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

+ W.P.(C) 7886/2016 & CM APP No. 32640/2016

UNION OF INDIA Petitioner

Through: Ms.Geetanjli Mohan, Adv.

versus

CEMENT CORPORATION OF INDIA LTD. Respondent

Through: Mr.Jainendra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

% **03.04.2018**

1. This is a writ petition whereby challenge is laid to the order dated 20.4.2016, passed by the Appellate Authority. The Appellate Authority by virtue of the impugned order has sustained the award dated 16.09.2009, passed by the learned Arbitrator.

2. To be noted, in this case, arbitration between the parties herein was conducted under the Permanent Machinery of Arbitration (in short "PMA") mechanism and therefore, the appellate provision contained in the PMA guidelines was taken to by the petitioner/Union of India to prefer an appeal.

2. The petitioner/Union of India was the original claimant. The petitioner/Union of India had lodged a claim in the sum of Rs.2.65 crores on account of risk purchase made qua three contracts executed with the respondent herein.

2.1 In addition to the claim in the sum of Rs.2.65 crores, the petitioner/Union of India also demanded payment of interest by the respondent at the rate of Rs.18% per annum. The respondent herein preferred a counter claim against the petitioner/Union of India in the sum of Rs.51,69,143.75.

3. The learned Arbitrator vide order dated 16.09.2009 rejected the claim made

by the petitioner/Union of India on account of risk purchase and sustained the counter claim made by the respondent in its entirety. It is this which propelled the petitioner/Union of India to prefer an appeal before the Appellate Authority, which resulted in passing of the impugned order.

4. Ms.Geetanjli Mohan, learned counsel for the petitioner/Union of India, submits that apart from anything else, the impugned order passed by the Appellate Authority is flawed for the reason that there is no discussion qua the objection raised by the petitioner/Union of India with regard to the claim for loss of profit made by the respondent. Insofar as the claim made by the petitioner/UOI on account of risk purchase is concerned, Ms.Geetanjli Mohan, says that it cannot but be argued that the learned Arbitrator has returned a finding of fact which cannot be assailed in writ jurisdiction, especially, when the matter on merits has been examined at length at two levels, i.e., by the learned Arbitrator, and then, by the Appellate Authority.

5. On the other hand, learned counsel for the respondent says that the Appellate Authority has sustained the Award dated 16.09.2009 in its entirety and, therefore, no interference is called for.

6. I have examined the record as also the orders passed by the Appellate Authority. Insofar as the issue pertaining to risk purchase is concerned, the petitioner/UOI has not been able to make out a case for setting aside the impugned order on that score. The rejection of the claim for risk purchase by the learned Arbitrator has been sustained on merits by the Appellate Authority. Therefore, to my mind, no interference is called for in that behalf. However, in respect of the other issue which concerns the award of loss of profit to the respondent, according to me, learned counsel for the petitioner has made out a case. My attention has been drawn by the learned counsel for the petitioner to the proceedings dated 30.12.2015, of the Appellate Authority, the relevant portion of which is extracted hereafter for the sake of convenience:

"This appeal comes before me for the first time after Sh. S.K.Mohapatra, Additional Secretary, to whom this matter was assigned, demitted office. It was stated by the parties that matters is at the final stage of hearing as pleadings have already been completed. The parties agree that they would file their written submissions and the appeal can be disposed of on the basis of the written submissions to be submitted them.

Let the written submissions be filed within a period of four weeks from today. parties agree that there is no need of further personal hearing and that the appeal can be disposed of on the basis of written submissions to be filed by them. Ordered accordingly."

7. A perusal of the proceedings would show that it was agreed that the parties will not address oral arguments and that, the Appellate Authority proceeded to decide the appeal based on the written submissions filed by them. The written submissions filed on behalf of the petitioner/Union of India show that a specific objection has been taken *vis-a-vis* the loss of profit claimed by the respondent. The relevant part of the objections is extracted herein.

“(D)LOSS SUFFERED BY CLAIMANT NOT PROVED

In this regard it is submitted that PO pertaining to the order placed on Respondent under clause 10 stipulated total cost including all taxes to be paid on production of Railway receipt (RR) similar condition was also there in risk purchases order placed on IIIrd party thus indicating that on receipt of RR 100% payment was to be made and thus after the cement was loaded and RR was issued and produced before the purchaser, payments were made to the third party. It is submitted that before the Arbitrator the CCI had never taken any plea regarding the non completion of the risk purchase contract in fact it was nobody's case that payments were not made for the supplies under the risk purchase contracts. For ready reference one of PO purchase order placed on IIIrd party under the repurchase order is annexed herewith and marked as Annexure A-6 (all PO had same terms and conditions). It is submitted that all supplies under risk purchase contracts were completed and on production of RR as per the conditions stipulated in the PO 100% payments had to be made.

(E) ARBITRATOR WRONGLY AWARDED A SUM OF Rs.

**51,69,143.75 ON ACCOUNT OF LOSSES SUFFERED DUE
SUPPLY OF CEMENT AT LESSOR COSTS.**

It is submitted that the whole premise of awarding the said sum is wrong and legally unsustainable in view of submissions made in para; (A). It is a little strange that before awarding the claim under this head, in the discussion, the arbitrator has made observations that when termination is done wrongly the contractor is entitled to claim damages for business process which he expected to earn by undertaking the contract. The said observation could be a relevant basis for awarding claim of CCI on account of loss of sale suffered due to action of the appellant in terminating the contract but on the basis of this observation the CCI could not be awarded an amount on account of difference in quoted price and escalated price. By awarding the said sum the Arbitrator in effect is compelling the appellant to make the payment to CCI which is not payable being against the terms of the contract and on the basis of which contract was terminated. It is again reiterated that the learned Arbitrator; wrongly held that the termination on the ground that the escalated price cannot be paid to CCI, the contracts being fixed price contracts specially when in the risk purchase contracts higher price than the escalated price demanded by CCI came to be paid by the appellants. It is further submitted that the learned Arbitrator based her decision on extraneous circumstances which are completely irrelevant instead of basing it on established principles of law governing the contracts.

On the basis of submissions made herein above it is respectfully prayed that the Award dated 16.9.2009 be set aside and the appeal of the Railway administration be allowed with costs”.

(emphasis is mine)

8. A perusal of the impugned order passed by the Appellate Authority would show that there is no discussion with regard to the counter claim made by the respondent on account of loss of profits. The Appellate Authority has mechanically sustained the Award dated 16.09.2009 on this score. Accordingly, the impugned order is set aside. The matter is remanded to the Appellate Authority for a *de novo* adjudication of counter claim filed by the respondent.

8.1 The Appellate Authority will issue a fresh notice to the parties and

after hearing them and/or their authorised representative, will pass a speaking order in that regard.

9. The writ petition stand disposed of in the above terms.

RAJIV SHAKDHER, J

APRIL 03, 2018

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