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

+ **FAO(OS)(COMM) 75/2018**

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Date of decision: 24<sup>th</sup> April, 2018

M/S N N BUILDCON PVT LTD

..... Appellant

Through Mr. Vineet Jhanji, Ms. Jyoti  
Mendiretta and Mr. Imran Moulaey, Advocates.

versus

UNION OF INDIA

..... Respondent

Through Mr. Rajesh Gogna, Central  
Government Standing Counsel.

**CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE CHANDER SHEKHAR**

**SANJIV KHANNA, J (ORAL)**

This intra-Court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (Act, for short) and Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 impugns the order dated 14<sup>th</sup> March, 2018 passed by a single Judge in O.M.P. (COMM) 119/2018, *NN Buildcon Pvt. Ltd. Vs. Union of India*. The impugned order dismisses the objection petition filed by the appellant under Section 34 of the Act and upholds the arbitral Award dated 25<sup>th</sup> December, 2017 (corrected vide communication dated 5<sup>th</sup> January, 2018).

2. The appellant was awarded contract for construction of Security Police Line Campus at Babu Dham, Chanakyaपुरी, New Delhi vide letter of acceptance dated 12<sup>th</sup> February, 2013. The estimated cost of the work was Rs.68,68,02,291/-. The stipulated date of commencement of work was 6<sup>th</sup> March, 2013 and the stipulated date of completion of work was 5<sup>th</sup> March, 2015.
3. The respondent, however, vide their letter dated 23<sup>rd</sup> March, 2013 informed the appellant that they had received a communication from the Delhi Police stating that work should not be started till EFC approve the project and administrative approval and expenditure sanction was received from the Ministry of Home Affairs. By another communication dated 26<sup>th</sup> March, 2013, the respondent reiterated the position and had directed the appellant to stop work till further orders. Thereafter, vide letter dated 16<sup>th</sup> August, 2013, the Engineer-in-charge foreclosed the contract under Clause 13 of the agreement.
4. The appellant had invoked arbitration clause vide letter dated 3<sup>rd</sup> February, 2016 pursuant to which the disputes and claims made by the appellant were referred to the sole Arbitrator. The Award dated 25<sup>th</sup> December, 2017, awards a sum of Rs.4,12,100/- along with interest @10% for 3 years and 178 days amounting to Rs.1,43,900/- with a stipulation that if the amount was not paid to the appellant by 24<sup>th</sup> January, 2018 the same would carry simple interest @ 10% till the realization of the amount.
5. The appellant is primarily aggrieved by rejection of Claim No.9 on account of loss of profit on the work not executed till closure of work. The amount was quantified as Rs.2,38,70,263/-. Appellant assertion was that if the work had continued for a period of six months, he would have earned

profit of 15 percent on the proportionate quantum of work. In other words, the claim was for loss of profit.

6. The Award on the aspect of reason for cancellation of the work had recorded:-

“7.1 Giving the background of the award of the contract the respondent explained that the Administrative Approval and Expenditure sanction (AA & ES) for the work was originally accorded by the Govt of NCT of Delhi on 22.12.2010 for an amount of Rs. 72.50 Crore (Exh. R-19). The tenders for the work were called in 2012 and a revised estimate for Rs. 116.60 Crore was also submitted to Delhi Police for revised sanction. Initially the Delhi Police gave clearance to the Respondent C.P.W.D to award the contract by restricting the expenditure to Rs.78.99 Crore and informed that fund will be made available under Plan head. Respondent referred Delhi Police letters dated 19.12.2012 (Exh.C-16) in this regard. However, very shortly after work was awarded and the work started at site, Delhi Police asked to stop the work apparently because Ministry of Home Affairs (MHA), Govt of India issued guidelines for allocation of funds for Delhi Police Building Program due to paucity of funds in the 12<sup>th</sup> Plan Period. The letter dated 20.03.2013 (Exh. R-23) from the Delhi Police in this regard asked not to start the work and not to incur any financial liability till EFC (Expenditure Finance Committee) approves this project under head Plan and AA/ES is received from MHA. The Respondent acted immediately and wrote to the Claimant by letter dated 23.03.2013 asking the Claimant to not resume work and to remove all T&P machinery and staff from the site and not incur any expenditure on the work. This instruction was reiterated by letter dated 14.06.2013 in which direction was also issued to hand over the vacant site to DCP (L&B) Cell, PHQ, New Delhi (Exh. R-18). Finally, after approval from the

competent authority of CPWD, the Engineer-in-charge issued the order of foreclosure of the contract under clause 13 of the agreement by letter dated 16.08.2013 (Exh. R-2).”

