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

+ **O.M.P. (COMM) 233/2018 & IA Nos. 7361/2018, 7362/2018
& 7365/2018**

FERNAS CONSTRUCTION INDIA PVT.
LTD.

..... Petitioner

Through: Counsel for the petitioner
(appearance not given).

versus

ARTSON ENGINEERING LTD.

..... Respondent

Through: Mr Sameer Parekh, Mr D. P.
Mohanty and Ms Pavitra Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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29.05.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 19.12.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a Sole Arbitrator, Justice V.K. Bali, Retired (hereafter 'the Arbitral Tribunal'). The present petition was filed on 17.04.2018, which was beyond the period as specified under Section 34(3) of the Act. However, it was filed within a period of thirty days (in fact, on the 30th day) after expiry of the period of three months and, therefore, by

virtue of proviso to Section 34(3) of the Act, the above captioned petition can be entertained provided the petitioner is able to satisfy this Court that it was prevented by a sufficient cause from filing the petition within a period of three months as specified under Section 34(3) of the Act.

2. In this regard, the petitioner has filed the application (IA No. 7361/2018) seeking condonation of delay in filing the above captioned petition. The only reason stated in the application is that the petitioner had requested the counsel, who was handling the matter before the Sole Arbitrator, to prepare a petition under Section 34 of the Act. However, after sometime, he had declined to proceed further with the matter and, thereafter, it took time for the petitioner to engage another counsel to brief him for filing of the accompanying petition. It is further stated that since voluminous documentation was involved, the counsel engaged by the petitioner took time to understand the matter and prepare the petition. The petitioner has not provided any particulars including (i) when was the counsel engaged; (ii) on which date did he declined to prepare the petition; (iii) when was the new counsel engaged; and (iv) when was the petition drafted.

3. It also appears from the plain reading of the impugned award that it is the petitioner's regular practice to change counsel resulting in unnecessary delays. In the initial stages, before the Arbitral Tribunal, one Mr Jiwan Pal Singh had appeared before the Arbitral Tribunal on 23.05.2016, albeit, without filing his *vakalatnama*. On that date, the matter was adjourned by the Arbitral Tribunal *sine die* in view of the

proceedings pending before this Court in Company Petition No. 773 of 2014. The arbitration proceedings were revived pursuant to a letter dated 11.03.2017 sent at the instance of the respondent and a hearing was fixed by the Arbitral Tribunal on 30.03.2017. On that date, a separate set of counsel appeared (Mr Krishna Chander Dubey assisted by Ms Bharti Saini). They also did not file their *vakalatnama*. On that date, a final opportunity was granted to the petitioner to file its statement of defence and the next hearing was scheduled on 19.05.2017 at about 02:00 p.m. On that date, the petitioner sent an email one hour prior to the scheduled time of hearing claiming that the counsel appearing on its behalf had withdrawn and the petitioner would be engaging a new counsel. It is also relevant to note that the petitioner had not availed the final opportunity granted to file its statement of defence. Thereafter, the hearing was adjourned to 25.07.2017 and on that date, the petitioner engaged a new counsel. The petitioner now claims that the counsel who had appeared before the Arbitral Tribunal (presumably Mr Nayar) has also declined to draft the application under Section 34 of the Act. It is, thus, seen that the petitioner has repeatedly changed its counsel and it is not first time that this ground is being raised to explain the delay.

4. Although, this Court has the jurisdiction to entertain the present petition, however – considering the legislative intent in providing a strict time frame for filing an application under Section 34 of the Act – it would not be apposite to condone the delays in filing in a routine manner.

5. It is also relevant to note that the petition as filed on 17.04.2018 was defective: it was not accompanied by a statement of truth in the form of an affidavit; the petitioner had not filed the signed *vakalatnama*; and the attested affidavit was not filed with the Registry of this Court. In addition, there were other defects and, accordingly, the petition was returned as such. It is also relevant to note that the petition as originally filed (along with documents) consisted of only 124 pages as against the petition of 427 pages filed finally. Thus, it is also apparent that the petition was filed without the relevant documents. The petition was again re-filed on 25.04.2018 but was still defective and was returned as defective on the same date. Similarly, the petition was filed on 03.05.2018 and was returned as defective on 04.05.2018. It was again re-filed on 16.05.2018 and was returned as defective on 17.05.2018. The petition was successively filed on 19.05.2018, 21.05.2018 and finally filed on 22.05.2018. Thus, it took the petitioner more than a month to finally cure all the defects.

6. Thus, the petition is not only beyond the time as specified under Section 34(3) of the Act; it is also doubtful whether the petition as filed on 17.04.2018, could be considered as the petition at all.

