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

+ **O.M.P. (COMM) 124/2018**

PUBLIC WORKS DEPARTMENT

..... Petitioner

Through: Mr Ramesh Singh, Standing Counsel
GNCTD with Mr Chirayu Jain,
Advocates.

versus

ERA INFRA ENGINEERING LIMITED

..... Respondent

Through: Mr Lovkesh Sawhney, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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02.04.2018

IA No.3689/2018

1. For the reasons stated in the application, the delay in filing is condoned.
2. The application is disposed of.

IA No.3688/2018

3. Allowed, subject to all just exceptions.

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4. The petitioner has filed the present petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the order dated 15.11.2017 (hereafter 'the impugned order'), whereby the Arbitral Tribunal has terminated the arbitral proceedings in respect of the petitioner's counter claims.
5. The petitioner contends that it is ready and willing to deposit the fees

in respect of its counter claims and, therefore, the arbitral proceedings could not be terminated in respect of the counter claims.

6. The only question that falls for consideration of this Court is whether the arbitral proceedings in relation to the counter claims can be terminated for failure on the part of the petitioner to pay its share of fees in relation to the claims made by the respondent.

7. Briefly stated, the relevant facts necessary to address the controversy involved in the present petition are as under:-

7.1 On 29.12.2008, the respondent was awarded the work of “*C/o 200 Beds Hospital at Kokiwala Bagh, Ashok Vihar, Phase-IV, Delhi (SH C/o OPD, Ward Service, Nurses, RMO Hostel Block i/c Internal water supply and sanitary instalment internal electrical works*” (hereafter ‘the Work’).

7.2 The Work was to commence on 19.01.2009 and had to be completed by 18.09.2010. The execution of the Work was delayed. The petitioner alleges that the delay was solely attributable to the respondent. This is stoutly disputed by the respondent. The respondent has also raised several claims against the petitioner.

7.3 In view of the disputes between the parties, the respondent filed a petition under Section 11 of the Act being **ARB.P. 343/2017** captioned “***Era Infra Engineering Limited v. Executive Engineer, Public Works Department***”. The said petition was allowed and by an order dated 19.05.2017, Justice Manmohan Sarin (Retired), former Chief Justice of Jammu and Kashmir High Court was appointed as the sole arbitrator to adjudicate the disputes between the parties. The respondent (who was arrayed as claimant before the Arbitral Tribunal) filed its statement of claims claiming an aggregate of a sum of ₹47,86,00,032/-. The petitioner also filed

its counter claims claiming a sum of ₹1,26,14,762/- along with interest.

7.4 On 05.06.2017, the Arbitral Tribunal passed a procedural order directing both the parties to deposit a sum of ₹5 lakhs each along with a sum of ₹15,000/- towards reimbursement of administrative and secretarial costs.

7.5 The petitioner sent a letter dated 30.08.2017 stating that its Competent Authority (that is, Secretary PWD, Delhi Government) had fixed the arbitral fee at ₹2,00,000/-.

7.6 Admittedly, the petitioner failed to deposit the said amount and this led the Arbitral Tribunal to pass an order dated 07.10.2017 suspending the counter claims as the petitioner had failed to deposit the fees as directed.

7.7 Thereafter, the Arbitral Tribunal passed the impugned order terminating the arbitral proceedings in relation to the counter claims.

8. It is seen from the above that the controversy had arisen in view of the petitioner's stand that it was not liable to pay the fees as determined by the Arbitral Tribunal; according to the petitioner, it was only liable to pay the fees as determined by the Competent Authority.

9. At the outset, Mr Ramesh Singh, learned standing counsel for the petitioner stated that the petitioner's stand is erroneous and the petitioner would pay the amount of fees in respect of its counter claims as per the Fourth Schedule of the Act. He, however, submitted that the petitioner could not be compelled to pay its share of fees relating to the claims made by the respondent.

10. The question whether the petitioner's counter claims could be terminated on its failure to pay the arbitral fees in relation to the claims made by the respondent (claimant before the Arbitral Tribunal), can be addressed by referring to the provisions of Section 38 of the Act, which is

set out below:-

“38. Deposits.— (1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.”

11. The scheme of Section 38 of the Act is unambiguous. Although, both the parties are required to share the fees in equal measure, failure of a party to pay its share does not result in termination of the claims or counter claims. In terms of the proviso to Section 38(1) of the Act, the Arbitral Tribunal may direct that separate amount be deposited in respect of counter-claim. In terms of sub-section (2) of Section 38 of the Act, each party is required to pay the amount in equal shares. If one party fails to pay his share, the other party can pay the same.

12. In terms of the second proviso to sub-section (2) of Section 38 of the Act, if the *other party* also fails to pay the aforesaid share, the Arbitral Tribunal can suspend or terminate the arbitral proceedings. The, *other party*, obviously means the party other than the one that has defaulted in paying its share of fees. If such party also fails to pay its share of fees, the Arbitral Tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter claim. The use of the word '*such*' as prefix to the words 'claim or counter-claim' makes it amply clear that termination of claims or counter claims is contemplated only if the party who has made those claims or counter-claims, fails to pay the fees in respect of those claims/counter claims. Thus, if a claimant fails to pay the fees in respect of his claims, the arbitral proceedings can be terminated in respect of the claims; but, the counter-claims raised by the other party cannot be terminated if that party is willing to pay the arbitral fees. Conversely, the arbitral proceedings with respect of claims cannot be terminated on failure of the respondent to pay the arbitral fees in respect of the counter-claims.

13. In the present case, the petitioner is willing to pay its entire arbitral fees in respect of its counter claim of ₹1,26,14,762/- which according to the petitioner works out to be ₹3,40,115/- (as per the Fourth Schedule of the Act). Mr Singh also states that the petitioner will deposit the entire fee of ₹3,40,115/- in respect of the counter claims within a period of two weeks. In view of this statement, this Court is of the view that it would be apposite to set aside the impugned order passed by the Arbitral Tribunal terminating the arbitral proceedings in respect of the counter- claim preferred by the petitioner.

14. The petitioner shall deposit the aforesaid sum with the Arbitral

Tribunal within a period of two weeks from today. On such amount being deposit, the Arbitral Tribunal shall also adjudicate the counter claims preferred by the petitioner.

15. It is clarified that the Arbitral Tribunal may, depending on the outcome of the arbitral proceedings, also make an award for costs in favour of the prevailing party.

16. The petition is disposed of in the aforesaid terms.

17. Order *dasti*.

VIBHU BAKHRU, J

APRIL 02, 2018

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