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

+ **FAO(OS) (COMM) 229/2018**

HINDUSTAN CONSTRUCTION CO LTD Appellant

Through: Mr.Dayan Krishnan, Sr.Advocate with
Ms.Malvika Lal, Advocate

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA Respondent

Through: Mr.Maurya Vijay Chandra, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

ORDER

% **15.10.2018**

C.M.42085/2018 (delay)

1. This application has been filed by the applicant/appellant seeking condonation of delay in filing the present appeal.
2. There is no opposition to the prayer made in the application. Accordingly, delay of 36 days in filing the present appeal is condoned.
3. The application stands disposed of.

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4. Challenge in this appeal is to the order dated 02.07.2018 by which the learned Single Judge has allowed the objection to the arbitral Award dated 03.09.2017 in part and the counter claim of the appellant herein has been rejected on the ground that the Arbitrator has failed to give any reasons for the same.
5. Mr.Dayan Krishnan, learned senior counsel appearing for the appellant submits that the effect of the aforesaid order would be that the counter claims are to be adjudicated afresh which direction has not been issued by the Single

Judge.

6. Notice to show cause as to why appeal be not admitted. Mr. Maurya Vijay Chandra, counsel for the respondent accepts notice.

7. We have heard learned counsels for the parties. Paragraphs 38 to 43 of the impugned order dated 02.07.2018 in O.M.P.(COMM) 19/2018 passed by the learned Single Judge read as under:

38. In the circumstances, the Arbitral Tribunal was required to adjudicate whether (i) the counter claim fell within the scope of reference; (ii) if so, whether it was barred by limitation; (iii) and if not, whether it was sustainable on merits. However, it is seen that although the Arbitral Tribunal has adjudicated the issue as to whether the counter claim was barred by limitation, it has not addressed any of the other issues. The Arbitral Tribunal has simply allowed the counter claim in the following words:-

“10.1.1 It is noted from the final statement prepared by the Claimant himself that a sum of Rs.1,25,95,186/- has been shown as payable to the Respondent. However, the Claimant has opposed the claim, not only on the merit but also on the plea of limitation. The Claimant has mentioned that the Counter Claim of the Respondent is even otherwise not admissible as the claim has been made after the period of limitation. The AT holds that Final Payment Certificate was being prepared by the Respondent even on 23.05.2016, which shows that the accounts between the Claimant and the Respondent were still being made as on 23.05.2016, as such the Counter Claim preferred by the Respondent cannot be considered as barred by limitation. As such AT considers it as fair and reasonable to award a sum of Rs.1,25,05,186/- in favour of the Respondent towards its counter claim.”

39. As apparent from the above, there are no reasons provided by the Arbitral Tribunal for allowing the counter claim. This is plainly contrary to Section 31(3) of the Act, which mandates that the Arbitral Tribunal shall state the reasons upon which the arbitral award is passed unless the parties have agreed otherwise or the arbitral award is a consent award.

40. It cannot be disputed that it is a fundamental policy of Indian law that all decisions must be informed by reason and such reasons,

however brief, must be discernable from the order embodying such decisions.

41. In view of the above, this Court is unable to sustain the award of counter claim in favour of HCL as the same is not only contrary to Section 31(3) of the Act but also falls foul of Section 34(2)(d)(ii) of the Act as being contrary to fundamental policy of Indian law.

42. In view of the above, the impugned award to the extent of counter claim awarded in favour of HCL, is set aside.

43. The petition and the pending applications are disposed of. Parties are left to bear their own costs.”

8. Mr.Krishnan relies upon an order passed by the Supreme Court of India in the case of ***Ambica Constructions vs. Union of India*** reported in (2015) 17 SCC 357, which we reproduce below :

“1. Leave granted. Heard the parties. The challenge in this appeal is to the order dated 15-10-2004 passed by the Division Bench of the High Court of Calcutta in *Ambica Construction v. Union of India* [*Ambica Construction v. Union of India*, APO No. 255 of 2001, order dated 15-10-2004 (Cal)] whereby the appeal filed by the appellant has been dismissed. The High Court has noticed that the learned Single Judge did not decide a contention made in the application for setting aside the award. The High Court further noticed that the learned Single Judge neither set aside nor affirmed the award or decide the application on merits.

2. Having noticed the order passed by the learned Single Judge, the Division Bench was also of the view that since the arbitrator admittedly has not assigned any reason in passing the award, the appeal was disposed of without setting aside the award. In our view, the correct order would have been to set aside the award and remand back the matter to the arbitrator to pass the award after assigning the reasons. In this view of the matter, the orders of the learned Single Judge and that of the Division Bench [*Ambica Construction v. Union of India*, APO No. 255 of 2001, order dated 15-10-2004 (Cal)] are set aside and the matter is remitted back to the arbitrator for assigning reasons for his award.

3. The appeal is disposed of in the above terms.”

9. Counsel for the respondent has no disputed that upon rejection of the counter claim due to lack of reasons the same would have to be decided afresh.

10. Since the award pertaining to the counter claim of the appellants has been set aside, in our view, the matter should have been remanded back either to the Arbitral Tribunal or a fresh Arbitrator should have been appointed in the matter or it should have been clarified that it would be open for the appellant herein to seek a fresh remedy in relation to the rejection of the counter claim.

11. The matter has been passed over once to enable the counsel for National Highway Authority of India (NHAI) to seek appropriate instructions. It is agreed by the counsels for the parties that this Court may appoint a sole Arbitrator to decide the counter claim filed by the appellant herein.

12. Accordingly, we appoint Mr.Darmar Murgesan, retired Chief Justice of this Court as a sole Arbitrator in the matter. The fee of the arbitrator shall be fixed as per the fee schedule of NHAI.

13. The appeal stands disposed of accordingly.

14. No costs.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

OCTOBER 15, 2018

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