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

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FAO(OS) 261/2017

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Date of decision : 25th September, 2017

BHARAT HEAVY ELECTRICALS LIMITED Appellant

Through : Mr. Sanjeev Anand,
Mr Divya Nishant and
Mr. Pallav Kumar, Advs.

versus

M/S TEKNOV CONSULTANTS & ENGINEERS PVT LTD

..... Respondent

Through : Mr. Karan Luthra, Adv.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

CM No.35246/2017 (exemption)

1. Allowed, subject to just exceptions.

2. The application is disposed of.

CM No. 35248/2017 (condonation of delay in refilling)

3. Notice.

4. Mr.Karan Luthra, learned counsel accepts notice on behalf of the respondent.

5. Having regard to the nature of the application, counsel are orally heard.

6. This application seeks condonation of 103 days delay in refiling the present appeal after its original filing on 11th May, 2017. It appears that, despite being apprised of the objections by the Registry, the appellant failed to remove the same, resulting in 103 days delay in refiling. Even though the applicant does not disclose any reasons or circumstances for the delay as occasioned inasmuch as we have heard Mr. Sanjeev Anand, learned counsel for the appellant, on the appeal itself, we are inclined to accept the prayer for condonation of delay in refiling this appeal. Delay in refiling the appeal is condoned.

7. This application is allowed.

CM No. 35247/2017(condonation of delay in filing)

8. Mr.Karan Luthra, learned counsel accepts notice on behalf of the respondent.

9. Having regard to the nature of the application, counsel are orally heard.

10. For the reasons stated, delay of 20 days in filing the appeal is condoned.

11. This application is allowed.

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12. We have heard Mr. Sanjeev Anand, learned counsel for the appellant, at length, on the challenge laid by way of the present appeal

under Section 37(1) of the Arbitration & Conciliation Act, 1996. The appellant seeks to challenge the judgment, dated 16th March, 2017 passed by the learned Single Judge, dismissing OMP 534/2015, which was filed under Section 34 of the Arbitration & Conciliation Act. The appellant had, therein, filed objections to an Arbitral Award dated 30th April, 2015, passed by the sole Arbitrator in disputes between the parties.

13. The facts giving rise to the present matter are within a narrow compass and, to the extent necessary, are set down hereafter.

14. It appears that disputes arose between the parties with regard to a work order dated 12th February, 2007 which was issued by BHEL (the appellant herein) in favour of M/s Teknow Consultants & Engineers Pvt. Ltd. (the respondent herein) *“for execution and handing over of Civil works of switchyard and transformer yard for M/s. Neyveli Lignite Corporation 220/33 KV substation at Barsingsar in Rajasthan.”* The relevant clauses of the work order, which have been relied upon by the learned Single Judge are noted hereafter :

“(i) Under Clause 3.1 the total contract price was Rs.5,11,14,000.

(ii) Under Clause 3.2 the actual payment to be made to the Respondent was based on measurement taken at the site and verified by the Engineers of BHEL as per the unit rate agreed between the parties.

(iii) Under Clause 5.7 no interest was payable by BHEL “on security deposit or on any money due to the Contractor.”

(iv) Under Clause 9 of the work order it was stipulated that in case due to reasons not attributable to the Respondent, the work got delayed and the scheduled completion got extended, the Respondent would not be entitled for any over run compensation for a period of three months beyond the original contract period. In case the scheduled completion got extended beyond three months fixed, over run compensation would be suitably paid on mutual agreement between BHEL and the Respondent. The decision of BHELK in this regard was final and binding on the Respondent.

(v) Under Clause 11, if the Contractor fails to complete the work within the contractual period it was liable to pay penalty @0.5% for amount equal to short fall in progress achieved and 0.5% of the contractual price as LD for each week of part thereof subject to a maximum (penalty + LD) of 10% of the contract price.

(vi) Under Clause 17 no idle labour charges would be admissible in the event of any stoppage of work resulting in the Contractor's workmen being idle due to any reason at any time."

15. The objections before the learned Single Judge, and before this court, are confined to the Award by the sole Arbitrator, on the claim of overrun charges, to the extent of Rs.14,79,615/-. We may extract hereunder clause 9 of the work order which reads as follows:

“9.0 OVER RUN CHARGES :

9.1 *In case due to reasons not attributable to the contractor, the works get delayed and the scheduled completion get extended, the contractor shall not be entitled for any over run compensation for a period of*

3 months beyond the original contract period. In case of scheduled completion period gets extended beyond this grace period of 3 months as stated above, fixed overrun compensation shall be suitably paid based on mutual agreement between BHEL and vendor. However, the decision of BHEL will be final and binding on the vendor.”

16. It is an admitted position, as was noted by the Arbitrator and as relied upon by the learned Single Judge that, vide an e-mail dated 30th June, 2009, the BHEL confirmed that “*the overrun charges as per the contract shall be paid*”. It is based on this admission, as well as clause 9 of the work order, that the Arbitrator has *inter alia* observed as follows :

“ The Contract therefore provides for fixed over run compensation except that no such charges will be payable for the first three months of the extended period.

The Respondent has admitted that Over Run Charges vide their e mail dated 30th June, 2009 that “Over Run Charges shall be paid” although Escalation is not payable.

As per contract the over run charges were to be mutually decided by the claimant and the respondent and the decision of the respondent was to be final in this regard.

Since, the Claimant and Respondent have not decided the over run charges mutually and have also not presented any formula or mutually accepted methodology for the same, the tribunal would like to decide based on the following :-

At the time of submission of offer against the tender floated by the Respondent, the Claimant has filled up the analysis of unit rate as per the format provided in the tender at Annexure-D. The document has been furnished by the Respondent at page 57 of their reply to the claims.

