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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 21st March, 2018
Pronounced on: 10th April, 2018**

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CS(COMM) 136/2017

M/S CURRENT ADVERTISING PVT. LTD. Plaintiff

Through : Mr.Kamal Gupta, Ms.Tripti Gupta,
and Mr.Kirti Kakkar, Advocates.

versus

M/S CEMENT CORPORATION OF INDIA LTD Defendant

Through : Mr.Arvind Kr Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This is an application under Section 14 of the Arbitration Act, 1940 for filing the award dated 27.2.2009 and making it a rule of Court. This application is pending since 2009. The brief facts of the case are as follows :

(a) The petitioner has been carrying on business of publicity and advertisements. The respondent No.1 is a Government of India enterprise and is a company under the Indian Companies Act, 1956;

(b) that a contract dated 02.02.1993 came into existence between the petitioner and the respondent No.1 on the petitioner accepting the terms and conditions which were received along with the letter dated 27.01.1993 of the respondent No.1, placing the

petitioner on its panel as approved Publicity Agent;

(c) that under the said contract, the respondent No.1 awarded and assigned various works of advertising to the petitioner which were duly executed by the petitioner to the entire satisfaction of the respondent No.1;

(d) that as the petitioner did not receive payment of its certain bills for display of 'Kiosks' (display of advertisement boards on electric poles). The petitioner sent a notice dated 10.02.1994 demanding payment of the amounts due from the respondent No.1 to the tune of Rs.7,36,715.00 along with interest @ 24% per annum. The petitioner also invoked the arbitration clause contained in the contract dated 02.02.1993;

(e) as the respondent No.1 failed to appoint the arbitrator within the stipulated period, the petitioner filed a petition under Section 20 of the Arbitration Act, 1940 in this Court which was registered as suit No. 2461/1994;

(f) during the pendency of the said petition, the Chairman-cum-Managing Director of the respondent No.1 appointed Shri R. K. Gupta, Zonal Manager (North) of the respondent No.1 as Sole Arbitrator to adjudicate upon the disputes between the parties. Shri R. K. Gupta issued a notice dated 22.04.1995 calling upon the petitioner to submit its claim;

(g) the petitioner filed an application, being LA No.4142/1995, in the said suit No.2461/1994 for restraining Shri R.K. Gupta from acting as Sole Arbitrator. Taking cognizance of the said LA., this Hon'ble Court by its order dated 15.05.1995, was pleased to stay

the proceedings before the learned arbitrator;

(h) eventually on a request made by the counsel for the petitioner, this Court by its order dated 31.09.1999 was pleased to recall the interim order dated 15.05.1995 passed in the said suit and the learned arbitrator was permitted to continue the proceedings;

(i) since Shri R.K. Gupta had in the meanwhile resigned as arbitrator due to his retirement from service of the respondent No.1, the Chairman-cum-Managing Director of the respondent No.1 appointed the respondent No.2, Shri H.S. Rekhi, Zonal Manager (North) of the respondent No.1, as arbitrator, to adjudicate upon the disputes between the parties. This was communicated to the petitioner by the respondent No.1 vide its memo dated 27/29.10.1999;

(j) the respondent No.2 thereupon entered upon the reference;

(k) the respondent No.2 eventually made and published his award dated 27.02.2009 and an intimation in respect thereof was sent by the respondent No.2. by his letter dated 09.03.2009 to the Chairman-cum-Managing Director of the respondent No.1 with a copy to the petitioner. A copy of the award was also forwarded to the petitioner by the letter sent by registered A.D. Post which was received by the petitioner on 14.03.2009.

2. The petitioner has now applied for making the award the rule of the Court. The respondent No.1 has filed objections under Sections 30 & 33 of the Arbitration Act, 1940 against the said

award. It is alleged by the respondent No.1 that the petitioner has not executed the work to the satisfaction of the respondent and has committed breach of the terms and conditions of the agreement and had got the work executed from one M/s Adline Advertising Agency and hence has breached clause 6 of the agreement as under:

“Clause 6

The agency shall submit estimates, quotations, rates etc. as may be directed from time to time and obtain prior approval in writing of the Corporation in respect of each job, assignment, insertion of advertisement in newspapers and magazine or advertising campaigns as the case may be.”

