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

+ **O.M.P. (COMM) 207/2018 & IA Nos. 6735-6736/2018**

HOTEL LEELAVENTURE LIMITED

..... Petitioner

Through: Mr Rajiv Nayar, Senior Advocate
with Mr Abhimanyu Mahajan, Mr
Frankis Mattew, Ms Anubha Goel,
Mr Saurabh Seth, Mr Sarthak
Mehrotra, Mr Arindam Gosh,
Advocates.

versus

AHLUWALIA CONTRACTS (INDIA)
LIMITED

..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
15.05.2018

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VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 15.01.2018 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted of a Sole Arbitrator, namely, Justice Manju Goel (Retired) (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties with respect to the Work Order dated 05.05.2008

(hereafter referred to as ‘the Main Work Order’).

2. In February, 2008, the petitioner had invited a tender for carrying out the civil and structural construction work of the proposed hotel – “The Hotel Leela” – located at Netaji Nagar, Chanakyapuri, New Delhi. After negotiations with the respondent, a work order dated 20.03.2008 was issued to the respondent for carrying out the work at a value of ₹78,00,00,000/-. This work order was subsequently revised and a revised work order dated 05.05.2008 (‘the Main Work Order’) was issued increasing the value of the works from ₹78,00,00,000/- to ₹83,00,00,000/- on the basis of the Bill of Quantities (BOQ). Thereafter, on 21.07.2008, the parties entered into a formal agreement for execution of the works at the value of ₹83,00,00,000/-. The respondent continued to execute the works and in terms of the agreement between the parties, raised interim bills (RA Bills) from time to time. It is stated that in all, the respondents raised 29 RA Bills.

3. The petitioner issued four ancillaries work orders dated 17.03.2010, 30.03.2010, 01.06.2010 and 12.07.2011 for carrying out certain civil and allied works relating to compound wall; vacuum dewatered flooring; the back house finishing work; and labour contract for dry external cladding work and for civil works at swimming pool respectively. The said ancillary work orders are hereafter referred to as ‘Ancillary Work Orders’.

4. During the period from August 2010 to January 2011, the petitioner released an aggregate sum of ₹11,75,00,000/- on *ad hoc* basis. The said sum comprised of ₹2 crores disbursed on 28.08.2010; ₹1 crore disbursed on 30.08.2010; ₹3 crores disbursed on 14.09.2010; ₹1.5 crores disbursed on

18.10.2010; ₹2.25 crores disbursed on 25.10.2010; and two tranches of ₹1 crore each disbursed on 24.01.2011.

5. The respondent submitted its final bill with regard to the Main Work Order for an amount of ₹145,83,91,042/-. It is stated that the respondent also issued separate bills pertaining to work done against the Ancillary Work Orders.

6. The petitioner contested the final bill raised by the respondent. The disputes were mainly with regard to the quantity of steel claimed to have been used in raising the building, which the petitioner claimed was excessive.

7. The respondent invoked the arbitration clause in respect to the Ancillary Work Orders, and the petitioner claims that by a letter dated 20.05.2014, it appointed an arbitrator to adjudicate the disputes in relation to the said Ancillary Work Orders.

8. The respondent also invoked the arbitration clause in the Main Work Order, *inter alia*, claiming a sum of ₹13,43,68,824/- together with interest. Thereafter, the respondent filed a petition under Section 11 of the Act (Arb. P. 466/2014), which was disposed of by this Court on 05.03.2015 by appointing the sole arbitrator – the Arbitral Tribunal – to adjudicate the disputes in relation to the Main Work Order.

9. The respondent filed a Statement of Claims before the Arbitral Tribunal claiming a sum of ₹7,20,14,948/- on the basis of a certificate dated 12.09.2011 issued by the Cost Management Services Consultant (M/s Currie

& Brown (I) Ltd.), which was contested by the petitioner.

10. According to the respondent, it had raised bills aggregating ₹10,37,31,727.35/- against the work executed pursuant to the Ancillary Work Orders: ₹4,10,11,765.60/- against the work order for compound wall; ₹2,13,15,987/- against the work order for back of the house work; ₹3,98,76,767.75/- against cladding work; and ₹14,92,216/- against the swimming pool works. The respondent claimed that it adjusted the *ad hoc* amount of ₹11.75 crores against the aforesaid bill and after adjusting the bills to the full extent, a sum of ₹1,37,68,273/- remained in excess, had been adjusted against the amount claimed in respect of the Main Work Order. After giving credit for the aforesaid sum of ₹1,37,68,723/-, the respondent claimed a sum of ₹7,20,14,948/- as due and payable against the Main Work Order.

