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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 18th January, 2018
Pronounced on: 27th February, 2018**

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O.M.P. (COMM) 459/2017 & IA No.15509/2017

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Petitioner

Through : Mr.Sanjay Jain, ASG with
Mr.Ashok C. Parkash Malhotra,
Mr.C.S.Chauhan and Ms.Rajul
Jain, Advs.

versus

TRANSSTROY (INDIA) LTD.

..... Respondent

Through : Mr.Dayan Krishnan, Sr. Adv. with
Ms.Bina Gupta and Ms.Surbhi
Kapoor, Advs.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is under Section 34 of Arbitration and Conciliation Act, 1996 (herein after referred as Act) for setting aside the arbitral award passed on 15.09.2017.

2. The brief facts of the case are as under:-

a) While passing an impugned interim award, the learned Arbitral Tribunal ignored the fact that Section 23 was amended to insert Sub-Section 2A to enable the Petitioner to file its counterclaim against the Claimant

(Respondent herein), if any, in the same arbitration proceedings, and will not require any fresh references from the Court.

b) The reason for insertion of section 23(2A) is in order to ensure the counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent in order to ensure final settlement of disputes between parties and prevent multiplicity of litigation. Therefore, the new law contributes in reducing the multiplicity of proceedings since the counter claim is not considered as a separate reference or a separate claim altogether. Be as it may, Section 23 is amended in order to permit set off or counter claim in the same arbitration to avoid multiplicity of litigation and to avoid divergent findings.

c) The present application has been filed, impugning the Arbitral Award dated 15.09.2017 received by the Petitioner vide an email dated 15.09.2017, passed by the learned Sole/Presiding Arbitrator in Arbitration proceedings for the disputes arising out of the work of "2-lane with paved shoulders from km 94.00 to km 174.00 of NH-210 in the State of Tamilnadu on EPC Mode under NHDP-III'. In terms of the impugned award, the Ld. Arbitrator has dismissed an Application filed by the Petitioner herein seeking permission to place on record the Counter Claim, conclusively decided that the dispute raised by the Respondent (Petitioner herein)

is not within the scope of the Arbitration Agreement, that the dispute sought to be filed is contractually not arbitrable and the adjudication of the said dispute is not within the jurisdiction of the Arbitral tribunal.

d) The dispute has arisen between the parties from the Contract Agreement dated 13.11.2014 executed between the parties and the Claimant (Respondent herein) has invoked the Arbitration Clause from the same contract agreement and if the agreement provides for reference of all disputes under the agreement to the Arbitrator, the learned Arbitrator has jurisdiction to decide all disputes that were made in the pleadings of the parties, including counter-claims. The new law contributes in reducing the multiplicity of proceedings *since the counter claim is not considered as a separate reference or a separate claim altogether*, therefore, the impugned award in this respect is liable to be set-aside; hence this petition.

3. Thereafter the arbitral tribunal has taken note of Article 26 of the agreement which is dispute resolution:

“26.1 Dispute Resolution

26.1.1. Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party

(the "Dispute") shall, in the first instance be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

26.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

26.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms

of settlement within 30 (thirty) days of the notice in writing referred to in clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3. 26.3 Arbitration

26.3.1 any Dispute, which is not resolved amicably as provided in clause 26.1 & 26.2 shall be finally settled by arbitration as set forth below: ”

4. The learned arbitrator had passed the following award:-

“In_ other words, it has been provided that the dispute. SHALL in the first instance be settled amicably as per procedure listed under clause 26.2 and then SHALL finally be settled by Arbitration. The AT further observes clause 26.2 provides that,