The factual explanation given by the respondent was accepted. This finding was not specifically challenged in the objection under Section 34 of the Act. This factual finding is also not challenged before us.

7. Clause 13 of the contract reads as under:-

“CLAUSE 13: If at any time after acceptance of the tender, Engineer-in-charge shall decide to abandon or reduce the scope of the works for any reason whatsoever and hence not require the whole or any part of the works to be carried out, the Engineer-in-Charge shall give notice in writing to that effect to the contractor and the contractor shall act accordingly in the matter. The contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the works in full but which he did not derive in consequence of the foreclosure of the whole or part of the works. The contractor shall be paid at contract rates, full amount for works executed at site and, in addition, a reasonable amount as certified by the Engineer-in-Charge for the items hereunder mentioned which could not be utilized on the work to the full extent in view of the foreclosure;

(i) Any expenditure incurred on preliminary site work, e.g. temporary access roads, temporary labour huts, staff quarters and site office; storage accommodation and water storage tanks.

(ii) Government shall have the option to take over contractor's materials or any part thereof either brought to site or of which the contractor is legally

bound to accept delivery from suppliers (for incorporation in or incidental to the work) provided, however Government shall be bound to take over the materials or such portions thereof as the contractor does not desire to retain. For materials taken over or to be taken over by Government, cost of such materials as detailed by Engineer-in-Charge shall be paid. The cost shall, however, take into account purchase price, cost of transportation and deterioration or damage which may have been caused to materials whilst in the custody of the contractor.

(iii) If any materials supplied by Government are rendered surplus, the same except normal wastage shall be returned by the contractor to Government at rates not exceeding those at which these were originally issued, less allowance for any deterioration or damage which may have been caused whilst the materials were in the custody of the contractor. In addition, cost of transporting such materials from site to Government stores, if so required by Government, shall be paid.

(iv) Reasonable compensation for transfer of T & P from site to contractor's permanent stores or to his other works, whichever is less. If T & P are not transported to either of the said places, no cost of transportation shall be payable.

(v) Reasonable compensation for repatriation of contractor's site staff and imported labour to the extent necessary.

The contractor shall, if required by the Engineer-in-Charge, furnish to him, books of account, wage books, time sheets and other relevant documents and evidence as may be necessary to enable him to certify the reasonable amount payable under this condition. The reasonable amount of items on (i), (iv) and (v) above shall not be in excess of 2% of the cost of the

work remaining incomplete on the date of closure, i.e. total stipulated cost of the work as per accepted tender less then cost of work actually executed under the contract and less the cost of contractor's materials at site taken over by the Government as per item (ii) above. Provided always that against any payments due to the contractor on this account or otherwise, the Engineer-in-Charge shall be entitled to recover or be credited with any outstanding balances due from the contractor for advance paid in respect of any tool, plants and materials and any other sums which at the date of termination were recoverable by the Government from the contractor under the terms of the contract.”

8. Referring to the said clause and interpreting clause 13 in the factual matrix of the present case, the Arbitrator had held as under:-

“8.0 I have carefully examined all the submissions of both parties as to whether clause 13 of the contract was attracted in this case and whether Respondent’s action of foreclosure of the contract was in order or, it was in breach of the contract.

