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

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Pronounced on: 12.07.2018

+ O.M.P. (COMM) 260/2017

IRCON INTERNATIONAL LIMITED

..... Petitioner

Through

Mr.Dinesh Agnani, Sr.Advocate with
Ms.Leena Tuteja & Mr.Ishan Chawla,
Advocates

versus

HINDUSTAN CONSTRUCTION CO. LTD.

..... Respondent

Through

Mr.Dayan Krishnan, Sr.Advocate with
Ms.Malvika Lal & Mr.Sanjeev
Sheshadri, Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) seeking to impugn the Award dated 30.03.2017 passed by the learned Arbitrator.

2. The petitioner awarded a contract to the respondent vide Agreement dated 10.12.2004 for construction of Peer Panjal Tunnel from CH-158 + 730 to CH 163 + 560 on Laole Qazigund Section of Udhampur Srinagar, Baramulla New BG Railway Line. The length of the tunnel was 6130 meters. The work was awarded through a Letter of Acceptance dated 10.08.2005 and

at the contract price of Rs.218,35,17,680/- and was to be completed within 44 months of issuance of LOI i.e. 08.04.2009. The Agreement between the parties was executed on 18.02.2006. As against the above noted completion date, the respondent finally completed the contract work on 29.06.2013. It is the contention of the petitioner that the contract provided 12 key dates. However, on account of the acts of the respondent the scheduled date of completion including the key dates had to be repeatedly extended because of the failure on the part of the respondent. It has been pointed out that the present Award is only concerned for the period from March 2011 to 29.06.2013. With respect to the period prior to March 2011, it is stated that different arbitration proceedings were pending.

3. The respondent invoked the arbitration clause vide its letter dated 17.02.2014 in terms of Clause 59.2 of SCC. The claim of the respondent was rejected by the Engineer In-Charge. The respondent hence filed a petition before this court for appointment of a Sole Arbitrator. Vide order dated 23.12.2015 in Arb.Pet. 521/2015 filed by the respondent, Justice (Retd.)P.K. Bahri was appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

4. Before the learned Arbitrator, the parties filed the following claims/counter claims:-

"The claimant raised the following claims amounting to Rs.30,67,45,458/-:-

Claim No.1. Cost incurred on the equipment/machineries, manpower, site over heads, head office over heads, POL, GPA insurance, BG charges and CAR policy Rs. 21,55,38,718/- (Details depicted in Annexure A to I) and Annexure J is in respect of interest claimed at the rate of 13.25% with effect

from 17-12-2013 till date of filing of statement of claim amounting to Rs, 6, 58,48,907/-.

Claim No.2. Cost on account of loss of opportunity Rs. 2,53,57,833/- The claimant has claimed pendente- lite and future interest at the rate of 18% per annum till realization and also costs of the arbitration proceedings.

5. The respondent raised following counter claims alleging that the claimant has been responsible for delay in executing the work of the contract:

Counter claim No.1. Rs.15,12,40,470/- is claimed as extra costs incurred for detail design consultancy and site supervision etc during the extended period of the contract.

Counter claim No.2. Rs.14,74,11,809/- as cost incurred for rectification work as the quality of the work executed by the claimant was poor and also additional costs incurred for infrastructure established and head-office costs incurred in the extended period of the contract and extra salary paid to the staff.

Counter claim No.3. Rs. 28,15,41,398/- is claimed for loss of profit/loss of business during the extended period.

Counter claim No.4. Rs. 18,59,00,568/- is claimed due to escalation in the extended period.

Counter claim No.5. Interest at the rate of 12%PA is claimed on the aforesaid amounts of counterclaims from due date till realization.

Counter claim No.6. Costs of the arbitration proceedings are claimed.”

6. The main issue was as to who was responsible for the delay in completion of the work, especially, for the period in question i.e. from 01.03.2011 to 29.06.2013.