" the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3. The above provision means that if the dispute is not resolved by amicable settlement', then it is left to either party to refer the said dispute to arbitration under clause 26.3. The AT finds from the above, that the clauses 26.1, 26.2 and 26.3, all are in conformity with each other and on harmonious reading of the said clauses, the contract provides that the resolution of the dispute shall be attempted, in the first instance, by amicable

settlement and on failure of such an attempt for amicable settlement, the dispute shall finally be settled by arbitration. The procedure stated in clause 26.1 and 26.2 is therefore mandatory. Further subsection 23.3 specifies that the dispute which cannot be settled amicably as per clause 26.1 & 26.2 only can be settled finally by arbitration. In view of the above, the question that arises here is, whether did the respondent, in the first instance, attempt an amicable settlement of the dispute regarding counter claim, raised now as per clause 26.1 & 26.2? If the answer is, yes, then only the AT can adjudicate the counter-claims sought to be adjudicated by the respondent and allow the Application filed by the respondent for the said purpose. The respondent has not stated anything about having made an attempt for such amicable settlement in its Application seeking permission to file counter-claims and even in the statement of counterclaim filed by it.”

5. The respondent has filed an application under sub-Section 2(A) of Section 23 of the Act seeking to place on record its counter claim against the claimant and some portion of it is reproduced as under:

“(h) The respondent contended that there is no delay in filing the instant Application as the arbitral proceedings are at initial stage and the respondent has already in its written statement reserved its right to file counter claim against the claimant; that the respondent has in its written statement has stated some amount to be recovered from the claimant as at that time the total amount

to be recovered from the claimant was not quantified and as such it has reserved its right to file counter claim and that subsequently the amounts to be recovered were quantified and therefore the respondent had sought liberty to file the counter claim now for the amounts to be recovered from the claimant.

(i). The respondent narrated the events and reasons for the issuance of Notice dated 29.09.2015 to the claimant to cure the defaults and the Notice dated 22.07.2016 for Termination of the Contract and contended that invoking of clause 26.1 and 26.2 of the Contract Agreement does not warrant for amicable settlement for the respondent authority as the claimant itself was in default for not completing the project and also the claimant has failed to produce any document in regard to the meeting held with the Chairman of the respondent for any amicable settlement of the disputes and that the disputes raised by the claimant were also not amicably settled for which the claimant has invoked arbitration clause.

4.2 In view of the submissions as detailed above, the respondent prayed that the AT may be pleased to allow the instant Application and reject the Reply filed by the claimant OR to pass any such further order(s) as the AT may deem fit and proper in the interest of justice.

5.0 Deliberation, Observations and findings by the AT.

15.1 The AT has deliberated upon and discussed the pleadings made by the

respondent vide Application dated 21.08.2017, Claimant's Reply dated 06.09.2017, Rejoinder filed by the respondent on 11.09.2017 and the oral submissions made by the counsel of both the parties on 11.09.2017, taking into consideration the provisions under the ACT and the Arbitration Agreement of the Contract. The observations and findings of the AT are detailed in paragraphs here under.

5.2 The respondent has filed the Application under sub- section (2A) of Section 23 of the ACT. The Section 23 is reproduced below:

Statement of claim and defence - (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2A) The respondent in support of his case, may also submit a counter-claim or plead a set off; which shall be adjudicated upon by the arbitral tribunal, if such counter-claim or set-off falls within the scope of the arbitration agreement.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it." (Emphasis Supplied)

The AT observes that the sub-section 23 (1) and 23(2) including sub-section 23 (2A), read together, stipulate the time, manner and the particulars to be filed as Statement of Claim ('SOC') by the claimant and as Statement of Defence ('SOD') by the respondent. In other words Sub sections 23(1); 23(2) and 23(2A) lay down the actions to be taken while filing SOC and SOD by the respective party as the case may be. Therefore the counter claim or set off is to be filed with the SOD. Thus the AT finds that the filing of counter-claim or set-off shall be along with the filing of the SOD by the respondent.

