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

Decided on: 01.02.2019

\+ O.M.P. (COMM) 51/2019

EARTHCON CONSTRUCTIONS PVT. LTD.

..... Petitioner

Through: Mr. Sachin Datta, Sr. Adv with Dr.Farrukh Khan, Mr. Amique Khalid and Ms. Affifa Atiq, Advs.

versus

MAHAMAYA INFRABUILD PVT. LTD.

..... Respondent

Through: Mr. Sandeep Aggarwal, Sr. Adv with Mr. Rajesh Pathak, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

I.A. No.1587/2019

1 Allowed, subject to just exceptions.

O.M.P. (COMM) 51/2019, I.A. No.1585/2019, I.A. No.1586/2019 & I.A. No.1588/2019

2 This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act') to assail a consent Award dated 30.03.2015 and the order dated 17.05.2018, whereby, arbitration proceedings were ultimately terminated, *albeit*, once again with the consent of senior counsel for parties.

3 I.A. No.1585/2019 has been filed to stay the operation of the impugned award and order. I.A. No.1586/2019 is filed to seek exclusion of 141 days, spanning between 23.07.2018 and 10.12.2018 spent in, what I

would classify as frivolous litigation, for the purpose of calculating the period of limitation under Section 34 of the 1996 Act. I.A. No.1588/2019 has been filed to seek condonation of delay of 13 days in filing the instant petition (though in the prayer the expression used is 'Written Statement').

4 The record shows that this case has a chequered history, a history which is pockmarked with U-turns and prevarication on the part of the petitioner. In order to appreciate, as to why I say so, it would be necessary to give a brief background in which the instant petition has been lodged.

5 A Memorandum of Understanding dated 10.08.2011 (in short 'MOU') followed by agreement dated 09.01.2013 (in short 'Agreement') had been executed between the parties. The MOU required the petitioner to develop and construct a group housing complex on a parcel of land described as: GH-B (GH-14 to GH-17), located in Industrial Area, Talanagari, Ramghat Road, Aligarh, U.P. The subject land admeasures 10742 sq. mts.

5.1 The respondent and the petitioner were to have financial interest in the Group Housing Project in the ratio of 25:75.

5.2 Pertinently, UPSIDC had given the aforementioned parcel of land on a 90 years lease to the respondent.

5.3 Under the agreement dated 09.01.2013, the petitioner agreed to pay an aggregate sum of Rs.17.40 crores to the respondent in the manner provided therein. Breach of the Agreement conferred a right on the respondent to terminate the MOU and takeover construction and sale of group housing complex.

5.4 Evidently, disputes arose between the parties in relation to the MOU and the Agreement.

6 The petitioner, it appears, served a legal notice dated 28.06.2013 on the respondent seeking specific performance of the MOU. The respondent

sent a reply to this notice on 07.08.2013.

6.1 Consequent thereto, the petitioner triggered the arbitration agreement between the parties by serving a notice dated 28.01.2014 on the respondent. In response, the respondent dispatched two letters to the petitioner. Via the first communication dated 25.02.2014, the respondent replied to the petitioner's notice dated 28.01.2014. Via the second communication, which is dated 05.03.2014, the respondent terminated the Agreement and the MOU.

7 The petitioner, in response thereto, served a reply dated 07.03.2014 on the respondent. Simultaneously, the petitioner also filed a petition under Section 11 (6) of the 1996 Act for appointment of an Arbitrator.

7.1 This petition was numbered as: Arb. Petition No. 149/2014. Vide order dated 21.04.2014, the petition was allowed and, a former Judge of this Court was appointed as a sole Arbitrator.

8 The record shows that upon a joint application being filed under the provisions of Order XXIII Rule 3 (though captioned under Rule 1) of the Code of Civil Procedure, 1908 (in short 'CPC') read with Section 30 of the 1996 Act, the learned Arbitrator passed an interim consent Award on 30.03.2015.

