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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **O.M.P. 534/2015**

BHARAT HEAVY ELECTRICALS LIMITED ..... Petitioner
Through: Mr. Sanjeev Anand, Mr. Dibya Nishant, Mr. Pallav Kumar, Mr. Gautam Mann and Mr. Akshay Kapoor, Advocates.

versus

TEKNOW CONSULTANTS &ENGINEERS PVT. LTD. ..... Respondent
Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Karan Luthra and Ms. Aakashi Lodha, Advocates.

CORAM: JUSTICE S. MURALIDHAR

<u>O R D E R</u>
% **16.03.2017**

1. Bharat Heavy Electricals Limited ('BHEL') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging the impugned Award dated 30th April 2015 passed by the sole Arbitrator in the disputes between the BHEL and the Respondent Teknow Consultants & Engineers Pvt. Ltd. arising out of a work order dated 12th February 2007 issued by BHEL in favour of the Respondent for "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."

2. The clauses of the work order relevant for the present purposes are as follows:

(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.

3. The original stipulated period of completion was 27th March 2008. On 24th March 2008, the Respondent applied for the first extension of time ('EOT'). On 1st September 2008, BHEL granted EOT till 31st January 2009

without any financial implications for BHEL. Likewise, the further EOT was granted till 30th April 2009 on the same basis.

4. On 30th April 2009, the Respondent applied for a further EOT till 31st August 2009. There was delay BHEL responding to this request. On 22nd June 2009, BHEL wrote to the Respondent complaining of the slow progress in the work and asking the Respondent to take immediate action to get the work started by 23rd June 2009 failing which they would have no choice to take suitable action as per the contract agreement. This was reiterated by BHEL by its letter dated 28th June 2009.

5. By its letter dated 28th June 2009 the Respondent informed the Petitioner that the EOT had been granted by BHEL till then for the convenience of BHEL. The Respondent did not accept or agree to any work to be done thereafter. BHEL was asked to close the contract as on 26th June 2009 and award the balance work to any other party after releasing the Respondent's overdue payments. The Respondent asserted that it had to get escalation and compensation from 31st April 2008 onwards.

6. On 30th June 2009, an email was sent by the BHEL to the Respondent stating that there was no provision in the contract for short closing of the contract. However, it was stated the "over run charges as per the contract shall be paid."

7. In response, on 4th July 2009, the Respondent informed the Petitioner that it is required pay the over run charges and that it was deputing its representatives for taking joint measurement of the site on 5th July 2009 for

the purposes of closure of the contract and for release of its payments.

8. On 15th July 2009, BHEL granted a final EOT to the Respondent to complete the work by 31st July 2009.

9. The disputes between the parties were referred to a sole Arbitrator. There were 8 items of claims and an additional claim of crash cost by the Respondent. Of the said claims what has been challenged by the BHEL in the present petition is the Award in respect of Claim No.6 which was for a sum of Rs.48,72,435 on account of over run charges. The learned Arbitrator by the impugned Award has awarded the Respondent Rs.10,76,084.

10. The other challenge is to Claim No.7 which was for pre-suit, *pendente lite* and future interest @ 18% per annum. By the impugned Award, the learned Arbitrator is granted interest @ 13% per annum from 1st July 2009 till the date of the Award and up to the date of payment. If the payment was beyond 90 days from the date of the Award then interest @ 18% per annum from the date of payment till realisation. To repeat, only the above two items have been challenged by BHEL in the present petition.

11. Mr. Sanjeev Anand, learned counsel for the Petitioner submitted that there was no occasion for the learned Arbitrator to have granted the claim for over run charges. It was submitted that each of the EOT was granted without any financial implication to BHEL and, therefore, the question of BHEL having to pay such over run charges did not arise. According to Mr. Anand, the EOTs were on account of delays caused by the Respondent.

12. The Court finds that in the impugned Award the learned Arbitrator has discussed Clause 9 pertaining to over run charges. He has also adverted to email dated 30th June 2009 written by BHEL to the Respondent stating that while escalation would not be payable, over run charges would in fact be paid. The learned Arbitrator has then noted that at the time of submission of the tender, the Respondent had filled up the analysis of unit rate as per the format provided in the tender documents itself. Out of the various items listed at Serial No.5 Establishment and Administrative Expenses of site (5%) as well as depreciation and maintenance of tools and plants (2%), were relevant for over run charges as a result of extended maintenance and running of site.

13. Since the Respondent had asked only for 5% of the contract value as over run charges, the Arbitrator awarded only that amount and that too only up to 27th May 2009 i.e. for a period of three months beyond the original completion date. The amount of over run per month charges was calculated @5% of the contract value divided by the original contract period and thus worked out as Rs.1,59,731 per month. This was then multiplied by the period of over run i.e. 10 months. This worked out to Rs.15,97,310. Since, however, Respondent had claimed only Rs.14,79,615, only Rs.14,79,730 was allowed. However, the amount of escalation claimed was disallowed and, therefore, the total over run charges actually allowed was Rs.10,76,084.

14. The Court finds that there is no legal infirmity whatsoever in the impugned Award insofar as the above allowing of the claim for over run charges is concerned. No ground has been made out under Section

34(2)(b)(ii) of the Act in this regard.

15. However, as regards the award of *pendente lite* interest, learned counsel for the Petitioner is right in his contention that under Clause 5.7 no *pendente lite* interest could be granted. The Award to the extent that it has awarded *pendente lite* interest is contrary to the express terms of the contract and is hit by Section 28(3) of the Act. The Award to this extent is opposed to the fundamental policy of Indian law and is hereby set aside. Only the post-Award interest in the manner awarded in the impugned Award is upheld.

16. As a result the challenge to the impugned Award as regards over run charges is hereby rejected. The Award is interfered with and set aside only to the extent that the grant of pre-suit and *pendente lite* interest up to the date of the Award. The Award of interest at the post-Award stage, as directed in the impugned Award, is hereby upheld.

17. The petition is disposed of in the above terms with no order as to costs.

S. MURALIDHAR, J

MARCH 16, 2017
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