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

+ O.M.P. (COMM) 150/2018

DEDICATED FREIGHT CORRIDOR CORPORATION
OF INDIA LIMITED (DFCCIL) Petitioner

Through: Mr P. Nagesh with Mr
Ashutosh Jha, Advocates.

Versus

M/S FERROVIA TRANSRAIL SOLUTION
PVT LTD. Respondent

Through: Mr Anil Seth, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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12.04.2018

VIBHU BAKHRU, J

1. The petitioner has filed the above captioned petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 13.10.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by three members, Sh Deepak Krishan (Presiding Arbitrator), Sh Budh Prakash and Sh Vipin Jha (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties in respect of the 'Contract Agreement' dated 12.04.2013 (hereafter 'the Agreement').

2. The petitioner has also filed an application (IA No.4843/2018) seeking condonation of delay of 76 days in re-filing the above

captioned petition.

3. The petitioner had filed the petition on 21.11.2017, which was within the time specified under Section 34(3) of the Act. However, the said petition was defective and was returned on 22.11.2017 for curing the defects. The petitioner re-filed the petition on 24.11.2017. However, the petition was still defective and, thus, was returned on 25.11.2017. The petitioner re-filed the petition on 14.12.2017 but it continued to be defective. The principal defect pointed out related to the non-filing of the original documents.

4. Thereafter, the petition was once again re-filed on 05.03.2018. Thus, for the period from 15.12.2017, when the defects have been pointed out, till 05.03.2018 – a period of over two and a half months – the petitioner did not take the necessary steps for curing the defects in filing the petition.

5. The petition continued to be defective and the same was pointed out on 06.03.2018. The petition was once again re-filed on 24.03.2018. However, it was still defective and the defects were pointed out on 03.04.2018. The petitioner re-filed the same on 05.04.2018 but it was once again found to be defective. The petition was finally re-filed on 09.04.2018.

6. It is seen from the above that although the petition was filed within time (on 21.11.2017) it was finally re-filed on 09.04.2018 after a delay of 139 days. This period is beyond the maximum time available under Section 34(3) of the Act for filing a petition under Section 34 of the Act.

7. Although, the provisions of Section 34(3) of the Act are not applicable with regard to delay in re-filing. However, given the legislative intent, it would not be apposite to condone inordinate delays in re-filing such petition. (See: *Delhi Development Authority v. Durga Construction Co.: 2013 (139) DRJ 133*).

8. The explanation provided in the application for such delay is (i) that the counsel for the petitioner got married on 24.11.2017 and thus, was busy in his marriage ceremony and related activities till first week of January; (ii) producing the original documents of the case is very difficult as the documents were voluminous in nature and lying in different offices of the petitioner; and (iii) that substantial time was also consumed in typing annexure which are voluminous in nature. It has also been stated that the counsel for the petitioner was held up since he was busy in welfare of her ailing mother. Plainly, the explanation provided, do not justify inordinate delay in re-filing the petition. The documents produced by the petitioner along with the petition are part of the arbitral record. It is seen that bulk of the said documents are pleadings of the parties.

9. In view of the above and given the legislative intent of restricting the time for filing the application under Section 34 of the Act, this Court is unable to accept that the condonation of delay in re-filing is justified. The application (IA No.4843/2018) is, accordingly, rejected.

10. Notwithstanding the above, this Court also considers it apposite to consider the petition on merits as well.

11. The principal controversy before the Arbitral Tribunal related to the interpretation of clause pertaining to adjustment of prices during the extended period of contract (Clause 13.8 of the General Conditions of Contract also referred to as 'PVC'). The Arbitral Tribunal accepted the respondent's contention that in terms of Clause 13.8 of GCC, price adjustment would be required to be made by using the indices or prices as applicable 49 days prior to the time for completion of the works *as extended from time to time*. The petitioner's contention that the price adjustment is required to be calculated using the indices or prices as applicable 49 days prior to the expiry of the time for completion of the works *as originally fixed* was rejected. The petitioner, *inter alia*, claims that the aforesaid interpretation is wholly unsustainable and contrary to the terms of the contract.

