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

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Date of decision: 18th August, 2017

+ O.M.P. (COMM) 292/2017

NHAI

..... Petitioner

Through Mr. Debojit Borkakati, Adv.

versus

M/S MADHUCON PROJECTS LIMITED..... Respondent

Through Mr. Akhil Sibal, Sr. Adv. with
Mr. Suryadeep Singh, Mr. Sourav Roy and
Mr. Rishabh Dheer, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

I.A. Nos. 8994-95/2017 (exemption)

Allowed subject to just exceptions.

I.A. No. 8996/2017 (for condonation of delay)

For the reasons stated in the application, the delay in filing the petition is condoned.

The application is disposed of.

O.M.P. (COMM) 292/2017

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking to impugn the Award dated 02.05.2017 passed by the Arbitral Tribunal.

2. Some of the relevant facts are that the petitioner accepted the bid of the respondent vide its communication dated 18.11.2005 for widening and strengthening of four lane of existing single/intermediate carriageway of National Highway No. 57 Section from Km 110.00 to Km 70.00 (Jhanjharpur-Darbhanga Section) in the State of Bihar for a contract value of Rs.388,23,24,691/-.

3. It is the case of the petitioner that the respondent was not able to meet the contractual requirements of mobilization of staff, timely deployment of machinery, etc. It is stated that after much delay, the contract with substantial completion of four laning was opened to traffic w.e.f. 01.09.2012. The engineer issued "Substantial Completion Certificate" on 25.09.2012 and 09.11.2012.

4. Disputes having arisen between the parties, the matter was referred to the Arbitral Tribunal. The respondent in terms of the agreement referred six disputes for adjudication under the aegis of Society for Affordable Redressal of Disputes (SAROD). The respondent vide its letter dated 14.10.2015 requested the Arbitral Tribunal that claim Nos. 5 and 6 may be allowed to be withdrawn. This request was accepted. Subsequently, these disputes were raised afresh by the respondent vide its letter dated 16.11.2015. By mutual consent of the parties, the disputes were referred to the same existing tribunal. The two disputes which are subject matter of the present Award deal with claim No. 1, namely, refund of the liquidated damages recovered by the petitioner for the alleged delay in completion of Kamla Balan Bridge being Rs.2,01,57,285/- and claim No. 2 for illegal recovery effected from the respondent towards the cost of balance work of Metal Beam Crush Barrier in the alleged final bill being Rs.2,56,11,648/-.

5. On the first claim regarding recovery of liquidated damages, the learned Arbitral Tribunal notes that the Taking Over Certificate was issued by the engineer on 29.09.2012. It was amended vide letter dated 09.11.2012. The Taking Over Certificate which was effective from 01.09.2012 was subject to completion of remaining structural works of Kamla Balan Bridge and the balance highway work as per the snag list attached as Annexure A by 31.03.2013 and rectification of defective work as per Annexure B by 30.11.2012. The Award notes that the structural work of Kamla Balan Bridge was completed on 31.05.2013 and the balance works as per Annexure A and Annexure B were completed by 30.06.2014. For the delay in completion of various works as per Annexure A and B of the Taking Over Certificate, the liquidated damages have been imposed on the respondent. The Award notes the contention of the respondent about as to why the delay took place, namely, non-availability of work fronts and obstructions created by land owners and paucity of cash flow due to non-release of long pending payments from the petitioner. The learned Arbitral Tribunal rejected the said grounds pleaded by the respondent. It however notes that clause 47.1 of the contract provides for liquidated damages which are leviable for the delay beyond the time of completion up to the date of Taking Over Certificate. Hence, the Award concludes that the liquidated damages were leviable only for the delay which occurred up to 01.09.2012 i.e. the completion date as per Taking Over Certificate and not for the period beyond 01.09.2012. The admitted fact was that the Taking Over Certificate was issued without any liquidated damages. The said damages are sought to be imposed for Rs.2,01,57,285/- for the delay in completion of works as per Annexure A and B of the Taking Over Certificate which is termed as defect liability

period from 01.09.2012 up to 31.08.2014. The Award notes that the petitioner has neither pleaded in the statement of defence nor during the argument that there is any provision in the agreement for levy of liquidated damages on account of delay in completion of work during the defect liability period. It hence rejected the said deduction of liquidated damages by the petitioner

6. The second claim pertains to recovery of costs of balance work of Metal Beam Crash Barrier being an amount of Rs.2,56,11,684/-. The petitioner have deducted the said amount from the final statement of the respondent for not providing the single and double faced Metal Beam Barrier at certain places. The claim was for refund of the said amount. The case of the respondent was that the barriers could not be provided on account of stiff resistance from the villagers as it would impede their movement across the road.