The learned Arbitrator noted that the respondent had been submitting letters of extension of time on account of varied grounds since January 2009 onwards. The learned Arbitrator also noted that the petitioner issued completion certificate vide letter dated 10.10.2013 recording the date of completion as 23.07.2013 and performance of the respondent was certified as satisfactory. The learned Arbitrator concluded that from the facts it is clear that the contract continued to be executed even after the expiry of the stipulated time fixed in the contract. The petitioner had been taking its own time to take decision on various applications moved by the respondent seeking extension of time. Ultimately after completion of the work, the petitioner then decided to extend the time up to the date of completion of the work without imposing any liquidated damages. Hence, the learned Arbitrator held that the time ceased to be the essence of the contract and under Section 55 of the Contract Act, no notice was required to be given for claiming damages for breach of contract. The learned Arbitrator also noted that the respondent had in its letter made the petitioner aware that it was suffering losses due to the delay for reasons attributable to the petitioner and that the respondent intended to recover that damages. The learned Arbitrator accepted the judgments cited by the respondent in OMP No. 44/2010 dated 05.03.2010 titled as ***Union of India vs. M/s. Chenab Construction Joint Venture***, OMP 327/2013 decided on 25.03.2010 titled as ***Bharat Lal vs. Municipal Corporation of Delhi*** and OMP No. 410/2007 decided on 02.09.2015 titled as ***DSIDC vs. Mohan Construction Company*** of this court O.M.P. (COMM) 260/2017

where it was held that grant of extension of time without levying of liquidated damages shows that the contractor cannot be blamed for any delay in completion of the work.

The learned Arbitrator after going through the record also concluded that there is no evidence on record to prove that the respondent delayed the execution of the work.

7. The learned arbitrator hence concluded that the petitioner was responsible for the delay in completion of the contract and the respondent is entitled to claim losses/damages.

8. On the quantification of damages, the learned Arbitrator noted that the respondent originally claimed Rs.23,55,38,718/- but later reduced this amount to Rs.13,84,42,811/-. In addition, the respondent claimed loss of opportunity of Rs.2,53,57,833/- which was reduced to Rs. 1,71,72,977/-. The claimant had claimed cost for only 158 days instead of 852 days. The learned Arbitrator accepted the calculations given by the respondent and passed an award in favour of the respondent for Rs.13,84,42,811/- plus interest. The claim of the respondent for loss of opportunity was rejected. Regarding the counter-claim raised by petitioner noting that they are based on the plea that the respondent was responsible for the delay in completion of the contract, the said counter claim was rejected.

9. I have heard learned senior counsel for the parties.

10. Learned senior counsel for the petitioner has sought to impugn the Award as follows:-

(i) At the outset, it was clarified that the real issue is about the finding recorded by the learned Arbitrator about the delay. It is pleaded that merely because, the petitioner did not impose liquidated damages on the respondent

would not and cannot lead to a finding of fact that the respondent was not responsible for the delay in completion of the contract.

(ii) It is also pleaded that the learned Arbitrator has wrongly accepted the calculations of the respondents for damages. Learned senior counsel has argued that the calculations as stated by the respondent for the excess amount also includes equipment which were not required at the site but continued to be at the site for no purpose adding to the billing.

(iii) It was further pleaded that the learned Arbitrator has wrongly taken the life span of the machines for the purpose of calculation of the damages payable. Hence, it is pleaded that the damages calculated are entirely erroneous and are liable to be struck down.

11. In my opinion, the pleas raised by the petitioner are entirely misconceived. As far as the finding of delay is concerned noted the relevant facts. The petitioner issued a completion certificate dated 10.10.2013 regarding the completion of the work as on 23.07.2013 and performance of the respondent was found to be satisfactory. The learned Arbitrator has also noted that the respondent continued to execute the work after expiry of the stipulated period and ultimately after completion of the work, the petitioner extended the time up to the date of the completion of the work.

The learned Arbitrator noted the DDC Report (Design and Supervision Consultant's Report) and the Non-Compliance Reports (NCRs) and the letters exchanged between the parties contemporaneously. The Design and Supervision Consultant was appointed by the petitioner to supervise the day to day construction and give instructions to the respondent so that the respondent could remedy the shortcomings and defects. The learned Arbitrator noted that shortcomings pointed out in the DDRs were O.M.P. (COMM) 260/2017

not continuing as the monthly bills being prepared and scrutinized did not show any material deduction were made on account of the defects or shortcomings. This clearly implied that the shortcomings that were pointed out in the DDR have been remedied by the respondent. The reports also do not indicate, the learned Arbitrator concluded, that there was delay in execution of the work by the respondent. The same is the position regarding the NCRs.

12. The learned Arbitrator noted some of the reasons given by the respondent for the delay in execution of the work by the respondent.

