

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

% Date of decision: 22nd October, 2018

+ FAO(OS) 158/2018, CM Nos. 43909-43910/2018

M/S DELHI TOURISM AND TRANSPORTATION
DEVELOPMENT CORPORATION

..... Appellant

Through: Mr. P.C. Sen, Sr. Adv. with
Mr. Abhimanyu Garg, Mrs. Preety
Makkar, Mr. Kaustabh Singh, Advs.

versus

M/S GAMMON INDIA LIMITED

..... Respondent

Through:

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM No. 43909/2018

Exemption allowed subject to all just exceptions.

Application stands disposed of.

CM No. 43910/2018 (seeking condonation of delay)

This is an application filed by the appellant seeking condonation of 19 days delay in filing the petition. For the reasons stated in the application, the delay of 19 days in filing the petition is condoned. Application stands disposed of.

FAO(OS) 158/2018

1. This appeal has been filed under Section 10 of the Delhi High Court Act, 1966 read with Section 37 of the Arbitration & Conciliations Act, 1996 (for short 'Act of 1996') against the judgment dated July 16, 2018 whereby the learned Single Judge has rejected the petition filed by the appellant under Section 34 of the Act challenging the Arbitral award dated June 09, 2015.

2. The facts are, the parties herein entered into a contract for construction of a flyover from Lajpat Nagar to Srinivaspuri for a consideration of Rs.42.57 crores. The work was to be completed within a period of 18 months. It is not disputed that the work could not be completed within the time limit and extension was granted by the appellant to the respondent vide communication dated July 04, 2005. On April 12, 2005, the construction of the flyover was completed by the respondent after a delay of almost one year. Vide the award dated June 09, 2015, the learned Arbitrator, so appointed, granted an amount of Rs.3,77,40,595/- to the respondent on account of various claims along with interest. A perusal of the impugned order would show that the appellant herein had primarily made two

submissions before the learned Single Judge (i) the procedure for invoking arbitration was never followed by the respondent; and (ii) once the final bill has been settled on July 28, 2006, then after two years, the respondent was precluded from raising fresh claims.

3. With regard to both the issues, the appellant herein relied upon Clause 25 of the Contract, which we reproduce as under:-

“CLAUSE 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:-

i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or

disputes any drawings, record or decision given in writing by the Engineer-in-charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days requests the Superintendent Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer in writing shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of the Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of Contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from the receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator.

ii) Except where the decision has come final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, DTTDC, in charge of the work or if there be no Chief Engineer, the administrative head of the said DTTDC. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Chief Engineer, DTTDC or the administrative head of the DTTDC, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all. It is also a term of this contract that if the contractor does not make any demand for

appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the DTTDC/Govt. shall be discharged and released of all liabilities under the contract in respect of these claims.”

4. Insofar as the submission No.1 above is concerned, it was the case of the appellant before the learned Single Judge that as per Clause 25 of the Contract for admissibility of claims, the same have to be referred to Engineer, In-Charge then to Superintending Engineer and finally to Chief Engineer. As the same was not followed, the claims were not maintainable. The learned Single Judge in paras 29 to 31, has held as under:-

“29. The aforesaid clearly evinces if the petitioner regarded the procedure prescribed under Clause 25 of the Contract for arbitrability of claims (of referring the claims first to the Engineer in-Charge, then to the Superintending Engineer and then the Chief Engineer) was not followed, then it should have raised the said objection before proceeding with the Arbitration without undue delay. However, in the instant case since the petitioner failed to raise any such objection before

the learned arbitrator, therefore it is now barred under Section 4 to raise the said plea for the first time before this Court only in oral submissions. Reliance is placed on paragraph 39 of the judgment in Bharat Sanchar Nigam Limited vs Motorola India Private Limited (2009) 2 SCC 337.

30. Since the petitioner has neither pleaded nor argued before the learned sole arbitrator about non-compliance of the procedure to be followed for arbitrability of claims under Clause 25 of the Contract, nor pleaded the same before this Court in any of the submissions (Section 34 Petition, Rejoinder and Written Submissions), the same cannot be now considered by this Court, per Bharat Singh and Others vs. State of Haryana and Others (1988) 4 SCC 534; refer paragraph 13; and Ritesh Tiwari and Another vs. State of U.P. & Others, reported as (2010) 10 SCC 677; refer paragraph 24.

31. The reliance placed by the petitioner on the cases of Harsha Constructions v. Union of India and Others, (2014) 9 SCC 246 and Indian Oil Corporation Limited v. ERA Construction (India) Ltd., OMP No.104/2006 in this Court is completely misplaced. The decision in Harsha Construction (supra) case clearly provides there is a separate clause being Clause 39 which is an excepted matter and hence could not have been

adjudicated upon by the Arbitrator as provided under Clause 63. However, in the instant case the issue of excepted matter does not arise. Even assuming without admitting for the sake of argument, that there is a procedure prescribed to be followed for arbitrability of claims, it by no stretch of imagination can mean that it be considered as an excepted matter. Hence, reliance on Harsha Construction (supra) is completely misplaced.”

