation advance and no interest was payable thereon.

24. Clearly, both the counter-claims were unsubstantiated by the evidence placed on record and the learned Arbitrator was right in rejecting them. The Court is of the view that none of the grounds under Section 34 of the Act are made out in the instant case.

25. The petition is dismissed but, in the circumstances, with no order as to costs.

S. MURALIDHAR, J

FEBRUARY 20, 2017

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