One of the main reasons given was that the delay was due to unforeseen change in geological condition/variation including in distribution of rock classes. The learned Arbitrator noted the plea of the petitioner relying upon Clause 5.4 of the instructions to the bidder which required the tenderer to assess the site condition before giving its tender. The petitioner had contended that it was the failure of the respondent to not properly examine the site conditions including geological conditions and the petitioner cannot be blamed for the same. This plea of the petitioner was rejected noting that the said clause 5.4 does not contemplate that the tenderer was to get a full survey done to know the geological conditions. The petitioner had conducted an extensive assessment of the site by site surveys and had incorporated the information so obtained in the bid document. All tenderers had to accept the same and give their bids. It is only while executing the work that it was found that the conditions encountered were substantially different including rock classes that required changes in methodology of execution resulting in an extra cost/delay.

13. On the plea of the respondent that extension of time was granted

without imposition of liquidated damages, reference may be had to the judgment of this court in *Union of India vs. M/s. Chenab Constructions Joint Venture*, OMP 44/2010 dated 05.03.2010 where this court held as follows:-

“The aforesaid conclusion clearly shows that the contract was extended for an abnormal period of time. Not only was the contract extended for an additional period of 77 months, the fact of the matter was also that because of non-construction of an additional pier P1 which was not in the scope of the work of the respondent, but which the petitioner had got constructed through another contractor, the work in question got delayed. Further the Arbitrators have noted that there was default on the part of the petitioner in not only originally having an unrealistic time period but considerable time was consumed in making changes and approval of design and there was further delay due to various changes and unforeseen circumstances beyond reasonable control of the claimant. It is further noted that the cash OMP 44/2010 Page 7 flow got affected because the respondent was not compensated for the escalation payment. Another finding of fact is that the extension which has been granted to the respondent for completion of the contract was an extension without levy of liquidated damages. Once there is no levy of liquidated damages, it is quite clear that the extension is not on account of any fault of the contractor. I, therefore, do not find any fault whatsoever with the aforesaid awarding of the claim to the respondent by the Arbitration Tribunal.”

14. I may, however, point out that the learned Arbitrator has not gone solely on the plea of the respondent that extension of time was granted by the petitioner without imposition of liquidated damages and hence the respondent was not guilty of any acts which caused the delay. The learned Arbitration has gone into the material facts to conclude that the respondent is not responsible for the delay.

15. Clearly, the learned Arbitrator has recorded a finding of fact based on the record that there had been no delay which can be attributable to the respondent. These are findings of fact. There are no cogent reasons to challenge the said findings.

16. The second contention raised by the learned senior counsel for the petitioner was regarding the plea that the learned Arbitrator has wrongly accepted the calculations of the respondent. It has been pleaded that some of the equipments which were billed were not deployed. Reliance is also placed on a chart that was filed in court which appears to be a chart filed before the learned Arbitrator. The chart seeks to highlight the dates up to which the equipments were required and the date of de-mobilization of the equipments. It is pleaded from the chart that despite the fact that the equipment were no longer required, demobilisation of the same took place later. It is further pleaded that the respondent still billed the petitioner for the excess period which bills the learned Arbitrator has wrongly accepted. It has also been pointed out that some cars and vehicles have also been added in the list for which there was no provision.

17. A perusal of the Award would show that the learned Arbitrator has noted this plea raised by the petitioner. The learned Arbitrator concluded that the equipments that were shown were actually deployed by the respondent. The learned Arbitrator noted that the petitioner relied upon Annexure/ Appendix XIV of the Contract which details out the equipment as originally envisaged for mobilization at the site and noted the plea of the petitioner that additional equipments could not be mobilized. This contention was rejected by the learned Arbitrator as under Clause 31 of Special Condition of Contract, the responsibility was on the respondent to mobilize all equipments

that were necessary for executing the work. The changed site geological conditions, required deployment of more equipments than what was originally envisaged.

The learned Arbitrator also noted that the respondent has referred to monthly progress report from March 2011 which gives the details of the equipments deployed at the site which is not disputed.

These are findings of fact recorded by the learned Arbitrator. There are no reasons to disturb the said findings.

18. Even otherwise, the chart relied upon by the learned senior counsel for the petitioner no doubt gives the dates on which as per the petitioner the requirement of the equipment at the site ceased. However, it is not possible for this court to determine as to whether these dates given in the chart are factually correct. These are issues which had to be pleaded before the learned Arbitrator. It is not for this court to, based on this chart, give a different finding of fact. There is no merit in the said plea.