12. Briefly stated, the controversy arises in the following context:

12.1 The petitioner invited tenders for the work of design, procurement, construction of track, other track related works, its testing and commissioning for double track electrified railway line, on a design build lump sum basis from New Karwandiya (Rly Km 564) to Durgawati (Rly Km 630) approximately covering a length 66 Kms on Mughalsarai- Sonnagar- Section of Eastern Dedicated Freight Corridor.

12.2 The respondent submitted its bid for execution of the said works which was accepted. Thereafter, the parties entered into the Contract Agreement ('the Agreement'). In terms of the Agreement, the total contract value was agreed as ₹147.61 crores and the work was to be

completed within a period of 540 days from the date of commencement of the work, that is, by 26.01.2014.

12.3 The parties adopted “Conditions of Contract for Plant and Design Build Contract First Addition 1999” as part of the General Conditions of the Contract.

12.4 The execution of the work has been inordinately delayed and the petitioner claims that the same is for the reasons attributable to the respondent. This is disputed by the respondent. However, admittedly, the petitioner has been granting extension to the respondent for completing the works without levy of any damages.

12.5 The respondent had been raising bills for the work done during the extended period of contract. Admittedly, the respondent had calculated the price adjustment by using the indices as applicable 49 days prior to the original date of completion (that is, 26.01.2014).

12.6 On 20.03.2015, the respondent sent a letter stating that there was an inadvertent error in calculation of the price adjustment as the indices to be used were the indices as applicable 49 days prior to the time for completion of the work as extended from time to time. Accordingly, it would be revising the escalation bills and submitting the same.

12.7 By a letter dated 02.05.2015, the petitioner rejected the respondent’s request for making any payment of escalation cost as claimed by it.

12.8 In view of the above, the respondent invoked Clause 20.2 of the

General Conditions of the Contract (GCC) and sought reference of the dispute to the Dispute Adjudication Board (DAB).

12.9 DAB accepted the respondent's contention and by an award dated 15.03.2016 held that the work executed during the extended period of time would qualify for the price variation adjustment as per Clause 13.8 paragraph 3 of the contract.

12.10 The said award was despatched to both the parties on 15.03.2016 and was received by the respondent on 19.03.2016. The petitioner filed the letter of dissatisfaction on 21.04.2016, which was sent by an email on 28.04.2016.

12.11 By a letter dated 16.05.2016, the respondent requested for referring the disputes to an arbitrator and the Arbitral tribunal was constituted in terms of the arbitration clause.

12.12 The arbitral proceedings culminated into the impugned award. The Arbitral Tribunal has accepted that the decision of the DAB was final and binding on the parties. Further, the Arbitral Tribunal also accepted that the petitioner was entitled to price adjustment by using the indices as applicable 49 days prior to the date of completion of the work as extended from time to time.

Submission

13. Mr P. Nagesh, the learned counsel appearing for the petitioner assailed the impugned award, essentially, on three fronts. First, he contended that the Arbitral Tribunal had merely accepted the finding of DAB and had not arrived at any independent finding and, therefore,

the Arbitral Tribunal had failed to independently address the issues.

14. Second, he submitted that the respondent had raised fifteen bills including price adjustment on the basis that the indices/prices as applicable as prevailing 49 days prior to the original date of completion of the works, which indicated that the respondent also understood the terms of the contract in the same manner as the petitioner. He contended that the interpretation sought to be advanced by the respondent was contrary to the terms of the Agreement between the parties.

15. Lastly, he submitted that the Arbitral Tribunal had grossly erred in awarding the sum of ₹2,75,05,383/- in favour of the respondent without examining the calculation of the aforesaid amount. He submitted that even if the respondent's contention was accepted, the respondent was required to prove the indices as applicable on the relevant dates to justify the calculation.

Reasons and conclusion

16. The contention that the Arbitral Tribunal had not applied its mind but had merely accepted the findings of DAB is erroneous. A reading of the impugned award, plainly, indicates that the Arbitral Tribunal has indicated the reasons for arriving at its conclusion.

17. The Arbitral Tribunal had framed two issues for determination as under:-

- “(1) That in this case the Dispute was referred to DAB which had given its decision earlier but the Respondent gave a letter of its Dis-satisfaction on

DAB's Decision but was considered having served after more than the stipulated period of 28 days by the Claimant, whereas the Respondent's contention was that they had done so well in time, the time allotted for the same. This claim of the Respondent was thus contested by the Claimant;

- (2) The basis contention even before the DAB was that for the above-mentioned contract, while the time for extension for date of completion was repeatedly given to the Claimant but the price variation which have to have been allowed to them was not granted leading to inadequate payments and demand of compensation for their cases. This Date of Completion (DOC) for the purpose of the PVC was kept frozen to the original DOC for each of the milestones separately, by the Respondent. This was contested by the Claimant and both the parties gave their reasons for the same.”

