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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 01st March, 2018
Pronounced on: 14th March, 2018**

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O.M.P. (COMM) 21/2017

INDIAN OIL CORPORATION LTD

..... Petitioner

Through : Mr.V.N.Kaura, Ms.Mona Aneja
and Mr.Abhinav Tandon,
Advocates.

versus

SPS ENGINEERING LTD

..... Respondent

Through : None being *ex parte*.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. These are objections under Section 34 of the Arbitration and Conciliation Act, 1996 against an award dated 17.09.2012 passed by Mr.P.K. Bahri (Retd.) the learned sole arbitrator in the matter between Indian Oil Corporation Ltd. vs. SPS Engineering Ltd.

2. The objector/petitioner Indian Oil Corporation Ltd. (hereinafter referred as "IOCL") is a Government of India Undertaking, incorporated under the Indian Companies Act, 1956, having its registered office at G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai - 400 051 and its refineries headquarter at Core-2,

Scope Complex, 7, Institutional Road, Lodhi Road, New Delhi - 110003.

3. IOCL awarded to the respondent, SPS Engineering Ltd. (hereinafter referred as "SPSEL"), the contract for infrastructure works of supply and installation of construction water system and drinking water system for Paradip refinery project at Paradip (Orissa) under tender No.4635/T/124/99-2K/104/04 by issuing its fax of acceptance No. PJ/PDRP/PMC/CL/-FOA-06 dated 17.10.2000 ("FOA") followed by a detailed letter of acceptance No. PJ/PDRP /PMC/CL/LOA/06 dated 30th November 2000, ("LOA") and a formal contract between IOCL and SPSEL was executed on 18.01.2001;

4. The resident construction manager, Engineers India Ltd. (RCM, EIL) was appointed as the engineer-in-charge for the works under the contract. EIL was the consultant appointed by IOCL for the project. The total nominal value of the contract was Rs.15,89,17,473/- based on the quantities and unit rates specified in the schedule of rates.

5. (A) The contract, interalia, comprised of the following documents **(a)** contract agreement dated 18.1.2001; **(b)** FOA dated 17.10.2000; **(c)** LOA dated 30.11.2000 along with its annexures; **(d)** tender documents along with all the annexures; and **(e)** further amendments thereto. **(B)** the tender documents referred to above included the following 2 volumes: volume No.1 (Techno-

Commercial) (a) notice inviting tender (b) general instructions to tenderers (c) general conditions of contract (GCC) (d) special conditions of contract (SCC) (e) specifications, drawings and formats volume II (Priced) schedule of rates.

6. SPSEL was to complete the work within 13 (thirteen) months to be reckoned from the date of issue of Fax of Acceptance. It is alleged from the inception of the contract, SPSEL showed a lack of interest in the timely completion of the works, and for the initial 11 (eleven) weeks undertook virtually no mobilization at site. Since inspite of repeated reminders from IOCL, SPSEL showed no signs of improvement in its otherwise poor performance resulting in a continuous decline in the progress of the work, such that SPSEL had achieved a meager total progress of 27.12% in the work as on 30th April 2002 (i.e. 5^{1/2} months beyond the scheduled completion date fixed under the contract), the engineer-in-charge was left with no option but to recommend to IOCL the termination of the contract.

7. Therefore, after issuing the show cause-notice dated 27/07/2002 to SPSEL as to why the contract be not terminated for the reasons stated therein and after considering SPSEL's replies thereto, IOCL in exercise of its powers under clause 7.0.1.0 of the GCC read with associated clauses in Chapter 7 of the GCC, terminated the contract by its letter dated 29/10/2002. By the aforesaid communication, IOCL also called SPSEL to conduct joint measurements to determine the final amount, if any, due to

SPSEL. In the said letter IOCL informed SPSEL, inter-alia, as follows: "This is to inform you that without prejudice to any other remedy available to the corporation under the contract, the corporation shall also be entitled, pursuant to clause-7.0.9.0 of the general conditions of contract to appoint another contractor at your risk and cost to complete to its entirely the work as contemplated in the scope of works and recover from you in addition to any other amount, charges, compensation or damages that the corporation may be entitled to (including its entitlement under clause-4.4.0.0 of the general conditions of contract) all costs and charges provided for in Clause 7.0.9.0."

8. IOCL, re-tendered for and consequently awarded the balance works to M/ s Deepak Construction company by a fax of acceptance (FOA) dated 30/03/2007. The FOA was followed by a detailed letter of acceptance (LOA) dated 09.04.2007 and the formal Contract in respect thereof was executed on 01/05/2007. Disputes arose between the parties which were referred to Shri P.K. Bahri (Retd. Judge of this Court) for decision as Sole Arbitrator.