8.1 For sake of convenience, relevant terms of settlement and interim consent Award are extracted hereafter:

<u>Settlement</u>

"...I. That the Claimant shall pay a sum of Rs.15.2 crores (Rs. Fifteen crores twenty lakhs) to the Respondent and after having received the aforesaid amount, the Respondent shall be left with no right or interest in the Plot No.GH-B (GH-14 to GH-17) admeasuring 10742.00 sq. mts. in housing sector Industrial Area Talanagri, Ramghat Road, Aligarh.

II. That the Claimant also undertakes to pay the remaining dues and interest thereon to the UPSIDC, in respect of the *said Plot in addition to the abovesaid Rs.15.2 crores payable to the Respondent.*

III. (A.) That out of agreed total amount of Rs.15.2 Crores, the Claimant shall initially pay Rs.2 crores to the Respondent on or before 31st January, 2015. The date of payment of Rs.2 crores i.e. 31st January, 2015 is the essence of this agreement. If the Claimant does not pay the said amount of Rs.2 crores to the Respondent on or before 31st January, 2015; the present settlement shall become infructuous and the arbitration proceeding shall be resumed forthwith. After receiving the aforesaid initial amount of Rs.2 Crores, the Respondent shall clear and pay, out of the received amount of Rs.2 Crores, the remaining due amount/arrears, interest, if any, payable on the due amount to the UPSIDC on or before February 15, 2015. After clearance of the dues of UPSIDC as mentioned above, the remaining amount out of Rs 2 Crores received by the Respondent shall be adjusted towards the total amount of Rs.15.2 crores payable to the Respondent. If the Respondent fails to clear and pay the dues of UPSIDC as mentioned above after receiving Rs 2 Crores, the Respondent shall pay back and refund the so received entire amount of Rs.2 Crores with interests @ 18 p.a. to the Claimant on or before 28 February 2015. In case the Respondent fails to pay back the aforesaid amount with interest within the stipulated time till February 28, 2015 as mentioned above, the counter claim and defense of Respondent shall stand struck off and the arbitration proceedings shall be resumed forthwith.

(B). The Claimant undertakes to pay the remaining/balance sum out of Rs.15.2 crores on or before 31st August, 2015.

(C) If the Claimant fails or neglects to pay the entire remaining amount that remains unpaid in terms of Para A above out of Rs.15.2 crores payable to the Respondent pursuant to this agreement by 31.8.2015; the Claimant shall be liable to pay interest at the rate of 18% p.a. on the remaining dues payable latest by 30.11.2015. The said interest shall be computable w.e.f. 1.9.2015 till the date of payment.

(D) If the Claimant does not make the payment of entire sum of Rs.15.2 crores and that amount paid to UPSIDC pursuant to this agreement as stated above to the Respondent by 30.11.2015; all amount given by the Claimant shall stand forfeited by the Respondent and the present proceeding shall be reinitiated from the stage prior to filing of this application. It is clarified that the sum of Rs.15.2 Crores mentioned herein includes the amount that remains with the Respondent after making payments to the UPSIDC in terms of Para A above.

(E) Till the time, the Claimant does not make payment of Rs.15.2. crores to the Respondent and the amount paid to UPSIDC pursuant to this agreement as stated above to the Respondent, the Claimant shall have no right to carry out any construction on the plot. The Claimant shall maintain complete status quo and will not create any third party right or interest in the plot in any manner whatsoever.

(F) After having received the balance amount out of Rs.15.2 crores and the amount paid to the UPSIDC in terms of Para A above and the Interest for any delayed payment, if any, the Respondent will immediately transfer the lease and all other rights in respect of the aforesaid plot in favour of the Claimant without any demur. All the expenditure related with the transfer of lease shall be borne by the Claimant.