11. Mr Nayar, the learned Senior Counsel appearing for the petitioner has restricted the challenge to the impugned award to the extent that the Arbitral Tribunal has accepted the respondent's contention that the sum of ₹11.75 crores was to be adjusted against the Ancillary Work Orders and not against the contract in question – the Main Work Order.

12. The dispute whether the *ad hoc* payments were to be adjusted against the work done against the Main Work Order or the Ancillary Work Orders was examined by the Arbitral Tribunal, and it did not accept the petitioner's contention that the same was to be adjusted against the Main Work Order for several reasons including (i) there was no dispute that the respondent had raised bills against the Ancillary Work Orders; (ii) the witness of the

respondent had testified that the *ad hoc* payments were towards the work executed against the Ancillary Work Orders and not the Main Work Order; (iii) the timing of the payments indicated that the payments were not against the Main Work Order; and (iv) the petitioner had not produced any material or evidence to establish that the payments were made against the Main Work Order. The relevant extract of the impugned award is set out below:-

“44....The certified four final bills for the ancillary work has been proved by Mr. M.K. Hingorani GM (Contracts) of the Claimant, Exhibit C25, collectively. These are dated between 08.09.2011 to 03.11.2011. He reiterates that the advance of Rs. 11,75,00,000/- was released by Respondent towards the ancillary work. When Mr. Hingorani was under cross examination, he was asked if the four certified bills had been paid for, he replied in the affirmative. A suggestion was put to him that the Claimant without the consent of the Respondent appropriated the amounts that were paid to the Claimant towards the main contract against the dues under the ancillary contracts. He did not accept the suggestion. When inquired as to what happened to the Arbitration invoked by those four notices, he stated that Arbitration was invoked inadvertently and neither party pursued the same.

45. During arguments the Learned Counsel for the Claimant took the Tribunal through the details of the payments made by the Respondent to show that the Respondent itself intended these payments to be towards the four ancillary contracts. It is submitted that towards the main contract the Respondent had released an advance amount of Rs. 8,30,00,000/- by way of mobilisation advance in the year 2008 itself. The mobilisation advance was recovered alongwith interest. Further the

Respondent had released payment against all the bills ending with bill no. 26 dated 12.07.2010. The 27th RA bill for the main work was certified on 18.08.2010 for the amount of Rs. 1,14,22,772/-. On 24.08.2010 a sum of Rs. 2,00,00,000/- was released. The Respondent says that this was released towards the main work. The Respondent released another sum of Rs. 1,00,00,000/- on 13.08.2010 even before the 28th RA bill was presented. It is submitted by the Learned Counsel for the Claimant that the Respondent could not have released Rs. 3,00,00,000/- by way of advance when the 27th RA bill submitted was for Rs. 1,14,22,772/- only.

46. 28th RA bill for the main work was certified on 08.09.2010 for a sum of Rs. 57,43,974/-. The Respondent released a sum of Rs. 3,00,00,000/- on 14.09.2010. The Learned Counsel for the Claimant says that this was most unlikely to have been towards the main contract as the bill was only for Rs. 57,43,974/- while a huge amount was lying in excess with the Claimant if the earlier payment of Rs. 3,00,00,000/- had been towards the main contract. It is further pointed that even before the submission of 29th RA bill on 27.10.2010 the Respondent released further sums of Rs. 1,50,00,000/- and Rs. 2,25,00,000/-. The Learned Counsel for the Claimant submits that this could not have been towards the main contract as the amount due to the Claimant was much less. On 24.01.2011, a sum of Rs. 1,00,00,000/- was released by the Respondent. On that very day another sum of Rs. 1,00,00,000/- was released by the Respondent. The Respondent claims that both these sums were released towards the principal contract. By then, if one goes by the theory of the Respondent, a sum of Rs. 8,03,33,254/- was already lying in excess with the Claimant. Could the Respondent release yet another sum of Rs. 2,00,00,000/- with such excess sum lying with the Claimant towards the principal contract?

