

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO.1506 OF 2014**

M/s. Gammon India Ltd.

....Petitioner

vs

Trenchless Engineering Services (P) Ltd.

...Respondent

.....

Mr. Jitendra G. Shukla, for the Petitioner.

Mr. Aziz Khan, a/w. Mr. Gaurav Gajjar, i/b. Divya Shah Associates, for the Respondent.

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CORAM : S.C. GUPTE, J.**DATED: 1 FEBRUARY 2019****P.C.:**

1. Heard learned Counsel for the parties. This arbitration petition challenges an award passed by an arbitral tribunal of three arbitrators. By their unanimous award dated 10 March 2014, as corrected on 22 April 2014, the learned arbitrators ordered and directed the Petitioner herein (who was the Respondent before the arbitral forum) to pay to the Respondent (original claimant) a sum of Rs.45,79,310/- together with interest as also costs of arbitration quantified at Rs.25,74,200/-.

2. The disputes between the parties arose out of a sub-contract for the work of HDD Crossing in a pipeline project of Hindustan Petroleum Corporation Limited ('HPCL'). HPCL had awarded to the Petitioner a contract for construction of Ramanmandi-Bhatinda and

Ramanmandi Bahadurgarh pipeline of HPCL. A sub-contract for part of HDD works for construction of pipeline for Chainage 217 (WO 63) and for Chainage 238.791 (WO 99) was awarded by the Petitioner to the Respondent. The disputes and differences arose between the parties in relation to this sub-contract. The Respondent-sub-contractor's claims, which sought payment for work done, were resisted by the Petitioner on the ground that the work was not completed within time. The Petitioner raised its own counter-claims, claiming damages from the Respondent. The learned arbitrators, by their impugned award, rejected the Petitioner's counter-claims and awarded the Respondent's claim, as mentioned above.

3. Learned Counsel for the Petitioner challenges the award mainly on the ground that it is contrary to express terms of the contract. Learned Counsel refers to three aspects of the contract in support of his submissions. It is, firstly, contended that the contract had made specific stipulations concerning the nature of work, the duration of the contract, penalty for non-completion of work and amendments to the contract. It is submitted that the contract admitted of its variation only in accordance with an agreement in writing between the parties. It is submitted that the Respondent sub-contractor's case on completion of contract work within the stipulated time was based on an alleged extension of time. It is submitted that the Respondent had merely relied on its unilateral communications in this behalf. It is submitted that there was no proof tendered before the arbitral forum of the Respondent having served these communications on the Petitioner. Secondly, it is submitted that the communications were addressed by the Petitioner to an unauthorized

person; the contract provided for all communications to be addressed to named authorities; the addressee of these communications was not a named authority to receive them. It is also submitted that notices required to be sent by the sub-contractor were to be addressed to Mumbai office of the Petitioner. The alleged communications were purportedly addressed to Fatehpur address of the Petitioner. Learned Counsel submits that there was, accordingly, no variation of contract so far as the date of completion is concerned. Thirdly, it is submitted that the arbitrators have completely disregarded relevant contractual stipulations for holding that the Respondent sub-contractor had completed the work within time, i.e. within the extended period of time. Learned Counsel also challenges the award insofar as it terminates the Petitioner's counter-claims. It is submitted that the counter-claims were terminated on the ground that the Petitioner counter-claimant had not paid fees to the arbitrators. It is submitted that the record of the case bears out that the Respondent herein (the claimant before the arbitral forum) had paid even the Petitioner's share of fees and, in the premises, it was incumbent upon the arbitrators to consider the counter-claims and direct the Respondent, if at all, to recover its fees as part of the award. It is submitted that the arbitrators could not have, in the premises, terminated the counter-claims.

4. Insofar as the Petitioner's submissions on the permissible variation of contract only in writing are concerned, it is important to note at the outset that a contractual stipulation providing for 'no variation except in writing' is capable of being given a go-bye by the parties themselves. There is nothing wrong in principle about such variation

being made through consensus of the parties. But what is more important is that one does not find any such contractual stipulation in the present contract. Learned Counsel for the Petitioner relies on clause 20.0 of conditions of contract in this behalf. Clause 20.1 refers to the Petitioner's right to make changes in the order any time. Under this clause, the sub-contractor was mandated to act upon changes to the work order communicated to him. Clause 20.2 refers to increase or decrease in work price or alteration of work completion date as a result of the changes ordered by the Petitioner under clause 20.1. Clause 20.2 provides that if such changes cause any increase or decrease in the contract price or alteration in the date of completion, the sub-contractor (i.e. the Respondent herein) shall notify the contractor (i.e. the Petitioner) about any such variation in the price or completion schedule that the sub-contractor wishes to have. Clause 20.2 provides that in case the sub-contractor notifies the contractor about any such variation, upon receipt of such notice, the parties would mutually discuss the matter and arrive at a mutually acceptable variation, but want of agreement between the parties in this behalf shall not absolve the sub-contractor from his liabilities and responsibilities in terms of the work ordered. As the arbitrators have noticed in their award, the request for extension of completion date was made by the Respondent sub-contractor at the very outset before undertaking the work. The Respondent had addressed a letter dated 16 June 2010 (within a couple of days of the work order dated 14 June 2010) suggesting amendments to the terms and conditions of the work order. A copy of this letter was admitted in evidence and marked by the arbitrators. It was the Respondent's case that out of these suggestions, some were accepted by the Petitioner and

