

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****COMM.ARBITRATION PETITION NO. 361 OF 2018**

**The Jawahar Nehru Port Trust)
1107, Raheja Centre,)
214, FPJ Marg, Nariman Point,)
Mumbai 400 021)**

**..... Petitioner
(Orig.Respondents)**

VERSUS

**Starlog Enterprises Ltd.)
Erstwhile ABG Infralogistics Ltd.,)
5th Floor, Bhupati Chambers,)
13th Mathews Road, Mumbai 400 004)**

**..... Respondents
(Orig.Claimants)**

Mr.Dipen Merchant, Senior Advocate, a/w. Mr.Bhalwal, i/b. Vyas & Bhalwal for the Petitioner.

Mr.Nirman Sharma, a/w. Mr.Ranjit Shetty, Mr.Jonathan Jose, i/b. Argus Partners for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 5th APRIL, 2018

JUDGMENT

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 the petitioner has impugned the arbitral award dated 20th December, 2017 allowing the claim of Rs.74,16,707/- which amount was deducted by the petitioner from the bill of the respondents is concerned and also impugns part of the award awarding interest at the rate of 15% per annum from the date of deduction to the date of award and from the date of the award till date.

2. Insofar as the claim of Rs.74,16,707/- allowed by the learned arbitrator in favour of the respondents is concerned, Mr.Merchant, learned senior counsel for the petitioner invited my attention to clause (23) of the contract and would submit that the petitioner was entitled to deduct this amount from the invoices as and when raised by the respondents towards the maintenance charges. He submits that during the course of the execution of the work, the equipments of the respondents did not work to the full extent and thus the petitioner was entitled to deduct the maintenance charges from the bills raised by the petitioner. It is submitted that though the learned arbitrator has rendered a finding that the petitioner was entitled to deduct such amount under the said provision from the invoices raised by the respondents, the learned arbitrator has rejected the deduction made by the petitioner under clause (23) of the contract on the ground that the said deduction was barred by law of limitation and did not allow the said claim made by the respondents for refund of the said amount on merits.

3. Insofar as claim for interest awarded by the learned arbitrator is concerned, learned senior counsel invited my attention to clause (42) of the contract which reads as under :-

42. No interest on account of delayed payments :

No interest will be payable nor any claim for interest will be entertained by the Employer with respect to any monies or balance which may be in

their hands owing to any disputes between themselves and the contractor or with respect to any delay on the part of the Employer in making payment.

4. It is submitted that in the impugned award, the learned arbitrator however has awarded interest 15% per annum from the date of deduction till the date of award which is in the teeth of the said provision of the contract.

5. The next submission of the learned senior counsel is that the counter claim is wrongly rejected by the learned arbitrator as time barred.

6. Learned counsel for the respondents on the other hand invited my attention to the findings rendered by the learned arbitrator. Insofar as the claim for refund of the amount deducted by the petitioner from the invoices raised by the respondents is concerned, he invited my attention to the findings of the learned arbitrator and more particularly paragraph (19). It is submitted that the petitioner had already deducted a sum of Rs.2,72,37,794/- under the said head from the bill raised by the respondents in the month of April 2002. It is submitted that the claim for refund of the said amount of Rs.2,72,37,794/- made by the respondents arising out of the said deduction has been rejected by the learned arbitrator on the ground that the said claim was time barred.

7. Insofar as claim no.3 is concerned, a perusal of the impugned award clearly indicates that the petitioner had deducted a sum of

Rs.2,72,37,794/-from the invoice of the respondents by pressing in service clause 23 of the contract in the year 2002 when there was alleged break down of the equipments of the respondents. The respondents also had made a claim for refund of the said amount of Rs.2,72,37,794/- before the learned arbitrator in the statement of claim filed after expiry of three years from the date of such deduction. The learned arbitrator rejected the said claim for refund of Rs.2,72,37,794/- on the ground of limitation. The respondents did not challenge the said award. The learned arbitrator has applied the same analogy insofar as the deduction of Rs.74,16,707/- from the invoice amount of the respondents by the petitioner is concerned. It is not in dispute that the petitioner had already deducted Rs.2,72,37,794/-towards the said head of break down of equipments in the month of April 2002.

8. Merely because the respondents submitted the last bill in the month of 2007, the petitioner could not have deducted the sum of Rs.74,16,707/- from the last bill submitted by the respondents for the alleged breaches committed by the respondents in the year 2002. In my view, the learned arbitrator has rightly rejected the contentions raised by the petitioner and has rightly allowed the claim for refund made by the respondents under claim no.3. The deduction made by the petitioner itself in the year 2007 was barred by law of limitation. I do not find any infirmity in this part of the award rendered by the learned arbitrator. The award does not show perversity and no interference by this court under section 34 of the Arbitration and Conciliation Act, 1996 is warranted.

9. Insofar as the award of interest by the learned arbitrator at the rate of 15% per annum from the date of deduction till the date of award is concerned, a perusal of clause (42) of the contract clearly provides that the claim for interest was prohibited under the said provision with respect to any monies or balance which may be in their hands owing to any dispute between themselves and the contractor or with respect to any delay on the part of the employer in making the payment. I am not inclined to accept the submission of the learned counsel for the respondents that this clause prohibiting the payment of interest would not apply to the situation where the deduction was made by the petitioner towards the claim in the nature of the liquidated damages.

10. The amount was deducted by the petitioner by invoking clause 23 of the contract. There was a dispute about the entitlement of the petitioner to deduct the said amount. The claim was determined by the arbitrator for the first time in the impugned award. The learned arbitrator in my view thus could not have awarded the interest from the due date till the date of award in view of the agreement recorded under clause 42 of the contract prohibiting such payment of interest. In my view, this part of the award is contrary to and in the teeth of section 31(7) of the Arbitration and Conciliation Act, 1996. The said provision prohibiting the payment of interest however will not apply from the date of award till payment. The part of the award allowing the interest at the rate of 15% per annum from the date of deduction till the date of award is accordingly set aside. The interest from the date of the award till payment is valid and is upheld.

11. Insofar as the rejection of counter claim made by the petitioner by the learned arbitrator is concerned, a perusal of the record indicates that the learned arbitrator has rendered various findings of fact after considering the pleadings and the documents relied upon by both the parties. The learned arbitrator has rejected the counter claim also merely on the ground of limitation. The petitioner has made such counter claim in respect of the alleged breaches alleged to have been committed three years prior to the date of making counter claim before the learned arbitrator. The counter claim was thus rightly rejected by the learned arbitrator. The findings of fact rendered by the learned arbitrator being not perverse, thus cannot be interfered by this court under section 34 of the Arbitration and Conciliation Act, 1996.

12. The arbitration petition partly succeeds. Interest awarded at the rate of 15% from the date of deduction till the date of award on the amount of Rs.74,16,707/- is set aside. No order as to costs.

13. In view of the disposal of the arbitration petition, Notice of Motion No.593 of 2018 does not survive and is accordingly dismissed.

[R.D. DHANUKA, J.]