3. It is alleged the respondent No.1 had assigned the petitioner the job of putting 150 Kiosks but instead of completing the work itself, the claimant assigned this work for execution to M/s Adline Advertising Agency and since the applicant failed to make payment to M/s Adline Advertising Agency which repeatedly represented to respondent No.1 and demanded its dues so to save its goal and interest the respondent No.1 was compelled to make payment to M/s Adline Advertising Agency though it was primarily the responsibility of the claimant to settle its dues and since the claimant has breached the terms and conditions of clause **6**, so per clause **11** of the agreement the respondent No.1 has a right to recover the damages caused to it.

4. However, a perusal of the Clause 6 shows it nowhere debars the petitioner to get the work done through a sub-contractor/sub-agent. There is no clause in the agreement if the petitioner gets the work done from some other agency or outsource it, the respondent

No.1 shall be entitle to compensation or could make direct payment to such party with whom the petitioner has contract viz with M/s Adline Advertising Agency. The contract puts no obligation upon respondent No.1 to make payment. Even otherwise a bare perusal of the record would reveal respondent No.1 has miserably failed to lead any evidence in this regard.

5. Let me now see how the learned arbitrator has dealt with this objection in his award dated 27.2.2009. The reasoning given in the award is as follows :

- (a) The work of putting up KIOSKS has been got done by the Claimant company through M/s. Adline Advertising Agency which as per Respondent Corporation is violation of Clause no.6 of the contract entered into with the Claimant company and thus is breach of contract as emphasised by the Respondent Corporation. The deponent of Claimant company deposed that they had to hire the services of M/s Adline Advertising Agency to execute the job of putting up KIOSKS in Delhi Region as M/s. Adline Adv. Agency were the sole concessionaire of KIOSKS on Electric Poles in New Delhi Zone as permitted by Municipal Corporation of Delhi. This contention of the Claimant company is admitted by the deponent of Respondent Corporation. The Claimant company did not posses permission for putting up KIOSKS in the specific Region as stated by their representative during his cross-examination. He further stated that an Advertising Agency does not own any media and all the jobs given to an Advertising Agency are executed through media owners. Agency does not execute end can not execute job by itself only because it does not own any media. The work of putting up KIOSK against Respondent's orders started in Feb'93 and was completed in June'1993. Subsequently as per terms of the contract, bills were raised on the Respondent Corporation for making balance payment of Rs.4.50 lacs considering payment of Rs.6.00 lacs already received by the claimant company.*
- (b) The work of putting up KIOSKS as admitted by deponent of the Respondent Corporation was frequently supervised by the Representative of Respondent corporation. The letter of claimant company dtd.20.7.1993 addressed to the Respondent also confirm that the display of KIOSKS was inspected and verified by*

the Respondents during July 1993. The records also reveal that the Respondent Corporation did not point out any default, deviation or delay in execution of above job/work assigned to the claimant company untill Nov'1993 when through its letter dtd.9.11.1993 Respondent Corporation for the first time pointed out about breach of contract referring to clause no.6 of the contract after taking cognizance of the representation dtd.28.9.93 made by M/s Adline Advertising Agency for payment in view of stopping of payment of cheque no.017463 dtd.15.9.93 for Rs.1.50 lacs issued by the claimant company.

- (c) The mysterious silence of the Respondent regarding breach of contract during February'93-June 93 when the work of putting up KIOSKS was in progress is implied consent of the Respondent. The claimants vide their letters dtd.14.9.93 and 27.10.93 requested the Respondent Corporation to clear up the outstanding dues failing which the claimant company would be compelled to dis-continue work of releasing advertisements. The Charkhi Dadri Unit of the Respondents acknowledged its liability and promised to pay outstanding bills vide letter dtd.19/22.10.93. The documents produced before me also reveal that the Claimant company not only replied the Respondent's notice dtd.9.11.93 protesting against its contents and advising Respondent Corporation to desist from making any payment "to M/s Adline Adv. Agency but also issued legal notices during Dec'93 and Feb'94 reiterating their demand for immediate payment of dues alongwith interest @ 24%. The claimant company also requested for referring the matter for adjudication by an independent Arbitrator by invoking clause no.11 of the contract in case the Respondent disputes their claim for payment of dues. This also is admitted by "the deponent of the Respondent Corporation that there was no provision in the contract for making payment to any third party. It was thus the duty of the Respondent Corporation to take categorical consent of the claimant company before releasing any payment to any third party considering M/s Adline being the third party so far as this contract is concerned. Despite of claimant company's letter, excess payment was released to M/s. Adline Adv. agency while the claimant's bills even for jobs rendered to the Respondent Corporation like publishing of advertisements in Newspapers remain pending/unpaid which in my opinion is not justified.