the mutual agreement concerning these modified/amended terms and conditions was communicated by the Respondent to the Petitioner by a separate communication of the same date. The agreed amendments inter alia provided that the work could be completed within two to three weeks from the date of the signing of the work order. The Petitioner, of course, disputed receipt of these two letters. The arbitrators considered the evidence of the Respondent's Technical Manager (Vaibhav Gupta), who had deposed to having sent the letters on behalf of the Respondent to the Petitioner and the letters having been received by the latter. He also referred to the mutual agreement modifying or amending the terms and conditions of the work order referred to in the letter dated 16 June 2010. The letter was also forwarded as an e-mail. Copies of both the letter and e-mail were admitted in evidence and marked by the learned arbitrators. The witness had deposed not only to signatures on the letters but also their delivery to, and receipt by, the Petitioner. The arbitrators noticed that the testimony of Vaibhav Gupta had remained uncontroverted. Relying on this evidence, the arbitrators accepted the Respondent's case that the Respondent had suggested modifications to the original terms of the contract; some of these modifications, including extension of time, were mutually agreed between the parties; and that such agreement was duly placed on record by the Respondent subcontractor. That appears to be a possible view. There is no substance in the argument of learned Counsel that there was no proof in writing of receipt of these two communications by the Petitioner. The proof may be oral or written. Sufficiency or otherwise of the proof offered by the party is for the arbitrators to decide. So long as the arbitrators' assessment and findings are supported by some evidence and cannot be shown as

assessment or findings based on no evidence, there is nothing further for the challenge Court to do. It cannot go into the assessment or findings to ascertain their correctness in a challenge under Section 34 of the Act.

5. Learned Counsel for the Petitioner is also not right in his submissions on the authorized person to whom as well as the address at which notices ought to be addressed. The submissions are based on the contractual stipulations contained in clauses 32.1, 32.2 and 32.3 of conditions of contract. Clauses 32.1 and 32.2 provide that where the work order requires either party to give notice to the other, such notice would be in writing and delivered or sent by a registered mail at the address of the other party given in the work order for notices and other communications. Clause 32.3 provides for addressing commercial issues on the project to one R.R. Sinha at the Petitioner's Pipeline Division at Mumbai. In the first place, notices referred to in these clauses are notices required to be given by either parties under the terms of the work order. As we have seen above, the notice concerning alteration of the completion date was not a notice under clause 20.2 as a result of any change made by the Petitioner under clause 20.1. On their own terms, therefore, these clauses do not apply to the two communications of 16 June 2010, referred to above. Besides, as we have noted above, there was evidence in support of these communications and it was for the arbitrators to decide whether or not to accept such evidence.

6. As regards the Petitioner's contentions regarding the authority of the addressee of the communication, namely, B. Surender of the Petitioner, the arbitrators have adequately discussed the material as

well as circumstances, which showed the authority of B. Surender. The arbitrators observed that B. Surender had, at all material times, been the Residential Construction Manager of the Petitioner and so far as the particular project was concerned, he was the Project Manager thereof. The arbitrators have referred to the fact that B. Surender had in fact signed the sub-contract on behalf of the Petitioner. Even the completion certificate was issued by him. The arbitrators observed that, in the circumstances, a mere allegation that B. Surender had no authority to agree to any modification or alteration on behalf of the Petitioner was not sufficient. The arbitrators observed that the Petitioner had not placed on record any document to show that B. Surender had no such authority. The arbitrators noticed that the Petitioner had not even led evidence or examined B. Surender to substantiate its case concerning his lack of authority. In the circumstances, the arbitrators held that the date of completion had stood modified and amended in accordance with the mutual agreement between the parties. Once again, within the parameters of the law of challenge to an arbitration award under Section 34 of the Act, no fault can be found with the assessment of the arbitrators or their findings in this behalf. The assessment and findings exhibit possible views. They are supported by evidence. No irrelevant or non-germane material or circumstance was considered or relevant or germane material was disregarded by the arbitrators in such assessment.

7. Coming now to the termination of the Petitioner's counter-claim, it is an admitted position that the counter-claim was terminated by a separate order passed by the arbitrators on 22 July 2013. The arbitrators had noted in this separate order that the Petitioner had not

paid fees and was unwilling to share the fees of the arbitral tribunal in the matter of the reference, despite having filed its written statement and counter-claim. Insofar as the Petitioner's counter-claim was concerned, the Respondent-sub-contractor (the original claimant) had indicated his unwillingness to pay the Petitioner's share of fees so far as the counter-claim was concerned. In the premises, under Section 38 of the Arbitration and Conciliation Act, 1996, the arbitrators terminated the counter-claim. This part of the order was challenged by the Petitioner before this Court in an arbitration petition. By an order dated 3 December 2013, passed in that petition, this Court rejected the petition holding that the order passed by the arbitral tribunal terminating the counter-claim did not suffer from any infirmity. The matter really ought to rest at that. Learned Counsel for the Petitioner, however, submits that subsequent to this order, the Respondent (original claimant) in fact paid the entire fees of the arbitral tribunal. Payment of such fees is neither here nor there. A proceeding, which already had stood terminated as of 22 July 2013, could not have been revived by subsequent payment of fees by the claimant, assuming that the claimant had, in fact, paid the Petitioner's share for adjudication of its counter-claim. There is, accordingly, no merit even in this ground of challenge.

8. Accordingly, the petition has no merit and is dismissed. There shall, however, be no order as to costs.

(S.C. GUPTE, J.)