8.1 One major leg of argument of the Claimant was that the clause 13 is attracted when a work is abandoned or restricted permanently and is not to be carried out at all at a later date. In this case the same work was taken up again in 2016 by assigning the work to a different agency. Therefore, the conditions attracting clause 13 are not fulfilled and the provisions of clause 13 are not attracted in this case. There is no denying that clause 13 does apply only to cases where Government decides to abandon or reduce the scope of the works for any reason whatsoever and hence not require the whole or any part of the works to be carried out. The facts of the present case as could be seen from various documents submitted and referred by both parties and particularly from the letter from the office of Delhi Police Commissioner

dated 10.06.2013 (Exh. R-7/13, also referred in R-18) are that Government of India had decided that keeping in view that paucity of funds during the 12<sup>th</sup> Five Year Plan period, for the Delhi Police Building Programme Scheme, Delhi Police should give the first priority to projects of police station buildings and second priority for residential projects and then, if the funds are available, projects of office complex be taken up. Accordingly, MHA had decided that the action on the project of Construction of Security Police Lines, at Bapu Dham included in the 12<sup>th</sup> Five Year Plan be kept in abeyance as this is purely office complex. The record thus makes it clear that the Government of India had decided not to proceed with this work due to paucity of funds during the 12<sup>th</sup> plan period (2012-2017). This period was very long in consideration of the contract under consideration in which the work was due to be completed on 05.03.2015. Thus so far as this contract was concerned the Government decision amounted to abandonment of the work although the Government did not envisage abandonment of this work although the Government did not envisage abandonment of this work for good. Therefore, the subsequent action of the Government to assign the work with a reduced scope to another agency NBCC for calling of open tenders just before the end of the 12<sup>th</sup> Plan period, which NBCC did on 17.10.2016 (Exh. C-35A), does not in any way change the fact that the work stood abandoned during the period of the contract of the Claimant and also much beyond until the end of 12<sup>th</sup> Plan period.”

9. Challenging the aforesaid findings, vide objections under Section 34 of the Act, the appellant had relied upon judgment of this Court in ***Madhok Construction Co. (P) Ltd. vs. Union of India***, (1998) 71 DLT 599 and ***Shanti Devi & Ors. vs. Delhi Development Authority & Ors.***, 2007 (1) Arb LR 82.

10. The primary contention of the appellant before us is that this was not a case where the contract was abandoned and, therefore, Clause 13 was not attracted. This contention is predicated on the argument that the construction work of Security Police Line Campus at Bapu Dham, Chanakyapuri, New Delhi was subsequently taken up vide notice inviting e-tender dated 17<sup>th</sup> October, 2016. Thus, the submission was that the construction was not abandoned as contemplated in Clause 13 of the agreement. Consequently, the appellant was entitled to claim damages for premature foreclosure and finding of the Arbitrator to the contrary requires interference and should be set aside.

11. We do not find any merit in the contention raised by the appellant. Clause 13, as reproduced above, states that the Engineer-in-charge could at any time after acceptance of the tender decide to abandon or reduce the scope of the work for any reason whatsoever. In the present case, for detailed reasons set out in the Award as noticed above, the Arbitrator had held that the work was almost immediately abandoned after it was awarded to the appellant vide letter of acceptance dated 12<sup>th</sup> February, 2013. The reason was that the Ministry of Home Affairs had decided not to proceed with the contract work due to paucity of funds during the 12<sup>th</sup> Five Year Plan period. Delhi Police had accordingly written that work should not commence and no financial liability should be incurred till approval of project by EFC under head plan and till necessary approvals were received from the Ministry of Home Affairs. Appellant was promptly informed vide letter dated 23<sup>rd</sup> March, 2013 calling upon them not to resume the work and remove T&P machinery and staff. They were told not to incur any expenditure whatsoever.

12. Subsequently, as permission/approvals were not forthcoming, competent authority of CPWD i.e. Engineer-in-charge, vide letter dated 16<sup>th</sup> August, 2013 had foreclosed the contract under Clause 13 of the agreement No.10/EE/CD-6/2012-13 dated 12<sup>th</sup> February, 2013.

13. Nearly three years thereafter, fresh tenders were floated for construction of Police Line Campus at Bapu Dhan, Chanakyapuri, New Delhi. This was obviously a new contract.

14. Learned single Judge on the said aspect and challenge raised has observed as under:-

“12. A reading of the above clause would show that where the Engineer-in-Charge decides to abandon or reduce the scope of work ‘for any reason whatsoever’, he shall give a notice to that effect to the contractor and in such case the contractor shall not be entitled to claim payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the work in full but which he could not derive in consequence of the foreclosure of the whole or part of the works. The question in the present case would, therefore, be whether the foreclosure of the work by the respondent vide its letter dated 16th August, 2013 was due to abandonment of work or otherwise.