Sub-section 23(3) is regarding the amendment or supplement of the SOC or SOD during the course of the arbitral proceedings subject to the discretion of the AT. Further such discretion shall depend on the delay in making such amendment or supplement. In other words the claim or defence can be amended or supplemented, at a stage later than filing of SOC/SOD, which can be even during the course of the arbitral proceedings while oral hearing is in process. The AT therefore finds that sub section 23(3) pertains to the action that can

be taken by the parties after filing of SOC or SOD as the case may be.”

6. While interpreting these Sections it was held by the arbitral tribunal that the counter claim or set off is to be filed along with the statement of defense, though later the statement of claim/statement of defense can be amended subject to the discretion of the Arbitral Tribunal and sub section 23(3) pertain to action that can be taken by the parties after filing of the statement of claim/statement of defence as the case may be. It is sub Section 2(A) which allows the respondent to file a counter claim or plead a set off which shall be adjudicated by the arbitral tribunal provided if such counter claim or set off is within the scope of the arbitral agreement. Thus the arbitral tribunal was of the view it has jurisdiction to adjudicate the counter claim or adjust the set off only if it is falling within the scope of the arbitral agreement.

7. Now Section 26(2) says that *in case the conciliation is not conducted in terms of this sub section, then either party may refer the dispute in accordance with the provisions of clause 26.3.* Further 26.3.1 says any dispute which is not resolved amicably as provided in clause 26.3 shall be finally settled by arbitration set forth below.

8. Hence it is clear that only those disputes which pass the test of Section **26.1** and **26.2** were to be finally settled by the arbitration. I may here refer to a letter dated 02.012017 written by

the respondent to NHAI wherein it referred the following disputes for amicably settlement listed below:

“4.0 We have also appointed M/s Thisa Consulting Services Ltd, Hyderabad, as safety consultants as per Cause no.10.1.5 and proposed 1 key personnel of safety consultant also as per clause 10.1.5 and the entire contractual requirements for submission of designs & drawings have been fulfilled by us.

5.0 The design of plan and profile for the length of 60 km is completed and 10 km have already been submitted to the Engineer for his review and concurrence.”

9. Yet again a letter dated 09.02.2017 was written by the General Manager of NHAI to seek reference of above disputes to arbitration and the letter dated 10.03.2017 written to Sh.V.Velayutham notes the NHAI is pleased to appoint Sh.V.Velayutham as an arbitrator in disputes under reference raised by the contractor in this letter dated 09.02.2017.

10. Now certain dates are relevant viz. on 05.05.2017 the claims was filed; on 11.07.2015 statement of defense was filed; on 13.07.2015 the application seeking allowing of filing the counter claim was filed; wherein the petitioner also sought extension of time for filing the counter claim. The arbitral tribunal vide its order dated 18.07.2017 dismissed such application and observed as under:

“The AT has given thought to request made by the respondent taking into consideration the procedure and schedule of filing of pleadings agreed upon by both the parties as detailed in the Proceedings of the AT dated 20.04.2017 and the Act of 1996 as amended in year 2015.

The AT observes that sub-sections 23 (2) and 23(2A) of the amended Act of 1996, read together provide that the respondent may, in support of his case, also submit a counterclaim or plead a setoff, along with its Statement of Defence for adjudication by the AT. The AT observes that the respondent has pleaded a set-off of Rs. 1.23 crores vide its Statement of Defence; while as regards the counterclaims, it has been stated therein that the respondent reserves its right to file the counterclaims. The respondent has not stated any applicable law in respect of reserving such right.

In the above background, the AT observes that (i) during the proceedings the procedure and "C" schedule for filing the pleadings were determined by the AT as agreed to by both the parties; that there is no mention therein for filing of the counterclaims by the respondent and (ii) the Statement of Defence has already been filed by the respondent, with set-off and without any counterclaim as per the procedure agreed to by and between the parties, except that the respondent has suo moto reserved its right to file counterclaim at a later date. Thereafter there is no application by the respondent for filing of any counterclaim. In the above circumstances, there is no question of having any date determined by the AT or agreed upon by the parties for

filing the counterclaim by the respondent, and if there is no date fixed or agreed upon for filing of the counterclaims, the question of its extension does not arise. Therefore, the AT orders that the request for an extension of time for filing of the counterclaim made by the respondent is not in accordance with applicable law and is irrelevant in view of the factual circumstances as above.