(G) The parties hereto agree that the Claimant shall hand over a demand draft of the balance amount by 31.08.2015 without Interest, or with interest as agreed in sub-clause (C) by 30.11.2015 to Hon'ble Arbitrator. The Respondent shall be entitled to receive the demand draft from Hon'ble Arbitrator after execution of lease/transfer of lease of the said plot in favour of the Claimant…."

xxxxxx

<u>Award</u>

"The order of 9th March, 2015 reads as follows:
"As per the order dated 13.01.2015, the Claimant has paid Rs. 2 Crores to the Respondent and the Respondent has paid Rs.1,27,20,370/- as full and final payment against Plot No.GH-

B (GH-14 to GH-17) at Industrial Area, Tala Nagar, Ramghat Road, Aligarh by RTGS on 03. 03.2015.
Accordingly the matter will be listed on ***30.03.2015 at 4.00 p.m.*** *for final disposal of arbitration proceedings as per the terms of settlement between the parties." Both the parties have appeared pursuant to the above order and jointly state that the dispute is finally settled and no part of the dispute survives.*
Accordingly, Application under 023R23 CPC dated 12.01.2015 which is signed by both the parties and their Counsel and supported by affidavits of both the parties have been perused by me and is found to be lawful, just and reasonable.
Thus, the Application under 023R23 CPC dated 12.01.2015 is allowed and the dispute stands disposed of in terms of the settlement terms recorded in the Application dated 12.01.2015 and an award is passed in terms of the said Application which shall form a part of this Award as Appendix 'A'."

9 It appears that since the petitioner could not fully comply with the terms of the settlement, which, *inter alia*, required him to pay moneys to the respondent, it moved an application before the learned Arbitrator on 30.11.2015 for extension of time. By this application, a month's extension was sought by the petitioner to pay a sum of Rs.14,47,20,370/-.

9.1 On this application, the learned Arbitrator passed the following order on that very date i.e. 30.11.2015:-

"An application has been moved on behalf of the Claimant seeking extension of time to deposit the sum of Rs. 14,47,20,370/- (Rupees Fourteen Crore Forty Seven Lakhs Twenty Thousand Three Hundred Seventy only) by one month by extending it from 30/11/2015 to 31/12/2015 by suitably awarding the interim award and the schedule.

Though the application states that the Respondent has consulted (sic) to the modification, the respondent has agreed subject to the interest @ 18 % for one month. Accordingly, the *application is allowed and the time to make the payment extended upto 31/12/2015 subject to pay (sic) the amount with 18% interest. The interim award and the schedule stands amended accordingly.”*

(emphasis is mine)

10 Concededly, the petitioner failed to make the payment despite the extension of time being granted to it. The petitioner, instead, moved another application on 28.12.2015 seeking extension of time till 31.01.2016.

10.1 Since, this application was sent via e-mail to the learned Arbitrator, he responded to the petitioner in the like manner vide e-mail dated 31.12.2015. The learned Arbitrator, apparently, asked the petitioner to obtain written consent of the respondent for extension of time.

11 Consequently, the learned Arbitrator held a hearing on 05.01.2016. On that date, the learned Arbitrator, despite the objection of the respondent, gave one last opportunity to the petitioner to comply with the settlement agreement, which had, as noticed above, morphed into an interim Award.

11.1 Accordingly, the learned Arbitrator extended time for payment till 31.01.2016. Resultantly, Award dated 30.03.2015 was modified to that limited extent.

12 The record shows that the petitioner failed to honour its obligation for the second time. As a result on 24.02.2016, the petitioner, once again, sought extension of time to make payment to the respondent.

12.1 At this hearing, though, the petitioner, tendered a sum of Rs.1 crore to the respondent with the assurance that the remaining amount along with interest, as awarded, would be paid by 31.03.2016. The matter was, consequently, renotified for 07.04.2016.

13 Though, the proceedings of 07.04.2016 are not on record, it is the petitioner’s own stand that on 30.05.2016, an application was filed for

setting aside the interim consent Award dated 30.03.2015, as modified on 24.02.2016.