5. Suffice to state, from the finding of the learned Single Judge, it is clear that the plea urged was never taken by the appellant before the learned Arbitrator. The learned Single Judge had relied upon Section 4 of the Act of 1996 to hold that the appellant is now barred to raise such a plea for the first time only during the oral submissions. He relied upon the judgments in the case of ***Bharat Singh & Ors v. State of Haryana and Ors (1988) 4 SCC 534*** and ***Ritesh Tiwari and Another vs. State of U.P. & Others, (2010) 10 SCC 677***. The aforesaid being a finding of fact by the learned Single Judge and the fact, reference to Arbitration was made by the appellant itself, we see no illegality in the conclusion arrived at by the learned Single Judge.

6. On the aspect of limitation, it was contended by Mr. Sen, learned Senior Counsel for the appellant by relying upon Section 43 of the Act of 1996 that in terms of Clause 25 of the Contract, if the other party does not make any demand for appointment of Arbitrator in respect of any of the claims in writing within 120 days of receiving the intimation from the Engineer, In-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred unless, the respondent got the time extended by approaching this Court under Section 43 of the Act. Having not done that, the bar under Clause 25 would hit the claims as raised by the respondent before the learned Arbitrator. He would rely upon the judgment of the Madras High Court in the case of *Dr. E. Muralidharan v. Venkataraman & Co. 2009 (3) RAJ 537 (Mad)* in support of his contention.

7. On a specific query to Mr. Sen whether the plea, as has been advanced before us now, had been taken before the learned Single Judge; the answer of Mr. Sen was that the issue of limitation was taken before the learned Single Judge, which was rejected by him. We find that the appellant had not taken any plea in the manner now advanced by Mr. Sen, before the learned Single Judge. Suffice it to

state, the issue of limitation is a mixed question of fact and law, should have been taken by the appellant, at the time of reference / before the Arbitrator. This would have possibly made the respondent seek the remedy as available under Section 43 of the Act of 1996 at the relevant time, when three years of limitation for a money claim was available to the respondent. Having not made the plea before the learned Arbitrator, the plea advanced by Mr. Sen, does not impress us. We reject the same. One of the submissions of Mr. Sen was also with regard to Claim 41 inasmuch as the learned Arbitrator could not have awarded damages against the appellant when admittedly the appellant was not responsible for the delay in completing the contract within a period of 18 months as stipulated in the contract. We note, from the impugned judgment that such an issue was not argued before the learned Single Judge. Be that as it may, the reasoning given by the learned Arbitrator is the following:-

*“H. It is also worth noting that the Clause 2 provides
“If the contractor fails to maintain the required
progress in terms of clause 5 or to complete the work
and clear the site on or before the contract or
extended date of completion, he shall, without
prejudice to any other right or remedy available
under the law to the DTTDC on account of such*

breach, pay as agreed compensation the amount calculated at the rates, as stipulated below or such smaller amount as the Superintending Engineer (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day / week (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete...” (Emphasis supplied). The very fact that no compensation was levied by Respondents is proof enough that the concerned authority at the relevant point of time did not consider the Claimants being responsible for the delays.”

8. The aforesaid is a plausible view by the learned Arbitrator, which is not a perverse view, as sought to be contended by Mr. Sen and this court cannot substitute the view of the learned Arbitrator by its own view. We do not find any merit in the plea of Mr. Sen.

9. On the plea of interest, we find that such a plea does not find mention in the impugned order. Be that as it may, the learned Arbitrator has granted the interest in favour of the respondent on the basis of the following conclusion:-

“D. The amounts awarded against Claims No.2,5, 10, 12, 15, 20, 21, 22, 25, 27, 28, 29, 33, 37, 41, & 42

totaling to Rs.2,44,42,463/- are those as were part of the Claims of Claimants while submitting their final bill vide their letter dated 20-09-2005 (Exhibit C-122). The total period from 20-03-2006, which was the due date of payment of final bill, and up to the date of award works out to a period of 9 years, 2 months & 21 days. Considering however several adjournments, rather of long durations sought by Claimants during the proceedings, I deem it fit to reduce the effective period for which interest should be granted by a period of three years. Accordingly, interest is awarded for a period of 6 years, 2 months & 21 days.

E. Since the amount of Rs.2,35,46,494/- awarded against Claims Nos 1 to 41 would also have been subject to 1% Labour Cess and 2% WC Tax as per terms of Contract, the net amount of Rs.2,28,40,099/- against these Claims Nos 1 to 41 together with the amount of Rs.8,95,969/- awarded against Claim No.42, i.e an amount of Rs.2,37,36,068/- would attract Interest, which works out to Rs.1,32,98,132/-."

10. The learned Arbitrator has granted interest for 6 years, 2 months and 21 days. There is some justification for the learned Arbitrator to grant interest to the respondent. Noting the fact that the jurisdiction of this Court under Section 37 of the Act is very

limited, we are of the view that the impugned order does not require any interference. The appeal is dismissed.

V. KAMESWAR RAO, J

CHIEF JUSTICE

OCTOBER 22, 2018/ak

