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

\+ **O.M.P.(COMM) 287/2018 & IA 8886/2018**

Date of Decision : 14th December, 2018

IRCON INTERNATIONAL LTD. ..... Petitioner
Through: Mr.Chandan Kumar, Adv.

versus

C.R.SONS INFRA PROJECTS LTD. ..... Respondent
Through: Nemo

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 27.02.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the award of work of Construction of Corporate office building of IRCON at C-4, District Centre, Saket, New Delhi vide Agreement dated 17.08.2004.

2. Disputes having arisen between the parties, the same were referred to the Sole Arbitrator vide order dated 16.12.2009 passed by this Court in Arbitration Application No.254/2008. The summary of

the Award passed by the Sole Arbitrator is contained in paragraphs 316 to 318 of the Impugned Award and is reproduced hereinbelow:

> *"316. In view of the above, I hereby award the amount to the claimant as per detail given below:-*

	Claim number	**Amount Claimed**	**Amount Awarded**
317.	*Claim no.1*	*2,70,25,343/-*	*11,83,921.94*
	Claim no.2	*94,48,182/-*	*Nil*
	Claim no.3	*31,37,844/-*	*31,37,844/-*
	Claim no.4	*28,20,312/-*	*Nil*
	Claim no.5	*15,00,000/-*	*Nil*
	Claim no.6	*1,57,28,568/-*	*Nil*
	Claim no.7	*2,81,78,867/-*	*9% simple interest p.a. w.e.f. January, 2010.*
	Claim no. 8	*20,00,000/-*	*Rs.5.50 Lakhs*
		Total	***Rs.48,71,765.94***

> *318. In view of the above I hereby pass award in favour of the claimant and against the respondent in the sum of Rs-48,71,765.94 (Rupees Forty Eight Lakhs Seventy One Thousand Seven Hundred Sixty Five Rupees and Ninety Four Paise Only) with simple interest @9% per annum w.e.f. January, 2010 till realization. In addition the claimant is also entitled to an amount of Rs.4,900/- towards stamp duty."*

3. The petitioner has challenged the Impugned Award only to a limited extent in so far as it awards a sum of Rs.9,28,204.96 in Claim no.1 in favour of the respondent and a further sum of Rs.5.50 lacs as costs of the arbitration proceedings under Claim no.8.

4. As far as the amount of Rs.9,28,204.96, counsel for the petitioner submits that the Arbitrator in his Impugned Award has

categorically observed that the respondent had not challenged the deductions made by the petitioner in the final bill and infact, had accepted the correctness of the final bill. In spite of there being no challenge to the correctness of the final bill, the Arbitrator on his own went into the question of the justification of deductions of Rs.9,28,204.96 made by the petitioner in the final bill and held that the same were not justified and therefore, awarded the said sum in favour of the respondent. In this regard, he places reliance on paragraphs 203 to 206 of the Impugned Award, which are reproduced hereinbelow:

> "*203. It may however be <u>stated that in the present case the claimant did not refute the details given in the final bill and the deductions made by the respondent in the said final bill either in respect of the amount or in respect of the various heads under which deductions were made</u>. <u>In the statement of claim the claimant did not point out the incorrectness in the final bill prepared by the respondent and the deductions made thereunder</u>. The claimant only harped upon its own bill which is Annexure-XX and which is not proved at all.*
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> *204. In view of the fact that the claimant has failed to prove its claim no.1, even this amount of Rs.72,27,806/- is not payable to the claimant. The claimant has compared the amount claimed under various items namely item no.1.07 (supplying the chemical emulsion), item no.1.08 (Diluting & injecting chemical emulsion, item no.3.01 (P/L in position machine batched, machine mixed & machine vibrated design mix conc. Of specified grade for RCC-M 20, RCC), item no.3.05 (Centering & Shuttering), item no.3.05(i) (for weather shade, chajjas etc.), item no.3.07 (reinforcement of RCC*

work), item no.4.01 (brick work with CM 1.6 in foundation & plinth), item no.8.01 (20 mm thick kota stone flooring), item no.8.03 (62 mm CC Flooring "Hardcrete"), item no.10.04 (washed stone grit plaster), Ex.1 (supplying & filling good earth), Ex.6 (Kota stone slab 25mm thick in risers of steps, skirting), (finishing wall / ceiling with texture paint). According to the claimant under the aforesaid items the respondent has arbitrarily reduced the quantity in the final bill of various items than the previous running bills like 10th RA Bill, 11th RA Bill, 12th RA Bill, and 13th RA Bill and in some items the rate claimed is different than that proposed by the respondent. This contention of the claimant is without any basis. The measurements are duly signed. No such comparison with previous RA Bills can be allowed. The Tribunal is not supposed to make such a fishing and roving inquiry in the absence of any evidence adduced on record. The claimant cannot be permitted to agitate on the basis of comparison of what was paid or not paid upto 12th RA Bill which was the subject matter of the previous Ld. Arbitrator who has already passed award dated 10.02.2009.

