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

+ **FAO (OS) (COMM) 171/2017**

Date of decision: 7th February, 2018

JAYCON INFRASTRUCTURE LTD. Appellant
Through: Mr. Anshu Mahajan, Mr. Karan
Arora, Advocates

Versus

SOMA ENTERPRISES LTD. Respondent
Through: None

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

1. Jaycon Infrastructure Ltd. has filed the present intra-Court appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 impugning the order dated 7th July, 2017, passed by the learned single Judge in OMP (COMM) No.240/2017.

2. The impugned order dismissed the objections filed by the appellant under Section 34 of the Arbitration Act, which had impugned the award dated 31st January, 2017.

3. National Highways Authority of India had entered into a Concessionaire Agreement dated 9th May, 2008 with M/s Soma-Isolux NH One Tollway Pvt. Ltd. for six-laning of the Panipat – Jalandhar section of NH-1 from Km 96.000 to Km 387.100. M/s Soma-Isolux NH One Tollway Pvt. Ltd. was a Consortium Joint Venture of Insolux Corsan India Engineering and Construction Pvt. Ltd. and Soma Enterprise Limited. The latter is the respondent in the present appeal.

4. The respondent and the appellant had entered into two contracts dated 4th April, 2009 for:

- a. Structure work of project between Km 146.000 to Km 212.161 (66.161 km) of Reach II/B for a sum of Rs.251,89,21,566/-; and
- b. Earth work and excavation for highway and structure work of the project between Km 146.000 to Km 212.161 (Km 66,161) of Reach II/A for a sum of Rs.71,98,83,250/-.

5. Disputes and differences arose between the appellant and the respondent and thereafter Termination-cum-Settlement Agreement (TSA) dated 29th June, 2012 was signed and executed.

6. The appellant herein for the first time, on 31st July, 2012, raised a plea that the TSA was void as it was executed under coercion, undue influence and pressure.

7. In view of the aforesaid contention, the claims made by the appellant and the respondent were referred to arbitration.

8. Award dated 31st January, 2017 rejects the plea and contention that the TSA was void and bad in law on account of coercion, undue influence and pressure for several reasons, including the following consequential acts by both sides in terms of the TSA, namely:

I. Various Bank Guarantees totalling over Rs. 29.6 crores that had been submitted by the Claimant to secure the performance and unrecovered amount of mobilization, machineries etc. as on the date of execution of the TSA were returned by the Respondent.

II. In consideration of all the claims of the Claimant including those under the letter dated 25.06.2011, the Respondent had agreed to pay a sum of Rs. 5.86 crores to the Claimant.

III. In order to amicably close the contracts, the Respondent agreed to pay for certain claims raised by the Claimant, such as payment for transportation of WMM and GSB, claim towards extra MDD, payment for extra reinforcement used in the crash barrier etc.

IV. The Respondent paid extra amounts to the Claimant for rework done against flood losses. This was beyond what was contained in the contractual arrangement and those provided in BOQ attached to the Work Contracts. It did not recover the amounts towards material as per Schedule- B of Structure Contract for material recovery.

V. An amount of Rs. 11.96 crores was found to be due against the Claimant and payable to the Respondent under the head of unrecovered mobilization and machinery advance. It was agreed to by the Claimant to pay the same within 30 days from the execution date of the TSA. As per Clause 8

of the TSA, the Claimant submitted fresh Bank Guarantees of Rs. 11.96 crores to the Respondent to secure the said amount.

VI. The Respondent waived off the liability under the defect liability period provided that the Claimant made the payment of a recoverable amount of Rs. 11.96 crores.

VII. The Respondent did not levy liquidated damages and other Compensations under the works contracts.

VIII. It was agreed by the Respondent to forego all available rights and remedies against the Claimant under the works contracts including the right to get the remaining/defective works executed at Claimant's risk and cost.

IX. An indemnity Bond was also submitted by the Claimant to indemnify the Respondent and its employers for any liability towards violation of labour laws, rules and regulations in accordance with the TSA provisions.”

9. The award also refers to the principles of accord and satisfaction and holds that the TSA would be binding and would settle all disputes and claims, inter se the parties.

10. We are in agreement with the learned single Judge that the contention and challenge against the TSA on the ground of coercion, undue influence and pressure, rejected by the arbitrator, does not require interference in exercise of power under Section 34 of the Arbitration Act. The arbitrator has taken into consideration several facets and factors before reaching the said conclusion. The appellant

did not immediately upon execution of the TSA, which was admittedly signed and executed, protest and ascribe coercion, undue influence and pressure. Award refers to evidence to show discussion and exchange of drafts, before the TSA was executed. Pertinently, the appellant himself had written the letter dated 28th July, 2012, which is extracted in the award and reads as under:

“Kindly refer to your e-mail dated 27.07.2012 wherein, you have stated that you would be encashing our Bank Guarantees worth Rupees 11,96,72,557/- if we do not deposit the said sum before 30.07.2012. In this regard we express our total inability and helplessness to pay the said amount despite our best efforts to sell our director’s home and the company’s machineries and other assets at even thrown-away prices.”

Two days thereafter, the appellant changed their stand and stance to profess that the TSA was vitiated and void in law on the ground of coercion, undue influence and pressure.

11. Learned counsel for the appellant submits that the appellant had made a specific claim for reimbursement of the insurance claim under clause 11 of the original contract. He submits that the appellant, consequent to information furnished under the Right to Information Act, 2005, had learnt that the insurance company had paid Rs.3.44 Crores to the respondent for washing away of earth and damage caused due to heavy rains and floods. As per clause 11, the insurance claim was to be proportionately passed on to the appellant after deduction of 15% as administrative charges.

12. Clause 11 of the original contract states that insurance policy shall be procured in joint names of the appellant and the respondent and copy thereof would be furnished to the respondent. It cannot be ascertained and stated with certainty whether the amount received was for the stretch awarded to the appellant or other portions etc. Nature of the claim made and paid by insurance remains ambiguous and unclear. There were claims by National Highway Authority of India against the consortium. Claim under clause 11 was rejected by the arbitrator recording that the appellant had received and accepted payment as per and in terms of the TSA. After floods, the appellant had re-done the work on BOQ (Bills of Quantity) rates, which were higher than the rates provided and agreed in the original contract. The arbitrator made a reference to documents on record in support of the said factual finding for the re-work after the floods.

14. Counsel for the appellant submits that the finding of the arbitrator that the appellant was paid higher BOQ is factually incorrect. However, he is not able to substantiate and justify the said assertion by referring to any document. The arbitrator has specifically referred to documents placed on record and in particular to Volume 4, Pg.859 of the documents before the arbitrator. The arbitrator has also observed that the appellant had in TSA accepted Rs.29,86,799/- as settlement towards the insurance claim. The settlement agreement, i.e. TSA, certainly refers to the factum that there was a claim made by the appellant on account of flood losses. Upon mutual discussion, it was settled that an amount of Rs.29,86,799/- on account of flood loss

would be duly accounted. The finding of the arbitrator to this extent is correct. The TSA also postulated that the works contract shall stand terminated on payment of the amount mentioned therein. Therefore, the principle of accord and satisfaction was applied.

15. We do not see any reason to interfere with the award on the issue of reimbursement of insurance claim under clause 11 of the original contract raised in the present appeal and interfere with the impugned order affirming the award passed by the arbitrator on the said aspect.

16. The appeal is accordingly dismissed without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

FEBRUARY 07, 2018

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