9. In terms of clause 7.0.9.0 read with clause 7.2.0.0 of the general conditions of contract, no amount is recoverable under clause 7.0.9.0 of the general conditions of contract unless the balance work has been completed and the defect liability period in respect thereof has elapsed and all payments finally due on any account to the owner and/or other contractor(s) in respect of the

balance works have been finally settled and the owner has been discharged of all liabilities in respect thereof. Any amount incurred by the owner on such accounting in excess of the amount as would have been incurred by the owner for the said works under the contract together with supervision charges on the balance works would then be recoverable from the contractor.

10. The provisions of clauses 7.0.9.0, 7.1.0.0 and 7.2.0.0 of the general conditions of contract are reproduced below:

- i) *“7.0.9.0 Upon termination of the contract, the owner shall be entitled at the risk and expense of the contractor by itself or through any independent contractor(s) or partly by itself and/or partly through independent contractor(s) to complete to its entirety the work as contemplated in the scope of work and to recover from the Contractor in addition to any other amounts compensations or damages that the owner may in terms hereof or otherwise be entitled to the difference between the amounts as would have been payable to the contractor in respect of the work (calculated as provided for in clause 6.2.1.0 hereof read with the associated provisions thereunder and clause 6.3.1.0 hereof) and the amount actually expended by the owner for completion of the entire work as aforesaid together with 15% (fifteen per cent) thereof to cover owner's supervision charges, and in the event of the latter being in the excess former, the owner shall be entitled (without prejudice to any other mode of recovery available to the owner) to recover the excess from the security deposit or any monies due to the contractor.*
- ii) *7.1.0.0 No amount shall be due and payable to the contractor upon or in the event of termination of the contract unless and until the entirety of the works as contemplated in the scope of work shall have been completed in all respect to the satisfaction of the owner*

and following such completion the defect liability period in respect thereof as herein otherwise provided for has lapsed and all payments finally due on any account to the owner and/or other contractor(s) in respect of the balance works have been finally settled and the owner has been discharged from all liabilities in respect thereof.

- iii) 7.2.0.0 If upon the satisfaction of the provisions of clauses 7.0.9.0 and 7.1.0.0 hereof, there shall remain in the hands of the owner any excess/balance after all account and adjustment of all dues from contractor to the owner, the owner shall forthwith pay over the excess/balance to the Contractor and in the event of the Security Deposit and other dues of Contractor in the hands of the owner being insufficient to meet the dues of the Owner as aforesaid, the Contractor shall forthwith on demand pay the Owner the shortfall. "*

11. The Ld. Arbitrator made the award in the arbitration proceedings on October 27, 2008 in terms whereof the Ld. Arbitrator allowed the claims of IOCL to the extent of Rs.11,10,662/- and those of SPSEL of Rs.91,33,844/-, leaving a balance of Rs.80,23,182/- payable by IOCL to SPSEL under the said award after adjustment. With regard to IOCL's claim of Rs.2,10,41,626/- for the estimated cost of completing the balance work at the risk and cost of SPSEL under Clause 7.0.9.0, the Ld. Arbitrator in Paragraph 102 of his Award held inter alia as follows:

"102 The contract was terminated in October 2002 and till date the balance work of the contract has not been executed. Such damage could have been allowed to the respondent if in reasonable period after termination of the contract, the respondent had executed the balance work at the risk and costs of the claimant. In case the costs actually incurred have been more than the costs

which were required to be incurred under the contract, then the difference between the two costs could have been awarded as damages to the respondent.... Such damage cannot be awarded on mere opinion of any particular person or on hypothetical basis. Under clause 7.0.9.0 of General Conditions of Contract, the respondent was entitled at the risk and expenses of the contractor to get completed the balance work and recover the costs from the claimant. This clause further contemplates that on the amount actually' expended by the owner for the completion of the work 15% to be added as supervision charges. The same would have become recoverable from the claimant. In the present case, no such cost has been incurred till date.... "

12. (a) The balance work was completed by M/s Deepak Constructions on 29/12/2007 and the defect liability period in respect of the works performed by M/ s Deepak Constructions expired on 28/12/2008. (b) The Final Bill of M/s Deepak Constructions was reconciled on 7/5/2008, which was after the award had been reserved by the Ld. Arbitrator on 13/3/2008. (c) IOCL incurred a total expenditure of Rs.6,84,43,326.64 in getting the balance work (including the cost of materials supplied) completed by M/s Deepak Constructions. An additional cost (i.e. the differential between the cost of the performance of the work by M/s Deepak Constructions and the cost which IOCL would have incurred if SPSEL had performed the work) of Rs.3,53,49,329/89 was consequently incurred by IOCL in getting the balance work completed at SPSEL's risk and cost under clause 7.0.9.0 of the general conditions of contract, which IOCL was entitled to recover from SPSEL in terms of the Contract. (d) IOCL also became

consequently entitled to recover from SPSEL a sum of Rs.1,02,66,499/- towards Supervision charges @ 15% on the total cost of Rs.6,84,43,326/64 incurred by IOCL in getting the work executed by Deepak Constructions at SPSEL's risk and cost in terms of clause 7.0.9.0 of the general conditions of contract.