In view of the delay in filing of the SOD by the respondent, the claimant shall file its rejoinder thereon, if any, on or before 05.08.2017 and the statement of admission and denial of documents shall be filed by the parties on or before 11.08.2017.i.e. the date of the next meeting of the AT.

The above decision of the AT does not preclude the respondent from having another legal remedy in respect of its claims.

The above Order is issued by the Presiding Arbitrator in consultation with and on behalf of the AT.”

This order of the arbitral tribunal was never challenged.

11. The petitioner thus was never precluded from raising a counter claim but it was required to go through the procedure adopted per para 26.1 and 26.2 (supra) of the contract.

12. Now I come to the judgment which has been relied upon by both the Senior counsels from either sides. The learned senior counsel for the petitioner argued the counter claim was not required to go through the procedure set out under in Section 26.1

and 26.2 (supra) of the contract and that it could be filed at any stage. He referred to para 32(b) of *State of Goa's case Civil Appeal 4987/2011 dated 04.07.2011 of Supreme Court* which held:

“32. The position emerging from above discussion may be summed up as follows:

(a) xxx

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counter claim, even though it was not raised at a stage earlier to the stage of pleadings before the Arbitrator.

(c) xxx”

13. However Section 32 (2) (c) would be applicable in this case and it read as under:

“(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible”

14. The learned counsel for the respondent says clause (c) would be applicable here. A bare perusal of Section 26 say only those disputes which has come from the channel of clause 26.1 and 26.2 would be the disputes referable to arbitration and as specific disputes are only to be referred to arbitration and as an earlier attempt of petitioner to file counter claim have failed/rejected vide order dated 18.07.2017 against which no appeal was filed hence I am in conformity with the opinion of the arbitral tribunal. The

tribunal was right in rejecting the plea of the petitioner herein and hence the order needs no interference.

15. I may here refer though the petitioner has filed a petition under Section 34 of the Act which can be filed only against an interim or a final award and since the impugned order is not an interim award under Section 31(6) of the Act so petition under Section 34 of the Act would not be maintainable. However, this petition may be treated as one under Section 37(2) of the Act while deciding on the admissibility of the counter claim. Since the impugned order is passed under Section 16(2) of the Arbitration and Conciliation Act which runs as under:

“16. Competence of arbitral tribunal to rule on its jurisdiction:-

(1)xxxx xxxx

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.”

16. In *National Thermal Power Corporation Ltd. v/s Siemens Atkeingesellschaft* AIR 2007 Supreme Court 1491:-

“In other words, in the challenge to the award, the party aggrieved could raise the contention that the Tribunal had no jurisdiction to pass it or that it had exceeded its authority, in passing it. This happens when the Tribunal proceeds to pass an

award. It is in the context of the various sub-sections of Section 16 that one has to understand the content of the expression 'jurisdiction' and the scope of the appeal provision. In a case where the Arbitral Tribunal proceeds to pass an award after overruling the objection relating to jurisdiction, it is clear from Sub-section (6) of Section 16 that the parties have to resort to Section 34 of the Act to get rid of that award, if possible. But, if the Tribunal declines jurisdiction or declines to pass an award and dismisses the arbitral proceedings, the party aggrieved is not without a remedy. Section 37(2) deals with such a situation.”

17. On accepting of the plea viz the tribunal has jurisdiction to decide such an application, an appeal does lie to this Court from the order of the learned arbitral tribunal but for above reason I dismiss the same under Section 37(2) of the Act as well.

18. Thus, the appeal is dismissed along with pending application.

YOGESH KHANNA, J

FEBRUARY 27, 2018

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