7. Further, there is also delay in re-filing and if the same is considered, the cumulative delay is beyond the period of thirty days as provided under proviso to Section 34(3) of the Act. Although, as noticed above, this Court has jurisdiction, it is difficult to accept that there was sufficient cause that prevented the petitioner from filing the present petition within the prescribed period. The delay in filing

cannot be condoned for mere asking as that would frustrate the legislative intent of restricting the period within which the petition under Section 34 of the Act ought to be filed.

8. In view of the above, the applications filed by the petitioner for condoning the delay in filing and re-filing (IA Nos. 7361/2018 and 7365/2018) are rejected.

9. In view of the above conclusion, it is not necessary to further examine the impugned award. However, this Court had also heard the learned counsel appearing for the petitioner on merits as well.

10. The learned counsel appearing for the petitioner had assailed the impugned award on the solitary ground that the Arbitral Tribunal had erred in awarding consequential damages. He submitted that in terms of Clause 63.1.1 of the General Conditions of Contract (GCC), the petitioner had the right to terminate the contract without providing any reason and in such cases, the petitioner would be liable to pay the amounts as provided under Clause 63.1.2 of the GCC but would not be liable for any loss of opportunity, consequential loss, loss of work or loss of profits or any other claim of similar nature and, therefore, the Arbitral Tribunal had erred in awarding loss of profits in favour of the respondent.

11. The disputes between the parties arose in relation to the Work Order dated 09.02.2012 which was accepted by the respondent on 26.04.2012. The said work order was issued by the petitioner for execution of the part of works that were awarded by ONGC Petro

Additions Limited (OPAL). OPAL had awarded the petitioner the contract for transportation, fabrication, erection and laying of pipes above ground/supports; erection of valves, alignment and welding and various elevations, Non Destructive Testing (NDT); and Pneumatic/hydro testing and flushing of pipes etc. The petitioner had in turn awarded the work of fabrication and erection of above ground piping at OPAL complex, Dahej, Gujarat to the respondent.

12. The work awarded to the respondent was to be completed within a period of ten months.

13. The petitioner terminated the contract on 19.02.2013 alleging under performance on the part of the respondent. The respondent had also furnished bank guarantees to the petitioner in connection with the said contract, which were subsequently encashed by the petitioner. The petitioner claimed that the respondent had failed to deploy adequate manpower and machinery at site. Further, there was lack of supervision at site and the necessary consumables such as electrodes were also not available at site.

14. The respondent had contested the allegations made by the petitioner. It is the respondent's case that the petitioner had failed to perform its reciprocal obligations by providing adequate work fronts; by arranging the necessary Form (Form-V) for engaging labour; providing the necessary drawings within time; realising timely payments etc.

15. The Arbitral Tribunal examined the rival contentions and the

material placed on record and found merit in the contentions advanced on behalf of the respondent. The Arbitral Tribunal held that the petitioner had failed to supply the drawings for a period of one month from the date of the kick off meetings from the commencement of works (that is, 18.05.2012) and further the drawings provided for the balance seven months was also inadequate. The petitioner was responsible for the delay in submission of Form V necessary for the respondent to have engaged labour. It also found that the petitioner had failed to make timely payments. Accordingly, the Arbitral Tribunal held that the petitioner was not justified in cancelling the contract.

16. In view of the aforesaid findings, the Arbitral Tribunal (i) awarded a sum of ₹1,00,89,581/- in favour of the respondent on account of idling of manpower and machinery due to failure on the part of the petitioner to provide drawings, work fronts and free issue materials necessary to complete the contract; (ii) directed the refund of bank guarantees encashed by the petitioner and a sum of ₹4,72,262/- as financial charges paid by the respondent on account of the bank guarantees; (iii) awarded a sum of ₹4,78,173/- towards unpaid RA Bills Nos. 1 to 6; (iv) awarded a sum of ₹14,24,536.90/- towards RA Bill No. 7 and a sum of ₹11,65,588/- towards RA Bill No. 8; (v) awarded ₹30,00,000/- as costs for demobilising of manpower and equipment from the site; (vi) awarded a sum of ₹5,83,449/- on account of retention money retained by the petitioner; and (vii) awarded a sum of ₹1,10,00,000/- as loss of profits. In addition, the Arbitral Tribunal

had also awarded *pendente lite* interest at the rate of 10% per annum and future interest at the rate of 12% per annum.

17. The only contention advanced on behalf of the petitioner is that the Arbitral Tribunal had erred in awarding loss of profits, as the petitioner was entitled to terminate the contract under Clause 63.1.1 of the GCC without assigning any reasons. The learned counsel for the petitioner submitted that the Arbitral Tribunal had erred in holding that the said right was subject to payment as specified under Clause 63.1.2 of the GCC and since the said payment had not been made, the said option was not available to the petitioner.