13. Accordingly, IOCL became entitled to recover a sum of Rs.4,56,15,828.89 from SPSEL towards the cost of getting the balance work performed at SPSEL's risk and cost pursuant to clause 7.0.9.0 read with clause 7.1.0.0 and 7.2.0.0 of the general conditions of contract. (a) Therefore, IOCL became entitled to adjust from the said amount the sum of Rs.80,23,182/- which was determined as payable by it to SPSET, under the award dated October 27, 2008. Even after the said adjustment, a net sum of Rs.3,75,92,644/89 remained due and payable to IOCL by SPSEL together with interest thereon

14. The learned counsel for the petitioner has challenged the award stating inter alia its claim was rejected on the ground of limitation which *per se* is illegal. The relevant portion of the award is as under:

“18. The legal position is settled that the claims under the arbitration are to be examined on the test of a suit to be filed in a particular period of time only difference being that instead of filing the suit within the time prescribed under the limitation Act, the claims have to be asserted by the claimant by invoking the arbitration clause for reference of such claims to an arbitrator.

The date of invocation of arbitration is to be treated as the date; of filing of a suit, in order to determine whether the particular claim raised by the claimant is within time in case such a claim is brought before the civil court where there is no arbitration clause and the same is barred by time, similarly, in arbitration if the claim is not brought within the period prescribed in the Limitation Act, by invoking the arbitration clause, within that period, obviously such a claim would be time barred.

19. Under the provisions of the Arbitration and Conciliation Act, 1996, the arbitration is deemed to have commenced on the date the arbitration is invoked. The short question which arises for consideration is, as to which of the article of the Schedule attached to the Limitation Act, 1963 is applicable to the facts of the present case Article 55 of the Limitation Act refers to compensation for the breach of any contract, express or implied, not herein specially provided for and the period of limitation is three years and the period is to be counted from the date when the contract is broken or where there are successive breaches when the breach in respect of which the suit is instituted occurs or where the breach is continuing when it ceases.

20. The Ld. Counsel for the claimant has vehemently argued that even if Article 55 of the Limitation Act applies, the period of three years should be counted in the present case from the date the final bill of the agency executing the remaining work was finalized. He has also argued that in the present case, Article 113 should be

applicable, which is a residuary article, which should apply to the present case.

21. Article 113 of the Limitation Act applies to any suit for which, no period of limitation is provided elsewhere in the Schedule and period of limitation is three years and the time commences from the date the right to sue accrues.

22. I fail to understand as to why Article 55 should not be made applicable to the facts of the present case. Admittedly, the contract was broken in the year 2002 when it was terminated by the claimant. Section 73 of the Contract Act gives right to the aggrieved party to claim compensation / damages from the party, who has broken the contract. The aforesaid clauses of General Conditions of the Contracts in question only contemplate compensation to be given to the claimant for incurring extra expense for executing the remaining work-of the contract, at the risk and cost of the respondent. So, this compensation is covered by the provisions of Section 73 of the Contract Act and Article 55 clearly lays down that such compensation / damages could be recovered within three years from the date, the contract is broken. It is not possible to agree with the Ld. Counsel for the claimant that there is any continuous breach of the contract in respect of the claim raised in these proceedings. There are no successive breaches of the contract committed by- the respondent. Only breach committed by the respondent was that the respondent abandoned the work, which entitled the claimant to terminate the contract, which claimant has done in the present case.

23. Article 113 of the Limitation Act is clearly not applicable, as the period of limitation for the present claim is prescribed in Article 55 of the Limitation Act. The Ld. Counsel for the claimant has cited a case decided by Supreme Court in Civil Appeal No. 6894/1997 decided on 10A.2006 Syndicate Bank vs. Channaveerappa. I have gone through this judgment. It is relating to a matter of continuing bank guarantee, which is not comparable with the present case, where the contract was broken and as a result compensation is to be given to the aggrieved party. In the said case the clause in the contract provided that on demand being made the continuing guarantee became payable and thus right to sue accrued on such date.

24. The counsel has argued that the right to sue accrued to the claimant only on finalization of the final bill of the other agency.

25. However in case Article 113 is considered to apply even then this claim is barred by time. It is significant to mention that only nine months period was needed for completing the balance work of the contracts in question. The claimant on its own volition, had not taken any steps to get completed the remaining work of the contract within nine months or within any reasonable period, after the contract was terminated. A party, on its own, is not legally entitled to postpone the commencement of the period of limitation by not performing its own obligation in reasonable time.

