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

Date of decision: 13th March, 2018

+ O.M.P. (COMM) 116/2018 & IAs 3509-3510/2018

DELHI METRO RAIL CORPORATION LTD Petitioner

Through: Mr.Tarun Johri, Mr.Ankit Saini,
Mr.Ankur Gupta, Advs.

versus

VOESTALPINE SCHINE GMBH Respondent

Through: Ms.Vanita Bhargava, Mr.Ajay Bhargava,
Mr.Jeevan Panda, Ms.Shalini Sati Prasad, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 3510/2018

Exemption allowed subject to all just exceptions.

O.M.P. (COMM) 116/2018 & IA 3509/2018

1. This petition has been filed by the petitioner challenging the Arbitral Award dated 27th November, 2017 passed by the Arbitral Tribunal by which the Arbitral Tribunal has allowed the claim of the respondent for EURO 6,70,703.14 with interest @13.7% p.a. with effect from 2nd March, 2017 up to the date of the Award and a further sum of EURO 68,793.59 as also the cost of the arbitration to the extent of Arbitrator's fee.

2. It is contended by the counsel for the petitioner that in view of

Clause 9.2 of the Special Conditions of Contract, the Arbitrator had been expressly prohibited from awarding any interest on the amount found due and payable by the petitioner to the respondent. He submits that in spite of this prohibition being brought to the notice of the Arbitral Tribunal, the Arbitral Tribunal has granted interest in favour of the respondent, thereby violating the mandate of Section 28(3) of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the 'Act').

3. I am unable to agree with the said submission of the counsel for the petitioner.

4. In the present case, the Arbitral Tribunal has interpreted three distinct provisions of the contract between the parties. These are Clause 9.2 of the Special Conditions of Contract (SCC), which is relied upon by the petitioner, and Clause 15.5 of the General Condition of Contract (GCC) read with Clause 15.5 of the Special Conditions of Contract relied upon by the respondent. These provisions are quoted hereinbelow:-

“SCC 9.2 The rules of procedure for arbitration proceedings pursuant to GCC Clause 9.2 shall be as follows:

The Arbitration and Conciliation Act - 1996 of India shall be applicable. Purchaser and the supplier shall make every necessary effort to resolve amicably by direct and informal negotiation any disagreement or dispute arising between them under or in connection with contract.

Arbitration: If the efforts to resolve all or any of the disputes through conciliation fails, then such disputes or differences, whatsoever arising between the parties,

arising out of touching or relating to supply/ manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator where the total value of claims does not exceed Rs. 1.5 million. Beyond the claim limit of Rs.1.5 million, there shall be three Arbitrators. For this purpose the Purchaser will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers of Government Departments or of Public Sector Undertakings;

(b) For the disputes to be decided by a sole Arbitrator, a list of three engineers taken from the aforesaid panel will be sent to the supplier by the Purchaser from which the supplier will choose one;

(c) For the disputes to be decided by three Arbitrators, the Purchaser will make out a list of five engineers from the aforesaid panel. The supplier and Purchaser shall choose one Arbitrator each and the two so chosen shall choose the third Arbitrator from the said list, who shall act as the presiding Arbitrator;

(d) Neither party shall be limited in the proceedings before such Arbitrators(s) to the evidence or the arguments put before the Conciliator;

(e) The Conciliation and Arbitration hearings shall be held in Delhi only. The language of the proceedings that of the document and communications shall be English and the awards shall be made in writing. The Arbitrators shall always give item-wise and reasoned awards in all cases where the total claim exceeds Rs.One million; and

(f) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be shall be binding on all parties.

Interest on Arbitration Award: Where the arbitral award is for the payment of money, no interest on account of delay in payment will be paid to or shall be payable on whole or any part of the money for any period, till the date on which the award is made.

Cost of Arbitration: The cost of arbitration shall be borne by the respective parties. The cost shall, inter alia, include the fees of the Arbitrator(s) as per rates fixed by the Purchaser from time to time.”