18. Before proceeding further, it would be relevant to refer to Clause 63.1 which is set out below:-

TERMINATION AND REMEDIES

63.1 Termination

63.1.1 The Employer/Engineer may at any time terminate the Contract by giving the Contractor a notice in writing to that effect. Upon termination or upon receipt of the Termination Notice the Contractor shall either immediately or upon the date specified in the termination notice:

- a) Cease all further Work, except for such work as Employer/Engineer may specify in the Termination Notice for the sole purpose of protecting that part of the Works already commenced.

- b) Remove all Constructional Plant and Equipment from the site and remove the Contractor's personnel from the Site, remove from the Site any wreckage and debris of any kind and leave the whole of the Site in a clean and a safe condition, all at its own cost.
- c) Subject to the payment specified in clause 63.1.2 below:
 - i) Deliver to the Employer/Engineer the parts of the Works executed by the Contractor upto the date of Termination.

63.1.2 In the event of termination of the Contract under clause 63.1.1, the Employer/Engineer shall pay to the Contractor the following amount:

- (a) The Contract price properly attributable to the parts of the Works as per the sole discretion of the Employer executed by the Contractor as certified in this respect by the Engineer and in accordance with the Contract as at the date of Termination.
- (b) The approved costs incurred by the Contractor in protecting the Works pursuant to paragraph (a) of clause 63.1.1 as mutually agreed.
- (c) Reasonable demobilization charges as may be ascertained by the Employer/Engineer if Contractor has Constructional Plant and Equipment at site at the time the termination becomes effective.
- (d) Cost of any materials or equipments already purchased and/ or ordered by the Contractor, the delivery of which the Contractor must accept, such materials or equipments will become property of the

Employer/Engineer upon payment by the Employer/Engineer of the actual cost of the materials or equipment as determined by the Employer.

- (e) All reasonable cost on cancellation of orders for material, etc., which the Contractor may have committed for the project as may be determined by the Employer.”

19. The Arbitral Tribunal had considered the above clause and held that although the employer had the right to terminate the contract by giving a notice to the contractor, sub-clause (c) of Clause 63.1.1 of the GCC indicated that the said right would be subject to payment of the specified amounts in Clause 63.1.2. And, therefore, all such payments were required to be made in the event, an employer exercises his right to terminate the contract.

20. There is no dispute that the petitioner would be required to make payments of the amounts as referred to under Clause 63.1.2 of the GCC. The only controversy sought to be raised is that the petitioner's right to exercise was not contingent on making prior payment.

21. The plain reading of Clause 63.1.1 of the GCC indicates that on receiving the notice of termination, the contractor is required to cease all further work except as may be specified or may be necessary for protecting the works already commenced and remove all constructional plant and equipment and personnel from site. In terms of Clause 63.1.1(c), the contractor is also required to deliver to the

employer the works executed by it up to the date of termination. However, it is expressly provided that this obligation is subject to receipt of the payment under Clause 63.1.2 of the GCC. This clause, in essence, entitles the respondent to exercise lien over the work done. In the present case, the respondent has been unable to exercise this right and the termination of the contract by the petitioner is in effect resulted in the respondent being removed from the site. Thus, clearly, the petitioner was obliged to comply with the provisions of Clause 63.1.2 of the GCC, which it had failed to do. The Arbitral Tribunal had taken note of this fact in considering whether the termination of the contract could be considered as termination under Clause 63.1.1 of the GCC. More importantly, the Arbitral Tribunal had found that, in fact, the petitioner had not taken recourse to Clause 63.1.1 of the GCC and thus, was not entitled to take benefit for the same.

22. The aforesaid view is a plausible view.

23. Notwithstanding the above, this Court had also called upon the learned counsel for the petitioner to take instructions whether the petitioner was willing to deposit the amount that it considered payable under Clause 63.1.2 of the GCC. The learned counsel for the petitioner had, after taking instructions, replied in the negative.

24. Thus, although, the petitioner has earnestly argued that it is liable to pay only the amount due under Clause 63.1.2 of the GCC; however, the petitioner is also not ready to pay the aforesaid amount. It is also relevant to note that the petitioner has not paid its share of the

arbitral fee.

25. This court is of the view that the present proceedings are clearly abuse of the process of Court. The present petition, is not *bonafide* and as is apparent from the above, has been filed only to delay further proceedings.

26. In view of the above, the impugned award does not warrant any interference in proceedings under Section 34 of the Act.

27. The present petition is dismissed on the ground of delay as well as on merits. Pending applications also stands disposed of.

VIBHU BAKHRU, J

MAY 29, 2018
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