

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO.1045 OF 2013**

Union of IndiaPetitioner

vs

M/s. Lanco Infratech Ltd. ...Respondent

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Mr. Y.S. Bhate, i/b. Mr. Dhanesh R. Shah, for the Petitioner.

None for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 3 JANUARY, 2019

P.C.:

. Heard learned Counsel for the Petitioner. None appears for the Respondent. This petition challenges an award passed by a sole arbitrator in an arbitration reference arising out of a construction contract.

2. In response to a tender notice issued by the Petitioner employer for construction of flats in two blocks at Payalipada in Mumbai, the Respondent had submitted its tender. The tender was accepted by the Petitioner and a work order was issued on 17 October 2005. The completion period stipulated in the work order was 15 months. The original stipulated date of completion was, thus, 30 January 2007. Just before this completion date, a show cause notice dated 18 January 2007 was issued by the Petitioner requiring the Respondent to show cause why

action should not be taken under Clause 3 of the contract for non-completion of work within time. The Respondent replied this show cause notice. After this correspondence was exchanged between the parties, by its letter dated 25 January 2007, the Petitioner granted extension of time upto 30 June 2007 to the Respondent. The Petitioner thereafter terminated the contract by its letter dated 22 February 2007 on the ground that the Respondent had failed to complete the contract work by 30 January 2007, i.e. the originally stipulated date of completion. It was the Respondent's case before the arbitral tribunal (where the Respondent was a claimant) that despite extension of time and despite the Respondent having taken up the work during the extension period, the Petitioner had wrongfully terminated the contract under Clause 3 of General Conditions of Contract much before the expiry of extended period of time. Learned arbitrator, in his impugned award, after considering the material placed before him, held that the Petitioner had, by extending time, given a go-bye to its show cause notice; after this extension of time, the show cause notice became infructuous. The arbitrator held that since the original scheduled date of completion was extended by the Petitioner upto 30 June 2007, the reason given by the Petitioner for terminating the agreement on 22 February 2007, namely, non-completion of work by the original scheduled date of completion, i.e. 30 January 2007, was improper and that the termination letter was, accordingly, held to be illegal and, in the premises, refund of the Respondent's bank guarantee as well as earnest money and security deposit, the three amounts aggregating to Rs.30,54,264/- (Claim No.2), was awarded by the arbitrator.

3. The arbitrator's conclusion in this behalf is clearly a possible view of the matter. The arbitrator has, in the first place, considered whether the Respondent alone could be blamed for the delay in execution of the project. After taking into account the material placed by the parties before him, the arbitrator came to a conclusion that both parties were responsible for the delay. The arbitrator took into account the letters addressed by the Respondent to the Petitioner placing on record non-identification of disposal site for excavated earth, which were not replied to by the Petitioner. The arbitrator also took into account the existence of a tree in Block B area, which was required to be removed, the formal permission from the Municipal Corporation for which was delayed, leading to delay in excavation of that block. Keeping in mind these circumstances, the arbitrator came to the conclusion that the Respondent could not be held liable for delay in execution of the balance work. The arbitrator also considered, as noted above, the extension of time granted by the Petitioner to the Respondent. On the basis of this assessment, the arbitrator came to the conclusion that the termination letter issued by the Petitioner to the Respondent was wrongful and, accordingly, held withholding of EMD and security deposit as well as encashment of performance guarantee by the Petitioner to be illegal. The arbitrator, whilst arriving at these conclusions, has taken into account the evidence placed before him. The conclusions of the learned arbitrator are supported by such evidence. The arbitrator has not taken into account irrelevant or non-germane material or disregarded any relevant or germane material for arriving at his conclusions. The conclusions themselves are clearly possible conclusions. They are not such as would not be arrived at by a fair or judiciously minded person or

as would shock the conscience of the court.

4. The arbitrator's conclusion even on the issue as to whether the Engineer-In-Charge's termination of the agreement was included within "Excepted Matters" as defined under the agreement, is also a reasonable view. The arbitrator has interpreted the relevant terms of the contract, namely, Clauses 2, 3 and 25 of General Conditions of contract, in that behalf. The arbitrator has also taken into account the decision of the Supreme Court in the matter of **M/s. J.G. Engineers Pvt. Ltd. vs. Union of India**¹, where identical or similar clauses were interpreted by the Supreme Court. Based on these issues, the arbitrator has held that the terminations by the Engineer-In-Charge would not come within the excepted matters. Even this is clearly a possible view, which a fair and judiciously minded person could well have arrived at. It is not a view that would shock the conscience of the Court.

5. Learned Counsel for the Petitioner, relying on the judgment of our Court in **Swiss Bank Corporation vs. Jai Hind Oil Mills Co.**², submits that there is no unilateral waiver; the Respondent is not shown to have accepted the extension of time. The judgment of **Swiss Bank Corporation** makes it clear that to attract the doctrine of waiver it is not necessary that there should be meeting of minds or any agreement between the parties. The arbitrator's conclusion that there was waiver on the part of the Petitioner of the purported breach of the Respondent, thus, does not suffer from any infirmity and is not in breach of public policy.

¹ AIR 2011 SC 2477

² 1994 Bank J. 215

6. In sum, the conclusions of the learned arbitrator on Claim No.2 in favour of the Respondent are not amenable to any challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

7. As far as the Petitioner's counter-claims are concerned, there is nothing to suggest that the view of the learned arbitrator on these counter-claims suffers from any perversity. Counter Claim No.1 is for recovery of additional expenditure incurred by the Petitioner in executing the balance work by engaging another contractor at the risk and cost of the Respondent; it has been rightly rejected, since the termination of the contract itself was held to be untenable. So also, since the termination was held to be untenable, Counter-claim Nos. 2 and 3, which dealt with recovery of extended supervision and liquidated damages, were rightly rejected by the learned arbitrator. Counter-claim No.4, which was for recovery of compensation for delay in allotment of residential flats to the employees for whom they were meant, was considered to be presumptuous and remote. No fault can be found with the assessment of the learned arbitrator. There being nothing on record to prove that there was a case of damaged roads/storm water drains, Claim No.5 for recovery towards the restoration of damaged roads/storm water drains was rejected by the learned arbitrator. It is not in dispute that this issue was not raised during the execution of the work nor was the Respondent given any notice to make good to any alleged damage to the roads/storm water drains. The conclusion, therefore, cannot be called perverse or untenable. Counter-claim No.6 was towards non-deployment of electrical engineer. After considering the relevant terms of the contract

and considering the documents placed on record, the arbitrator came to a conclusion that the claimant had in fact deployed an engineer having a diploma in engineering for supervision and, accordingly, rejected the counter-claim. Once again, no fault can be found with this conclusion within the parameters of Section 34 of Arbitration and Conciliation Act, 1996. As regards Counter-claim No.7, the same was partly allowed by the learned arbitrator and this part of the award has not been challenged. Counter-claim Nos. 8 to 11 were for costs and interests of arbitration and were rightly rejected, save and except interest on the awarded amount under Counter-claim No.7. No fault can be found with respect to the same.

8. In the premises, there is no merit in the present challenge. The arbitration petition is dismissed.

(S.C. GUPTE, J.)