7. The learned Arbitrator came to the conclusion that non-execution of the balance work for barrier took place for the reasons which are not attributable to the respondent/claimant. Hence the Award concludes that the petitioner could not fulfill his contractual obligations to facilitate the installation of the barriers and hence, the action of the petitioner to deduct Rs.2,56,11,684/- was unjustified. Hence, the amount was awarded to the respondent.

8. I have heard learned counsel for the parties.

9. Learned counsel for the petitioner has vehemently argued regarding claim No.1 i.e. that the impugned Award has completely ignored the supplementary agreement dated 27.05.2015 executed between the parties on account of which the respondent agreed to pay the liquidated damages. He

submits that the Award is completely vitiated on account of completely ignoring the terms and conditions of this agreement. He relies upon the judgment of the Supreme Court in the case of *M/s. Cauvery Coffee Traders, Mangalore vs. M/s. Honor Resources (Intern.) Co. Ltd., (2011) 10 SCC 420* to argue that where a final settlement has been amicably arrived at between the parties, the controversy would stand concluded on account of the same. This was the only plea raised to impugn the Award.

10. Learned counsel for the respondent has pointed out that the supplementary agreement dated 27.05.2015 was only an arm twisting exercise which was got executed under coercion and duress from the respondent. He submits that immediately after execution of the supplementary agreement on 27.05.2015, the petitioner made payment to the respondent on 29.05.2015, 19.06.2015 and 27.06.2015. He relies upon the judgment of the Supreme Court in the case of *R.L. Kalathia and Company vs. State of Gujarat, (2011) 2 SCC 400* to contend that merely because the respondent had executed the said agreement does not ipso facto mean that the respondent is not entitled to its claims.

11. There is no dispute in this present case which has also been noted by the learned Arbitral Tribunal that there are no powers with the petitioner to levy liquidated damages for the period after the issue of the taking over certificate. The relevant clause of the agreement which deals with the liquidated damages, namely, clause No. 47.1 reads as follows:-

“47.1 If the Contractor fails to comply with the Times for Completion in accordance with Clause 48, for the whole of the Works or, if applicable, any section within the relevant time prescribed by Clause 43, then the Contractor shall pay to the

Employer the relevant such stated in the appendix to Tender as liquidated damages for such default and not as penalty (which sum shall be the only monies due from the Contractor for such default) every day or part of a day which shall elapse between the relevant Time for Completion and the date stated in a Taking-Over Certificate of the whole of the works or the relevant Section, subject to the applicable limited stated in the Appendix to Tender. The Employer may, without prejudice to any other method of the recovery, deduct the amount of damages from any monies due or to become due to the contractor. The payment of the deduction of such damages shall not relieve the Contractor from his obligations to complete the Works, or from any other his obligations and liabilities under the Contract.”

12. As noted by the learned Arbitral Tribunal, the above clause is applicable for levy of liquidate damages where the contractor fails to comply with the time for completion, between the agreed date of completion up to the date stated in the Taking Over Certificate. The learned Arbitral Tribunal also noted that the petitioner have neither pleaded in the statement of defence nor during the argument regarding the existence of any provision in the agreement for levying liquidated damages on account of delay in completion of the work beyond the Taking Over Certificate whereafter the defect liability period commences. The only argument is that in view of the supplementary agreement dated 27.05.2015, the said plea of the respondent could not have been granted.

13. The learned Arbitral tribunal has however come to a conclusion that in the original document, there were no powers with the petitioner to levy such liquidated damages. It further holds that in the absence of any power, the action of the petitioner in trying to seek legal sanctity by drawing up a supplementary agreement is bad in law and untenable.