47. I find force in the submission of the Learned Counsel of the Claimant. It is not the case of the Claimant that the Respondent was 'not making prompt payments of the bills. Bills upto 29th RA bill were timely paid. The Respondent

apparently was not in huge arrears to warrant release such huge amounts towards the main contract. At the same time the Respondent was under the obligation to pay for the ancillary contracts. The Respondent pleads that the ancillary contracts had been paid for. However, the Respondent has not produced any documentary proof to evidence the full and final payment of all the bills for the four ancillary contracts or any document to show that nothing was due from the Respondent towards these ancillary contracts. The Chairman and Managing Director of the Respondent has filed an affidavit by way of his testimony in Court. In Para 14 of his testimony he says:

“The Claimant has without the consent of the Respondent diverted Rs. 10.37 Crores which were paid by the Respondent towards the Work Order dated 20.03.2008. It appears that the Claimant has adjusted this amount in unilateral settlement of its claims arising out of ancillary Work Orders dated 15.03.2010, 30.03.2010, and 01.06.2010, in respect of which I am advised that payment in full had already been made by the Respondent.”

48. This is not a statement which can be given any credence. He merely says that he has been “advised” that the full payment has been made towards these ancillary contracts. Such statement is hearsay and cannot be relied upon. Accordingly, there is no option for the Tribunal but to hold that the payments for ancillary contracts remained due and were never specifically paid for.

49. The Claimant never issued any statement that Rs. 11.75 Crores received, as mentioned above, were being adjusted towards the main work. The Respondent never issued any advice in any form stating towards which dues these advance payments were being made. However, from the facts stated above it does appear that these advance payments were intended to meet the cost of ancillary works and not the main work. It will be wrong to say that Claimant belatedly appropriated these sums against the dues of the ancillary works. In my opinion, the Claimant was morally and legally right in adjusting Rs. 11.75 Crores received by it, as mentioned above, towards the ancillary contracts. The Claimant, therefore, is also right in keeping the amount of Rs. 1,37,68,273/- to be adjusted against his dues towards the main contract.”

13. In view of the aforesaid findings, the Arbitral Tribunal accepted the contention that only ₹1,37,68,273/-, was to be adjusted against the contract in question.

14. Mr Nayar contended that the principal grievance of the petitioner is that the findings of the Arbitral Tribunal would foreclose the petitioner's right to contest the bills raised by the respondent in respect of the Ancillary Work Orders which, according to the petitioner, were not due and payable to the respondent as the same were not certified. He submitted that the findings returned by the Arbitral Tribunal would prejudice the petitioner in disputes regarding the Ancillary Work Orders. He submitted that any finding returned by the Arbitral Tribunal with regard to the Ancillary Work Orders would be without jurisdiction, as the disputes regarding those contracts was not within the scope of reference to the Arbitral Tribunal.

15. The Arbitral Tribunal found that the petitioner had produced no evidence in support of the contention that the aforesaid sums were paid against the work done against the Main Work Order and not the Ancillary Work Orders. Further, the Arbitral Tribunal found that the timing of the *ad hoc* payments also indicated that the same were not against the Main Work Order. Accordingly, the Arbitral Tribunal held that the *ad hoc* payment – except the sum of ₹1,37,68,273/-, which the respondent accepted was the excess available with the respondent – was not liable to be adjusted against the amounts due under the Main Work Order. The said conclusion cannot be stated to be unreasonable or patently illegal. Therefore, this Court, is not persuaded to accept that any interference with the arbitral award is warranted, warrants no interference under section 34 of the Act.

16. Mr Nayar had urged that the findings of the Arbitral Tribunal were in wide terms and also foreclosed the disputes in regard to the Ancillary Work Orders, which were outside the scope of the arbitral proceedings. This contention is unpersuasive, as the question whether the petitioner had made payments against the Main Work Order were clearly within the scope of reference of the Arbitral Tribunal.

17. Having stated the above, it would be apposite to clarify that the impugned award would not preclude the petitioner from disputing the bills raised by the petitioner against the Ancillary Work Orders. This Court is informed that such a dispute has already been raised by the petitioner. In the event, the petitioner prevails in those arbitration proceedings, the respondent is surely precluded from disputing that it had received the sum of ₹10,37,31,727/- against the Ancillary Work Orders. If any amount is found

to have been overpaid by the petitioner in respect of the Ancillary Work Orders, the Arbitral Tribunal will surely consider the same while making the award. Needless to state that the said dispute will be decided uninfluenced by any findings returned by the Arbitral Tribunal in the impugned award.

18. The petition is dismissed with the above observations. The pending applications are also disposed of.

May 15, 2018
pkv/RK

VIBHU BAKHRU, J