19. Another contention raised by the learned senior counsel for the petitioner pertained to the life span of the machines. The learned Arbitrator noted the plea of the petitioner that most of the machinery brought on site had already outlived its life and was out dated. The learned Arbitrator noted that the petitioner had calculated the life of the equipment assuming it worked for 23 hours a day. This calculation of the petitioner was rejected noting that no machinery can be worked for 23 hours a day as assumed by the petitioner. In contrast the respondent relied upon CWC Guidelines and IS Code 11590:1995 to contend that the equipments depreciate and loses its value with the passage of time contingent upon the life of equipment in years. The learned Arbitrator held the procedure followed by the petitioner

as illogical and accordingly, accepted the calculations of the respondent. The learned Arbitrator noted that the claimant/respondent had not claimed any cost or loss in respect of the 49 of the equipments in the annexure. The plea of the petitioner was accordingly rejected.

20. In this case a lot of stress was laid by the learned senior counsel for the petitioner on the written submissions that were filed before the learned Arbitrator. Some pleas raised in the written submissions may be seen. These read as follows:-

“5) It is pertinent to mention that ;work delayed by 50 Month is attributable tothe claimants - Refer Deficiencies recorded by DDC in his monthly report each and every month due to contractor failure only. For example pleaserefer page no; .12,13,16,19,23,24,24,25,30,32,34 to 36,38 to 40,42,50 to -63 &70 to 80 of DDC MONTHLY REPORT , ANNEXURE-R-6 , FOLDER NO- 2 OF SOC. Therefore submission made by claimants for claim of 158 days is not correct.

6) & 7) The cost head for item no-1 i.e. cost on account of extended stay of plant and Equipment has been analysed - Annexure -C&D page 33-41 of soc.

The detail analysis of machinery deployed shows that:-

I) FORGED AND FRAUD invoices used for claim by claimants. (Copy enclosed for reference as Annexure-R12 placed at page no. 60 to II) No evidence provided by agency to prove that all this machine has been deployed at site.

III) Plant and machinery list of deployment placed in record by claimants as Annexure -D of SOC is verified as per list of Equipments of contract agreement (Appendix-XIV Page no 582 & 583).

Comparative Statement is placed as Annexure -R11. From comparative analysis it seems that only 50% machine deployed as per list of Equipment of contract agreement (Appendix-XIV Page no582 & 583 of contract agreement).

IV) Machine utilized for other work in year 2004 & 2005 i.e ADIT, Shaft & Cross passage of Tunnel T-80 is also included in this claim to only make money.(Please Refer Annexure-R9 & R10 for detail placed at page no.20 to 41)

V) M/ s HCC has relied on document of machines are being presently used for the work of T-48 in year 2013- . However their shelf life fully exhausted their life in year 2008-11 itself.(Please Refer Annexure-R9 for detail and R-10 for same machine deployed in T-48 placed at page no. 37 to 41)

VI) Claimants while making the claim no.1 has referred and relied upon plant and machinery, which were not in operation since April2012. One such example is of which mining work stood completed in April-2012 but still the machine have been shown in the charts(Annexure-D) for claim No.-1.(Please Refer Annexure-R9 for detail placed at page No. 20 to 36)

VII) No's of Copies of invoices is not readable. (Please Refer Annexure-R9 for detail placed at page nos.20 to 36)

21. It is clear from a perusal of the above submissions that they are vague and seem to be making submissions in abbreviations without reference to proper details.

22. It is settled law that findings of fact recorded by the learned Arbitrator cannot be disturbed by this Court. The Supreme Court in **Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49** held as follows:-

“12The third juristic principle is that a decision which is perverse or so irrational that no reasonable person

would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In **Kuldeep Singh v. Commr. of Police**, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a

court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In **P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.**(2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

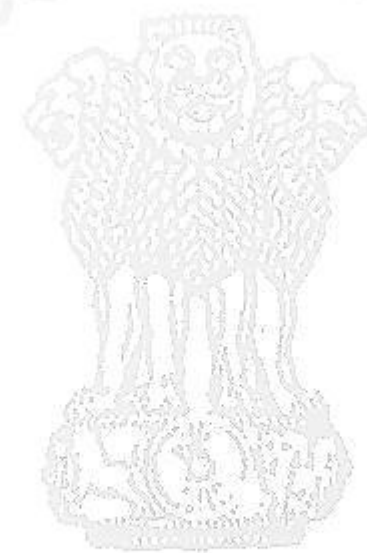
.....”

23. Clearly, the arbitrator is the master of the quality and quantity of evidence relied upon to give a finding of fact. It is not for this court to sit as a court of appeal to correct alleged errors of facts. The pleas of the petitioner are all urging this court to act as a court of appeal to correct the alleged errors of fact in the award. This is clearly not permissible.

24. There is no merit in the present petition and the same is dismissed.

(JAYANT NATH)
JUDGE

JULY 12, 2018/v



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