Out of the various items listed, the Tribunal is of the view that Sl.5 Establishment & Administrative expenses of site (5%) as well as depreciation and maintenance of tools and plants (2%) are the heads pertaining to over runs arising out of extended maintenance and running of site.

Since the claimant had submitted the above details in their offer against the tender floated by the Respondent and the Respondent has accepted the same and awarded the contract to the Claimant, it is clear that the document is acceptable to both parties.

Accordingly, the over run charges work out to 7% of the contract value. However, since the claimant has only asked for 5% of the contract value the tribunal would award only 5%.

The claimant has claimed the amount for a period of 11 months i.e. up to 27.5.2009. However, as the tribunal has held above that there is no contract between the parties beyond 30.4.2009 the over run charges can only be allowed up to that date i.e. for 10 months i.e. from July, 2008 to April, 2009.

Accordingly, the amount allowed as over run charges is as calculated below :-

Amount of over run per month = Rs.1,59,731 per month

Period for which over run is payable i.e. 3 months beyond the original completion date : July 2008 to April 2009 = 10 months

Total over run payable = 159731x10=Rs.15,97,730/-

However as the claimant has claimed an amount of Rs.14,79,615 therefore only Rs.14,79,730 is allowed.”

17. The objections pressed by BHEL before the learned Single Judge on this Award have been considered at length from paras 12 to 14 of the impugned judgment dated 16th March, 2017. The learned Single Judge has noted that the Arbitrator has awarded only 5% of the contract value as overrun charges and that only up to 27th May, 2009, commencing from the expiry of three months from the original completion date. This has been multiplied by the period overrun i.e. 10 months which actually worked out to Rs.15,97,310/-. However, inasmuch as the respondent had claimed only Rs.14,79,615/-, only this amount was awarded. It has also been noted that the claim of escalation claimed by the respondent was disallowed.

18. Learned counsel for the appellant is unable to point out any infirmity in the reasoning and findings returned by the learned Single Judge.

19. The scope of interference by a court exercising jurisdiction under Section 34 of the Arbitration & Conciliation Act is limited.

20. The extent of jurisdiction of the court while dealing with the challenge to an arbitral award, by now, stands authoritatively examined by a plethora of pronouncements of the Supreme Court, which travel from the judgment reported at **1994 Supp (1) SCC 644**,

Renusagar Power Co. Ltd. v. General Electric Co. to (2015) 3 SCC 49, ***Associated Builders v. DDA***. On an analysis of all the said decisions, this court has, in a recent judgment reported at ***MANU/DE/2699/2017, NHAI v. Hindustan Construction Co. Ltd.***, delineated the following propositions :

“36. Associated Builders v. DDA, MANU/SC/1076/2014 : (2015) 3 SCC 49, may justifiably be christened as the high watermark in the law relating to Section 34 of the Act, and any attempt to paraphrase the decision is fraught with the risk of mutilation. The decision is, almost entirely, definitively authoritative, and brooks no ambiguity or anomaly. Nonetheless, in view of the proliferation of litigation, challenging arbitral awards, in recent times, we have, in a recent decision, dated 10th August 2017, in Shiam Cooperative Group v Kamal Construction Co. Ltd., extracted, in extenso, the relevant paragraphs from the said decision, and respectfully culled, therefrom, the following clear principles:

- (i) *The four reasons motivating the legislation of the Act, in 1996, were*
 - (a) *to provide for a fair and efficient arbitral procedure,*
 - (b) *to provide for the passing of reasoned awards,*
 - (c) *to ensure that the arbitrator does not transgress his jurisdiction, and*
 - (d) *to minimize supervision, by courts, in the arbitral process.*
- (ii) *The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.*

- (iii) *An award would be regarded as conflicting with the public policy of India if*
 - (a) *it is contrary to the fundamental policy of Indian law, or*
 - (b) *it is contrary to the interests of India,*
 - (c) *it is contrary to justice or morality,*
 - (d) *it is patently illegal, or*
 - (e) *it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.*
- (iv) *An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if*
 - (a) *it disregards orders passed by superior courts, or the binding effect thereof, or*
 - (b) *it is patently violative of statutory provisions, or*
 - (c) *it is not in public interest, or*
 - (d) *the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or*
 - (e) *the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or*
 - (f) *the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or*
 - (g) *the principles of natural justice have been violated.*
- (v) *The "patent illegality" had to go to the root of the matter. Trivial illegalities were inconsequential.*
- (vi) *Additionally, an award could be set aside if*
 - (a) *either party was under some incapacity, or*
 - (b) *the arbitration agreement is invalid under the law, or*

- (c) *the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or*
 - (d) *the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or*
 - (e) *the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or*
 - (f) *the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or*
 - (g) *the award contravenes the Act, or*
 - (h) *the award is contrary to the contract between the parties.*
- (vii) *"Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which*
- (a) *the findings, in the award, are based on no evidence, or*
 - (b) *the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or*
 - (c) *the Arbitral Tribunal ignores vital evidence in arriving at its decision.*
- (viii) *At the same time,*
- (a) *a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",*
 - (b) *if the view adopted by the arbitrator is a possible view, it has to pass muster,*
 - (c) *neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.*

- (ix) *"Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.*
- (x) *For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.*
- (x) *The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts."*

21. Our jurisdiction, under Section 37 of the Act, is also delineated by the same judicial principles.

22. In view thereof, we find no merit in this appeal which is dismissed with costs which are quantified at Rs.25,000/-. Costs shall be paid within a period of one week from today.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

SEPTEMBER 25, 2017/kr