(emphasis supplied)

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“GCC

*15.5 In the event that the Purchaser fails to pay the Supplier any payment by its due date or within the period **set forth in the SCC**, the Purchaser shall pay to the Supplier interest on the amount of such delayed payment at the rate **shown in the SCC**, for the period of delay until payment has been made in full, whether before or after judgment or arbitrage award.”*

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SCC

15.5 The purchaser will establish a letter of credit from the purchaser’s bank for payment of foreign currency. The payment in INR will be made directly by the purchaser. If the supplier does not receive payment within 60 days of submission of invoice accompanied with relevant document in acceptable form, the supplier shall be entitled to receive interest on the amount unpaid during the period of delay. The interest shall be calculated at an interest rate equal to state Bank of India

prime lending rate.”

5. A bare reading of Clause 15.5 of GCC along with Clause 15.5 of SCC would show that it is the right of the respondent to claim interest and a liability of the petitioner to pay such interest upon delay in making payment within 60 days of the submission of the invoice accompanied with relevant documents by the respondent. This right of the respondent cannot be negated by Clause 9.2 which gives a restriction on the right of the Arbitrator to award interest. A reading of the three Clauses can only suggest that the Arbitral Tribunal, while enforcing the contractual terms as contained in Clause 15.5 of GCC read with Clause 15.5 of the SCC, cannot award interest over and above the contractual rate in exercise of his powers under Section 31(7) of the Act. It is not the case of the petitioner that the interest awarded by the Arbitral Tribunal is more than what is provided in Clause 15.5 of the SCC. In other words, the Arbitral Tribunal in its Impugned Award has merely applied and enforced Clause 15.5 of GCC read with Clause 15.5 of the SCC and has not exercised its powers under Section 31(7) of the Act to award pendente lite interest.

6. The Arbitral Tribunal has further placed reliance on the well-settled principle of interpretation of contracts that if any term of the contract is ambiguous in nature, then interpretation against the maker of the contract is to be preferred. Reliance in this regard was rightly placed on the judgment of the Supreme Court in ***Bank of India vs. K.Mohan Das*** (2009) 5 SCC 313, wherein it was held as under:-

“32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the

contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (verba chartarum fortius accipiuntur contra proferentem)."

7. The findings of the Arbitral Tribunal on this issue are reproduced herein below:-

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"Regarding interest, clause 15.5 of GCC and of SCC i.e. the contract between the parties provides for interest on delayed payment at SBI prime lending rate. The claimant during arguments filed a chart stating that although it had claimed 18% interest in the claim petition but it was not insisting on 18% interest and should be granted contractual interest @ 13.7% which was the SBI prime lending rate during the period. The respondent on the other hand submitted that as per arbitration clause SCC 9.2 between the parties, the claimant was not entitled for any interest on the amount claimed up to the date of award. The arbitration clause signed between the parties reads "where the arbitral award is for payment of money, no interest on account of delay in payment will be paid or shall be payable on whole or any part of the money for any period, till the date on which the award is made." The claimant has drawn attention of the tribunal to clause of the GCC and special conditions of contract wherein in case of delayed payment, the claimant was entitled for interest for the period of delay at the bank lending rate. The provision of granting interest on delayed payment is made in both the special and general conditions of contract. It is only the arbitration clause (9.2) which is drafted in the above manner. The claimant argued that there was a conflict between the clauses of

contract and the arbitration clause signed between the parties. Under these circumstances, the tribunal has to come to a conclusion as to which clause will prevail. He argued that if two contradictory clauses cannot be reconciled, under such circumstances, the tribunal has to follow the rule that a clause which is framed by a purchaser but is in contradiction to the other clauses must be read against the purchaser. He relied upon (2009) 5 SCC 313, Bank of India & another v. K.Mohan Dass & ors.