205. Since at the time of arguments the claimant on its own has based its claim on the basis of the final bill of the respondent, the amount payable shown in the said final bill is Rs.39,84,117.98 which has to be taken as correct. Out of the said amount the claimant has made recovery of the amount of Rs.37,28,401/- as per following details:-

1.	*Income Tax*	*56,020/-*
2.	*Total deductions to be made P/F fastener to the canopy area*	*8,59,084.96*
3.	*Fixing / refixing of scaffolding for above work*	*52,236/-*
4.	*Refixing of granite stone from the area*	*16,884/-*

	where stones had fallen	
5.	*Advance*	*16,71,805/-*
6.	*Secured advance*	*4,85,778/-*
7.	*Labour Cess*	*5,86,593/-*
	Total	*37,28,400.96*

206. No objection can be taken to the amount deducted toward income tax of Rs.56,020/-, advance of Rs.16,71,805/-, secured advance of Rs.4,85,778/- and labour cess of Rs.5,86,593/-. The total amount of these deductions comes to Rs.28,00,196/-. However, deductions of Rs.8,59,084.96 towards P/F fastener to the canopy area, Rs.52,236/- towards refixing / refixing of scaffolding for above work and Rs.16,884/- towards refixing of granite stone from the area where stones had fallen cannot be accepted. These three deductions amount to Rs.9,28,204.96. There is nothing on record to show that the claimant was called upon to do the jobs towards P/F fastener to the canopy area, fixing / refixing of scaffolding for above work and refixing of granite stone from the area where stones had fallen and that the claimant refused to carry out the work in terms of the conditions of contract. As such the amount of Rs.9,28,204.96 cannot be permitted to be deducted from the amount payable to the claimant. From out of the amount of Rs.39,84,117.98 payable to the claimant the permissible deductions are of Rs.28,00,196/-. Hence the amount payable to the claimant is Rs.2,55,716.98 which is the balance amount shown payable under the final bill plus Rs. 9,28,204.96 totalling Rs.11,83,921.94. "

(Emphasis supplied)

5. In spite of time being granted, the respondent has failed to file any reply to the petition. Today, in spite of a pass over, none appears for the respondent.

6. A reading of the Impugned Award shows that the claim of the respondent was based on a purported bill marked as Ex.CW-1/20. The Arbitrator has discussed the said bill in detail in the Impugned Award and has held that the respondent failed to prove the same. The Arbitrator further held that the respondent itself has placed reliance on the final bill prepared by the petitioner and as noted above, in paragraph 203 of the Impugned Award, has held that the respondent did not refute the details given in the final bill and the deductions made therein. Once, there was no challenge to the deductions made in the final bill, there was no occasion for the Arbitrator to go into the justification of the deductions so made by the petitioner. The deductions being disallowed were with respect to defects in the work carried out by the respondent. If such defects had been accepted by the respondent and deductions on that account had also been accepted by the respondent, it was not within the jurisdiction of the Arbitrator to thereafter disallow such deductions on the ground that the petitioner had not called upon the respondent to remove such defects. This was not in dispute before the Arbitrator.

7. In view of the above, the Award in so far as it directs the payment of Rs.9,28,204.96 in favour of the respondent under Claim no.1 is set aside.

8. Counsel for the petitioner further submits that out of total of 7 claims, apart from the claim of costs raised by the respondent, the Arbitrator has found three claims raised by the respondent to be not proved. Even for Claim no.1, against an amount of Rs.2,70,25,343/-

claimed by the respondent, only a sum of Rs.11,83,921.94 was awarded by the Arbitrator in favour of the respondent. Out of Rs.11,83,921.94, the award for Rs.9,28,204.96 was unjustified. As far as Claim no.3 is concerned, he submits that this was a minor claim raised by the respondent when compared to the other claims of the respondent. He submits that therefore, the Arbitral Tribunal has erred in awarding costs of Rs.5.50 lacs in favour of the respondent under Claim no.8.

9. The Sole Arbitrator has discussed the issue of costs under Claim no.8 as under:

> "*310. Under the said head, the claimant claims an amount of Rs.20,00,000/-. The details and calculation in this respect are annexed as Annexure-XXVII colly.*
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> *311. In its reply it is stated by the respondent that the claimant avoided proceeding with the on-going arbitration and as per arbitrator's letter he wanted a change of arbitrator. It is thus the claimant who has been dragging his feet. The claimant should bear the cost of this litigation.*
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> *312. In its rejoinder it is stated by the claimant that the respondent has failed to clear the dues of the claimant and therefore the claimant had to revoke the arbitration clause for his claims and as such it is the respondent who had to bear the cost of litigation.*
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> *313. Section 31A of Arbitration and Conciliation Act, 1996 provides regime for costs. "Costs" means reasonable costs relating to-*
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> *i) the fees and expenses of the arbitrators, Courts and witnesses;*

ii) legal fees and expenses;
iii) any administration fees of the institution supervising the arbitration; and
iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

314. In determining the costs, arbitral tribunal should have regard to the circumstances, including-

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

315. The claimant is entitled to the fee paid to the arbitral tribunal. The claimant paid an amount of Rs.4,63,147/- towards fees. Considering the fees and expenses incurred by the claimant of the Tribunal, legal fees and expenses, I feel that in the fact and circumstances of this case the claimant is entitled to cost of Rs.5.50 Lakhs in all."

10. Though the Arbitrator has correctly noted the provisions of Section 31A of the Act, he has failed to appreciate that the majority of the claims raised by the respondent were found to be frivolous and not proved.

11. As noted above, the respondent has infact, succeeded only to a very minor extent in two out of six claims raised by it. This therefore, was not a case where the petitioner could have been burdened with the costs of arbitration proceedings.

12. In the Schedule to the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the Illustration appended to sub-section 2 of Section 35 of the CPC as amended provides that where the plaintiff seeks a money decree for breach of contract and damages and the Court finds that though the plaintiff is entitled to the money decree, the claim for damages is frivolous and vexatious, the Court may impose costs on the plaintiff, for having raised frivolous claims for damages.

13. In the present case, as majority of the claims raised by the respondent were found to be frivolous, the award of costs of the arbitration proceedings against the petitioner cannot be sustained.

14. In view of the above, the Award in so far as it directs payment of Rs.9,28,204.96 under Claim No.1 and Rs.5.50 lacs under Claim no.8 is set aside. Parties shall bear their own costs.

NAVIN CHAWLA, J

DECEMBER 14, 2018
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