13. The Arbitrator has considered the above issue in detail. He has taken note of the fact that the work was awarded by the respondent based on an administrative approval and expenditure sanction accorded by the Government of NCT of Delhi in its favour on 22nd December, 2010. The Delhi Police had also given clearance to the respondent for the award of the work, however, shortly after the work was awarded in favour of the petitioner, the Delhi Police asked the respondent to stop the work. Due to such instructions

received by the respondent from the Delhi Police, the respondent, in turn, called upon the petitioner to stop all work under the agreement. The Arbitrator further takes note of the letter from the Commissioner, Delhi Police dated 10th June, 2013 which makes reference to the decision of the Government of India that the funds allotted in the 12th Plan period for the Delhi Police Building Programme Scheme (DPBP) first be utilized by giving priority to the police station buildings and secondly for the residential projects and only thereafter if some funds are left, then for the office complex. Based on this decision, the Ministry of Home Affairs had decided that further action on the project of construction of Security Police Lines at Bapu Dham be kept in abeyance as this was purely an office complex. As the scheduled date of completion of work under the agreement was 5th March, 2015 and the 12th Plan period was between 2012 and 2017, this would in fact, amount to the abandonment of work. The Arbitrator further takes note of the fact that the Government of India later decided to assign the work with a reduced scope to another agency, namely NBCC on 17th October, 2016. The Arbitrator comes to the conclusion that award of such work after such a long interval does not in any manner, take away from the fact that in August, 2013, the work was actually abandoned by the respondent for a valid cause.”

15. The learned single Judge has also distinguished judgment in the case of *Shanti Devi* (supra) in the following manner:-

“14. In Ms. Shanti Devi (supra), this Court, after analysing clause 13 of the agreement, had held that an Arbitrator would commit an error of jurisdiction if he awards a claim prohibited under the terms of the agreement. The Arbitrator is bound, like the parties, to act in terms of the agreement as the very reference to the Arbitrator arises from the contract. The bar

contained in clause 13 would become operative only if recourse to the said clause is bona fide, proper and is not arbitrary. In the present case, the Arbitrator finds that the recourse to clause 13 by the respondent is bona fide, proper and is not arbitrary. Therefore, clearly the respondent was entitled to rely upon clause 13 of the agreement for pre-maturely foreclosing the awarded work of the petitioner. The learned counsel for the petitioner does not contend that there was any malafide on the part of the respondent or any of its officers in ordering foreclosure of the work.”

16. In the case of *Shanti Devi* (supra), the contractor was awarded construction work for 18 blocks. During the course of construction, site for 4 blocks could not be handed over and a letter was written that these 4 blocks would be handed over as and when the same were available. Thereafter, the work was restricted and curtailed to 14 blocks, and a fresh notice was issued inviting tenders for the remaining four blocks, which were not allotted to the contractor though he was willing to complete the work at the same rates. The contractor had protested.

17. In the present case, as noticed above, the respondents had given the justification and reason for the foreclosure and cancellation of the contract. The said reasons were correct and not a mere sham or subterfuge to call for fresh tender. There was a valid cause and reason to abandon the work. Subsequent allotment of work that too after three years when situation had changed and funds were available would not be a ground to hold that Clause 13 was wrongly interpreted by the learned Arbitrator. Arbitrator is the sole judge of the facts and law. Arbitrator interprets the contract and applies it to the factual matrix. In the facts and circumstances of the present case, the learned Arbitrator had applied himself to the relevant clause and facts to

hold that the appellant was not entitled to claim for loss of profit on the work not executed.

18. As noticed above, Arbitrator had partly allowed claims of the appellant in respect of the work executed etc. vide the impugned Award. The Award to this extent was not challenged. Challenge is limited and confined to failure to award loss of profit on the work not executed.

19. With the aforesaid observations, the appeal is dismissed. There would be no order as to costs.

**SANJIV KHANNA, J.**

**CHANDER SHEKHAR, J.**

APRIL 24, 2018  
MR/NA