14. I may also look at the supplementary agreement dated 27.05.2015.

The said supplementary agreement reads as follows:-

“1. **WHEREAS**, the Employer had entered into a Contract dated 19.01.2006 (hereinafter referred to as "Contract") with the Contractor for 4 laning from Km 110.000 to Km 70.000 of Jhanjharpur-Darbhanga Section of NH-57 in the State of Bihar.

2. **AND WHEREAS**, the Executive Committee of the National Highways Authority of India in its 238th meeting held on 23.04.2015 approved the Extension of Time till 31.08.2012 with Liquidity Damages (LD) of Rs.2,01,57,285/- as finalized by Supervision Consultant. The , liquidated damages includes Rs 29,74,515/- for 274 days delay in completion of Kamla-Balan Bridge and Rs 1,71,82,770/- due to delay in completion of balance works as listed in Snag list.

3. The Contractor agrees for no claim of prolongation on account of grant of EOT and acceptance of LD amount of Rs.2,01,57,285/- and hence withdraw the claim of Rs.341.49 crores on account of EOT (prolongation) submitted to SAROD.

4. Save and except as provided in this Agreement, all other terms and conditions and rights and obligations of the Parties shall be governed by the Contract.

5. This Agreement shall be deemed to be part and parcel of the Contract, which shall stand amended to this limited extent as contained in this Agreement.”

15. A perusal of the above document does not show any categorical waiver or acceptance of the right of the petitioner to deduct liquidated damages of Rs. 2,01,57,285/- by the respondent. There is no such clear or unambiguous language of the agreement.

16. In fact a perusal of the said agreement dated 27.05.2015 would show that there appears to be no particular purpose as to why this agreement has

been executed. It seeks to take some unilateral concessions from the respondent and no more.

17. There appears to be merit in the contentions of the respondent that this was only a method to legitimize the illegal acts of the petitioner using arm twisting methods. The respondent was forced to execute the said supplementary agreement. Thereafter as pointed out by the learned counsel for the respondent, the necessary payments have been released to the respondent.

18. Reference may also be had to the judgment of the Supreme Court in the case of *R.L. Kalathia and Company vs. State of Gujarat(supra)*, the court in para 13 held as follows:-

“13. From the above conclusions of this Court, the following principles emerge:

(i) Merely because the contractor has issued "No Dues Certificate", if there is an acceptable claim, the court cannot reject the same on the ground of issuance of "No Dues Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing 'No Dues Certificate'.”

19. Hence, merely because the respondent had executed the above agreement cannot ipso facto mean that the respondent lost his rights to claim legitimate dues which had been wrongly withheld by the petitioners. It is quite clear that the amount of liquidated damages could not have been levied as per the agreement between the parties. Only to justify the illegal deduction from the bills of the respondent, the supplementary agreement was got executed from the respondent. The award rightly rejects the case of the petitioner.

20. I may also note that the learned Arbitrator has interpreted the terms of the agreement between the parties to hold that withholding of the amount of liquidated damages by the petitioner is illegal and contrary to the terms of the agreement. Interpretation of the terms of the agreement is a plausible and reasonable interpretation.

21. The Supreme Court in *Mcdermott International Inc. Vs. Burn Standard Co.Ltd. And Others*, (2006) 11 SCC 181 had noted as follows:-

“72. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*]

MANU/SC/0803/2003 : AIR2003SC4519 and D.D. Sharma v. Union of India MANU/SC/0419/2004 : (2004)5SCC325]. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

22. The interpretation of the learned Arbitral Tribunal holding the supplementary agreement dated 27.05.2015 as not a bar to grant of refund of the liquidated damages is valid. A government enterprises cannot be allowed to take undue advantage and seen indulging in arm twisting of a contractor. It was admitted in the course of argument that large amount of payments had been withheld by the petitioner. Immediately after execution of the supplementary agreement dated 27.05.2015, the petitioner made payments to the respondent on 29.05.2015, 19.06.2015 and 27.06.2015.

23. There is no merit in the present petition and the same is dismissed.

**(JAYANT NATH)
JUDGE**

**AUGUST 18, 2017
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