18. Insofar as the first issue is concerned, the Arbitral Tribunal concluded that the findings of DAB were final. This was so because the decision of the DAB rendered on 15.03.2016 was received by the petitioner on 19.03.2016 and the petitioner had not issued a Notice of Dissatisfaction within the prescribed period under Clause 20.4 of the Agreement. Although, it was contended that the Competent Authority of the petitioner had received DAB's decision on 31.03.2016 and had issued the Notice of Dissatisfaction on 21.04.2016. The same was not accepted. A perusal of the pleadings indicates that the petitioner had stated that it could not respond in time as it was busy with the year closing. The said contention is also unpersuasive as the contract

between the parties provided for an inflexible period of 28 days within which a party dissatisfied with the decision of the DAB was required to respond. The respondent had produced the tracking report establishing that the DAB's decision has been received by the petitioner on 19.03.2016.

19. In view of the above, this Court finds no infirmity with the decision of the Arbitral Tribunal that DAB's ruling had become final and binding on the parties.

20. Notwithstanding the above conclusion, the Arbitral Tribunal also proceeded to examine whether the petitioner would be entitled to price variation (PVC) on the basis of indices/prices prevailing 49 days prior to the time for completion of the works as extended from time to time. In this regard, the Arbitral Tribunal had noticed that the petitioner pleaded that the delay in completion of the works had been caused due to various reasons attributable to the respondent. The respondent had disputed the same and had submitted that the delay was largely on account of local conditions and indecision by the employer.

21. Before the Arbitral Tribunal, it was contended by the petitioner that the price variation would be payable as per Clause 13.8 of the Agreement. Thus, the only issue that is required to be addressed by the Arbitral Tribunal was with regard to use of indices in calculation of the price variation.

22. Mr Nagesh had also referred to the letters granting extension of time for completion of the works and each of the said letters issued by

the Engineer expressly provided that the price variation for the extended period of the contract would be governed as per GCC Clause 13.8 paragraph 7, which is also quoted in the letters granting extension of time.

23. In this view, the only question that fell for consideration was the interpretation of paragraph 7 of Clause 13.8 of the Agreement. Paragraph 7 of Clause 13.8 of the GCC reads as under:-

“If the Contractor fails to complete the Works within the Time for Completion, adjustment of prices thereafter shall be made using either (i) each index or price applicable on the date 49 days prior to the expiry of the Time for Completion of the Works, or (ii) the current index or price: whichever is more favourable to the Employer.”

24. The expression “time for completion” is defined in Clause 1.1.3.3 of the Agreement, which reads as under:-

“1.1.3.3 **“Time for Completion”** means the time for completing the Works or a Section (as the case may be) under Sub-Clause 8.2 [*Time for Completion*], as stated in the Appendix to Tender (with any extension under Sub-Clause 8.4 [*Extension of Time for Completion*]), calculated from the Commencement Date.”

25. It is seen from the above that the expression “time for completion” would mean the time for completion of the works with further extension. Thus, the indices and prices to be used for computing price variation under paragraph 7 of Clause 13.8 of the Agreement would be the prices and indices as applicable 49 days prior to the time for completion of the works as extended from time to time.

26. Accordingly, the Arbitral Tribunal had held that the respondent would be entitled to enhanced price variation. This Court finds no ground to interfere with the aforesaid decision. It is not possible to accept the contention that the impugned award is contrary to the terms of the Agreement.

27. The contention that the Arbitral Tribunal is erred in awarding the sum of ₹2,75,05,383/- is without any verification is also unmerited, as the Arbitral Tribunal has made it amply clear that “*the said award is subject to the bills so raised to be verified by the Employer’s Engineer for correctness of arithmetical calculations and the interest calculation as awarded.*”

28. In view of the above, the petition is dismissed both as barred by limitation as well as on merits. All the pending applications are also disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

APRIL 12, 2018

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