(d) CLAIM- I

The claimants have claimed an amount of Rs.7,36,715/- for following works.

- A) For publishing advertisement in Newspapers for which bills are pending at Corporate Office and Charkhi Dauri Unit of Respondent Corporation.- Rs.2,86,715/-
B) For display of KIOSKS – Rs.4,50,000/-

(e) AWARD

The claim of claimants was examined by me based on various documents such as claim, rejoinder and documents filed by both the parties. In view of the deposition made by Respondent corporation's deponent regarding i) Supervision by Respondents Representative during work of putting up KIOSK ii) non-pointing out any default, deviation or delay in execution of jobs/works assigned to the claimant company iii) non-availability of any document on record refuting claimant's bills pending for payment iv) absence of acknowledgement of payment received by M/s. Adline Advertising Agency, the claimant's claim.

A) Payment of Rs.2,86,715/- towards pending bills at Corporate Office and Charkhi Dadri Unit of the Respondent Corporation is allowed.

B) Payment of Rs.4,50,000/- towards putting up KIOSKS is also allowed.

(f) CLAIM NO.2

The claimants have claimed interest @ 24% p.a. on total amount of 7,86,715/-. Interest @ 9% p.a. is allowed from the date of Arbitrator's entering upon reference i.e. 21.1.2000 till the date the award is made the rule of Court or till the date of realisation of above amount whichever is earlier.

(g) COUNTER CLAIM :

The Respondent Corporation submitted a counter claim of Rs.26,42,500/- with interest @ 24% p.a. and Rs.50,000/- towards cost of Arbitration proceedings.

(h) AWARD

On perusal of counter claim and documents filed in support of counter Claim the Respondent Corporation failed to prove damages caused due to delay in execution of tile work by the claimant company. And further failed to prove the caused damages by virtue of the sub-letting of work by the claimant company to M/s. Adline Advertising Agency. Hence the counter claim of the respondent Corporation is without any basis and hypothetical. It is not based on the facts and documents. Hence the counter claim is disallowed. Question of payment of interest does not arise.

6. The respondent has raised two objections **a)** the award was passed four years after hearing of the arguments and hence needs to be set aside; and **b)** an amount of Rs.5.00 Lac paid to M/sAdline be adjusted and whereas the petitioner has sought for increase in rate of interest.

7. Qua *a)* I may say the time for making the award was extended with the consent of parties and lastly on 23.12.2008 as under:-

"BEFORE SH. H.S. REKHI, SOLE ARBITRATOR, CEMENT CORPORATION OF INDIA LIMITED (A GOVT. OF INDIA ENTERPRISE), BHATINDA GRINDING UNIT, 6 K.M .STONE, MALOUT ROAD,BHATINDA, PUNJAB-151001.

REF: CCI/LO/ARB/2008/476

DATED: 23.12.2008

IN THE MATTER OF:

CURRENT ADVERTISING PVT.LTD.

...CLAIMANT

AND

CEMENT CORPORATION OF INDIA LTD.

... RESPONDENT

Respectfully submitted that:

- 1. We are in receipt of your letter dated 27.10.2008 asking the consent for extension of time in the captioned matter.*
- 2. We have No Objection in extension of time for a further period of 4 months from today for the purpose of making and publishing the award.*

(L.R.BANSAL)

PRESENTING OFFICER

*Sh. H.S.Rekhi,
Sole Arbitrator,
Cement Corporation of India Ltd.,
(A Govt. of India Enterprise)
Bhatinda Grinding Unit, 6 K.M. Stone,
Malout Road, Bhatinda,
Punjab-151001 "*

Thus, the time was extended lastly vide above request and the award was made within such period.

8. The order of the learned arbitrator notes written arguments were filed and since the arbitrator required more time so both the parties gave its consent for extension of four months with effect from 01.08.2005 and thereafter from time to time extensions were given till the learned arbitrator published the award. Since the award was published on 27.02.2009 i.e. after 4½ years from conclusion of arguments, it is alleged by the respondent it amounts

to misconduct.