30. The claimant has relied upon the final bill of the agency in relation to the execution of the balance work at the risk and cost of the respondent. the accounts appear at pages 334 to 342 of Vol. V. as below:-

As per contract of the respondent the value of the balance work would have been Rs. 32425039/- excluding the value of material like steel and cement etc. which were to be supplied by the owner. The claimant has chosen not to place on record such value. The value of the same has to be added to know the total cost at which the balance work could have been executed by the respondent. The claimant has not shown as what was the value of such material in the year:2001-02 and then in the year 2003. May be in the year 2003 its value could be RS.1.50 crore. The value of the work in case it has been executed by the respondent would be Rs.47425039/-.

31. The value of the said work, in case the same had been executed in reasonable time say in the year 2003 by the other agency at the risk and cost of the respondent, shown by the claimant in the letter dated 26-7-12 sent by its counsel is Rs 55929900/- which includes the value of the material supplied by the owner which is shown as Rs. 27868861/- at page 342 of Vol. V.

32. Due to lack of evidence and material it is not possible to arrive at any exact amount which could be the liability of the respondent. Keeping in view above facts I hold that Rs. 80 lac may be considered as reasonable compensation to the claimant in case it were to be held that the claim is not barred by time.

33. *I make the award as follows:-*

1) *The claim of the claimant is rejected as time barred.*

2) *The parties are left to bear their own costs."*

15. Now the learned arbitrator held Article 55 of the Limitation Act was applicable as the petitioner claimed damages on termination of the contract due to inability of the contractor to fulfill it, which per se is guided by Section 73 of the Indian Contract Act, hence the limitation would be three years from the day the contract is broken by the contractor. I disagree with this preposition. As per clause 7.0.9.0 (supra), upon termination, the owner had an option to get the work done from another contractor and shall be entitled to recover from the contractor in addition to any other amounts, compensation or damages viz. the difference between the amounts as would have been payable to the contractor and the amount actually spent. Now this comparison could be done only after the final bill is given by the substitute contractor and not before that. The limitation hence would start from the date of filing of the final bill by him which in the present case is 07.05.2008, hence the claims was within limitation. The reasoning of the learned arbitrator on this issue hence is set aside.

16. In *Indian Oil Corporation Ltd. vs. SPS Engineering Ltd*, (2011) 3 SCC 507 the Court held:

“(iii) Finding : Once a risk and cost tender is issued at the risk and cost of a person, then, the amount which is to be claimed from the person who is guilty of

breach..... becomes crystallized when the risk purchase tender at a higher cost is awarded.. This may be true as a general proposition. But it may not apply if there is a specific provision in the contract (like clause 7.0.9.0) which requires that the employer should claim as extra cost, only the difference between the "amounts as would have been payable to the contractor in respect of the work" and "the amount actually expended by the owner for completion of the entire work".”

17. and in *Indian Oil Corporation Ltd. Vs. Era Construction (India) Ltd.* 2012 SCC Online Del 2425 the Court held:

“In Indian Oil Corporation Limited v. S.P.S. Engineering Ltd., the Supreme Court dealt with the question whether IOCL’s claims in that case could have been held by the Designate Court under Section 11 of the Act to be time barred. It was noticed that it was only when the work entrusted to the alternative agency was completed and the bills settled or finalized could the extra cost be determined even for the purpose of Clause 7.0.9.0. The finding of the Designate Judge under Section 11 of the Act was set aside and it was opined that the said question should have been left to be decided by the Arbitrator after completion of the pleadings. For the purposes of the present case, it is important, therefore, to note that for the purpose of IOCL’s claims which were only with regard to the extra cost paid to the sub-contractors, and which was recoverable from ECIL in terms of Clause 6.1.4.2.0, unless the final bills of the sub-contractors after completion of their

respective works were submitted and processed, IOCL would not be in a position to determine what amount, if any, was payable to ECIL against its final bill”

18. I am in complete agreement with the law laid down in *Era Construction (supra)* to hold the learned arbitrator went wrong to say the claim was beyond limitation as was beyond three years from the date of termination of the contract; hence had misread the provisions of the contract and the law. The award therefore is set aside qua the claim of the petitioner vis-a-vis the final bill of the substitute contractor. The matter is thus again referred to Sh.Rakesh Kapoor, Retd. District Judge, (Mobile No.9910384621) who is appointed as an arbitrator to find if the claim of the petitioner qua the final bill submitted by the substitute contractor is within time and in case it is found to be within limitation then to compute the compensation payable to the petitioner, per terms of the contract, more specifically clause 7.0.9.0 (*supra*). His fee shall be per the Fee Schedule of Delhi International Arbitration Centre (DIAC).

19. In view of this the petition is allowed. No order as to costs.

YOGESH KHANNA, J

MARCH 14, 2018

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