We consider that the arbitration clause is a separate contract between the parties. The arbitration clause is agreed between the parties to resolve the dispute arising out of the contract. The arbitration clause is always considered as an independent contract and survives even if the contract between the parties is void or voidable or has been terminated. The arbitration clause cannot substitute or over-ride the substantive clauses of the contract. If the parties had agreed upon certain rights and obligations under the contract, the arbitration clause cannot take away those rights and obligations. Consider an arbitration clause providing short supply or non supply of material shall not entail monetary relief. Such part of an arbitration clause which materially changes the contract has to be ignored. The grant of interest over the delayed payment was a right given to the claimant under the contract. This right was affirmed by Special Conditions of Contract and General Conditions of Contract. By prohibiting the arbitrator from granting interest this right has been taken away from the claimant. If the parties had no intention to grant interest over the delayed payment, the parties would have stated so in the contract itself. First expressly providing for grant of interest and then taking away this right under the arbitration clause does not seem to be the intention of the parties and the arbitration clause seems to have been poorly drafted in a whimsical manner. We also agree with the claimant's argument that if a party

who had drafted the contract has introduced such clauses which contradict each other, then while interpreting the clause, the drafter of the contract must suffer the disadvantage (SCC supra).

8. In any case, the interplay between the above three mentioned Clauses is a question of interpretation of the contract. The Arbitral Tribunal having interpreted the contract, which cannot be said to be totally unreasonable or perverse in nature, it is not for this Court to set aside the award only because it may interpret it in a different manner.

9. In *Associate Builders vs. DDA* (2015) 3 SCC 49, the Supreme Court has held as under:

42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

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42.3 (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute.- (1)-(2) * * *

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall taken into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181, this Court held as under: (SCC pp. 225-26, paras 112-13)

“112. 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 and Natural Gas Commission, (2003) 8 SCC 593:(2003) Supp (4) SCR 561 and D.D. Sharma v. Union of India, (2004) 5 SCC 325] 113. 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.”

44. In MSK Projects (I) (JV) Ltd. v. State of Rajasthan (2011) 10 SCC 573: (2012) 3 SCC (Civ) 818, the Court held: (SCC pp. 581-82, para 17)

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram AIR 1954 SC 689,

Thawardas Pherumal v. Union of India AIR 1955 SC 468, *Union of India v. Kishorilal Gupta & Bros.* AIR 1959 SC 1362, *Alopi Parshad & Sons Ltd. v. Union of India* AIR 1960 SC 588, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji* AIR 1965 SC 214 and *Renusagar Power Co. Ltd. v. General Electric Co.* (1984) 4 SCC 679: AIR 1985 SC 1156)”

45. *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.* (2009) 10 SCC 63: (2009) 4 SCC (Civ.) 16 and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* (2010) 11 SCC 296 to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: [Sumitomo case, SCC p. 313 (2010) 4 SCC (Civ.) 459]

‘43. ... The umpire has considered the fact situation and placed a construction on the Clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one’s own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn v. Central Warehousing Corpn.* (2009) 5 SCC 142: (2009) 2 SCC

(Civ.) 406, the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

10. In view of the above, I find no merit in the objection raised by the counsel for the petitioner as far as the award of interest in favour of the respondent is concerned.

11. It is further contended by the counsel for the petitioner that the Arbitral Tribunal has not recorded any reasons for award of Arbitrator's fee in favour of the respondent. He submits that in terms of Section 31(8) read with Section 31A of the Act, the Arbitral Tribunal should have given reasons for award of cost in favour of the respondent.

12. I am unable to agree with the submission made by the counsel for the petitioner. Section 31(8) of the Act empowers the Arbitral Tribunal to fix the cost of the arbitration. Section 31A(1) of the Act further grants a discretion to the Arbitral Tribunal to determine whether costs are payable by one party or another and the amount of such costs. Section 31A(2) is relevant in the present case as it provides that if the Arbitral Tribunal decides to make an order as to payment of costs, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party. In the present case, almost all the claims of the respondent had succeeded. The

Arbitral Tribunal, therefore, was fully justified in awarding the Arbitrator's fee as cost in favour of the respondent. I do not find the award of such cost to be unreasonable or perverse so as to warrant interference under Section 34 of the Act.

13. No other submission is advanced by the counsel for the petitioner in challenge to the Impugned Award.

14. In view of the above, I find no merit in the present petition. Therefore, the petition as well as pending applications are dismissed with no order as to costs.

NAVIN CHAWLA, J

MARCH 13, 2018

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