9. The learned counsel for the respondent referred to *Anil Rai vs. State of Bihar (2001) 7 SCC 318* which notes:

“(iv) Where a judgment is not pronounced within three months from the date of reserving judgment any of the parties in the case is permitted to file an application in the High Court with prayer for early judgment. Such application, as and when filed, shall be listed before the Bench concerned within two days excluding the intervening holidays.

(v) If the judgment, for any reason, is not pronounced within a period of six months any of the parties of the said lis shall be entitled to move an application before the Chief Justice of the High Court with a prayer to withdraw the said case and to make it over to any other Bench for fresh arguments. It is open to the Chief Justice to grant the said prayer or to pass any other order as he deems fit in the circumstances.”

10. Further in *R.C. Sharma vs. Union of India and others (1976) 3 SCC 574* the Court held as under:

“12. Learned Counsel for the appellant said all that could possibly be said on behalf of his client. He pointed out that the High Court had given its judgment eight months after it had heard arguments. He urged that the result was that the High Court did not deal with a number of submissions made because they had, apparently, been forgotten. The Civil Procedure Code does not provide a time limit for the period between the hearing of arguments and the delivery of a judgment. Nevertheless, we think that an unreasonable delay between hearing of arguments and delivery of a judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is the litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgments. Justice, as we have often observed, must not only be done but must manifestly appear to be done.”

11. However in support of *a)* the learned counsel for the petitioner has relied upon two authorities viz., *Hindustan Construction Co. Ltd. vs. Governor of Orissa and Others (1995) 3 SCC 8* which notes as under:

“8. So far the question of extension of time for making the award is concerned, it is an admitted position that a memorandum was filed on

behalf of both the parties including the State Government on 28.8.1988 for extension of the period for making the award by four months from the date of the expiry of the time on 27.9.1988.

9. The first schedule to the Arbitration Act specifies the implied conditions of the arbitration agreements. Because of condition No.3, the arbitrator has to make award within four months of his entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow: In other words, the power to extend the time of four months has been vested in the Court, otherwise the award after expiry may become invalid. But that condition has to be read along with Section 28 of the Act.

"28.Power to Court only to enlarge time for making award.-(1) Court may if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2)any provisions in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, the time for the award, shall be void and of no effect.

In the case of Hari Krishan Wattal v. Vatkunth Nath Pandya,(1974) 1 SCR 259, it was pointed out that under clause 3 of the Schedule to the Arbitration Act, the Arbitrator is expected to make his award within four months from his entering on the reference or on his being called upon to act or within such extended time as the court may allow. But then it was said:-

"Sub-section 2 of section 28, however, indicates one exception to the above rule that the Arbitrator cannot enlarge the time, and that is when the parties agree to such an enlargement. The occasion for the Arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if the parties agree to the enlargement of time after the Arbitrator has entered on the reference, the Arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such a consent must be a post-reference consent, is also clear from section 28(2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the Arbitrator may enlarge the time,. such a provision always implies mutual consent for enlargement but such mutual consent initially expressed in the original agreement does not save the provision from being void It is, therefore clear that the Arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time."

12. Thus from above it is clear the Court/Arbitrator must endeavor to give judgment/award within reasonable time but the

law has carved an exception for arbitration as its period may be enlarged by mutual consent. Hence once the respondent had given its consent for extension of time to give award it cannot plead otherwise.

13. Qua contention **b)** I may refer to *Zonal General Manager, IRCON International Limited vs. Vinay Heavy Equipments (2015) 3 SCC 680* the Court held:

“6. The Single Judge rightly upheld the Arbitrator's repudiation of the applicability of the "back-to-back" principle to the issue of liability of payment in the facts of this case; affirming that the Appellant as Employer was primarily liable to the Respondent. ...

9. Insofar as the question of primary liability therein is concerned, the law on subcontracts and employer liability is amply clear. In the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the employer and the main contractor on the one hand and between the sub-contractor and the main contractor on the other will be quite distinct and separate. No such clause to the contrary, existent in the main contract between Appellants and SIPCOT, has been highlighted before us by the Appellants, which would persuade us towards a deviation from the presumption of distinct and sole liability of the Appellant-Contractor as employer viz. a. viz. the Respondent-Sub Contractor. On the contrary, much of the exercise in determining the existence of a "back to back clause" in the contracts C1 and C2 appears to be misplaced. Such an accommodation or transference of liability needs to be pinpointed in the main contract, for it is SIPCOT's acceptance of liability of subcontractor claims which is of the essence; even a clause indicating "back to back" liability in agreements C1 and C2 would not serve to novate the main contract and fasten payment liability on SIPCOT, prevented as it would be by privity, for it would be a matter of SIPCOT's acceptance of subcontractor liability in the main contract, and not a matter of novation by imposition upon SIPCOT by two parties in a separate bilateral contract. ...”

Hence, on the principle above there been no privity of contract between respondent and M/s.Adline Advertising Agency the payment made to M/s.Adline Advertising Agency by the respondent was illegal and cannot be adjusted against the dues of the petitioner.

14. Learned counsel for the petitioner in this application has asked for a pre reference period interest, and further the interest be increased from 9% pa to 24% pa viz. the rate of interest as shown in the invoices. He has referred to various invoices executed during the dealings and all such invoices contain a clause of 24% p.a. interest to be paid and there being no separate agreement for interest @ 24% pa. The learned counsel for the petitioner has relied upon the following decisions.

15. *M/s Lohmann Rausher Gmbh V. M/s Medisphere Marketing Pvt. Ltd.* 2005 (80) DRJ 9 :

18. It is not the case of the defendant that the invoices do not conform to the purchase order. As noted, the invoices raised contain the description of the goods, quantity and price. As noted, conditions of payment stand reflected in the invoice. Additionally, delivery address also finds mentioned in the invoice. All features pertaining to a contract of sale of goods are to be reflected in the two invoices. The invoices are a complete contract, required by law, where the contract pertains to sale of goods.

16. *Bharat Forge Ltd. V. Onil Gulati* 2005 (83) DRJ 140 :

13. In the instant case, as we have noticed the invoices clearly contain the terms of supply and other requisite terms, price for effecting the sale of goods is given. The invoices have been acted upon, accepted and partly paid. In these circumstances, the preliminary objection raised as to the non maintainability of the suit under Order 37 is devoid of merit.

17. *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa & Ors. V. NC Budharaj (deceased) by LRs & Ors.* (2001) 2 SCC 721 :

26. For all the reasons stated above, we answer the reference by holding that the Arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre- reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jenas case [1988 (1) SCC 418] taking a contra view does not lay down the correct position and stands

overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any Court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs.

18. Though the law confirms the interest can be awarded for pre-reference period but it depends upon the discretion of the learned arbitrator. Moreso, I would also not like to award further interest or change the rate of interest since such invoices filed before the learned arbitrator do not bear signatures of the respondent. Even otherwise in his discretion, considering the overall facts, the arbitrator has granted 9% interest per annum and this Court is not expected to sit in appeal over the discretion exercised by the learned arbitrator, the role of this Court being limited so I would not like to modify the award.

19. In *State of Rajasthan V. Nav Bharat Construction Company* (2) (2010) 2 SCC 182 :

17. *The jurisdiction of the court to set aside an award under Section 30 of the Act has now been settled by catena of decisions of this Court as well as by the different High Courts in India. Taking those principles into consideration, it would thus be clear that under Section 30 of the Act it must be said that the court is not empowered to re-appreciate the evidence and examine the correctness of the conclusions arrived at by the Umpire in considering an application for setting aside the award.*

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20. *That apart, the law is also settled as referred to herein earlier that the jurisdiction of the court under Section 30 of the Act is not appellate in nature and the award passed by the Umpire cannot be set aside on the ground that it was erroneous. It is also not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. Keeping these principles as laid down by this Court in the aforesaid two decisions, let us now consider the award passed by the Umpire in respect of the claims of the respondent excluding Claim Nos. 2 and 26.*

20. In the circumstances there is no reason to allow the

objections of the respondent. The application, thus, is allowed. The award is made the rule of the Court. Decree Sheet be drawn.

21. The petition and pending applications, if any, stands disposed of in terms of the above.

YOGESH KHANNA, J

APRIL 10, 2018

VLD/*dv*