14 The record shows that on 07.07.2017 parties convened before the learned Arbitrator when the following order was passed:

> "*While the settlement has not been reached, the Respondent has been informed by the Claimant that an effort would be made to arrive at a settlement before 30.08.2017. In case the matter is not settled and since the Award has already been passed, the parties are free to take consequential action in accordance with law.*
>
> *The parties are directed to furnish the details of the payments already made along with payment of their share of the Arbitrator's fee up to the 21st hearing on or before the next date of hearing.*
>
> *List on 30th August, 2017 at 4 pm.*"
>
> *(emphasis is mine)*

14.1 Admittedly, despite the door of settlement being kept open at the behest of the petitioner, since the petitioner failed to discharge its obligations, the arbitration proceedings were revived by the learned Arbitrator vide order dated 19.09.2017. This order reads as follows:

> "*The dispute has still not been settled despite vigorous efforts by the parties and the Senior Counsel for the parties. Accordingly, as per the order dated 30.03.2015 read with Clause D of the application under Order 23 Rule 3 of CPC read with Section 30 of the Arbitration Act filed by parties which led to a consent award , the matter is to revive from the stage prior to filing of the said application dated 13.01.2015.*

It is agreed that the Claimant has filed its Affidavit of Evidence and the Respondent is directed to file its Affidavits of Evidence on or before 03.11.2017.

The application dated 30.05 2016 shall be considered after the conclusion of evidence. However, it is made clear that the revival of the proceedings shall not come in the way of parties still trying to arrive at a fresh settlement.

List on 24th November 2017 at 4 pm, 13th December, 2017 at 2 pm, 14th December, 2017 at 4.30 pm and 15th December, 2017 at 4.30 pm for Cross Examination."

(emphasis is mine)

15 Apparently, thereafter, the petitioner filed another application, on 05.12.2017, to amend its Statement of Claims. To this application, the respondent apparently filed its reply on 13.12.2017, which, though, is not on record.

16 The record shows that the learned Arbitrator took up the two applications filed by the petitioner (one for setting aside interim consent Award dated 30.03.2015 and the other for amending its Statement of Claims) and dismissed the same on 31.01.2018 by a detailed order.

17 Thereafter, the petitioner took his chance, in this Court, by moving a fresh petition under Section 11 (6) of the 1996 Act. This petition was numbered as Arb. Petition No. 351/2018. Via this petition, the petitioner sought adjudication of all pending disputes between the parties including the disputes which had arisen after the passing of the Award dated 30.03.2015. This petition was, however, dismissed as withdrawn on 09.05.2018.

17.1 The learned Single Judge, while dismissing the petition as withdrawn, indicated that the withdrawal of the petition would not prejudice the petitioner in any other proceedings that it intended to embark upon.

18 It appears that it is, in this background, that the petitioner, thereafter, served upon the respondent a notice dated 12.05.2018. By virtue of this notice, the petitioner informed the respondent that it had appointed a former Chief Justice of Patna High Court as its nominee. Furthermore, it called upon the respondent to appoint its nominee Arbitrator, so that, once the two nominee Arbitrators were appointed, a fresh Arbitral Tribunal could be constituted to adjudicate upon the disputes obtaining between the parties.

19 The record discloses that since the proceedings before the learned Arbitrator were still subsisting, a hearing was held on 17.05.2018. At this hearing, the learned Arbitrator was informed by the senior counsel appearing for the petitioner that a petition had been moved before this Court under Section 11 (6) of the 1996 Act (inadvertently noted in the order of even date as Order 11 Rule 6). The learned Arbitrator, after recording what this Court had to say on 09.05.2018, in the operative part of the order passed on 17.05.2018 recorded the following:

> *"Since the senior counsel for both the parties have stated that nothing further survives before this Tribunal, these proceedings stand concluded."*
>
> *(emphasis is mine)*

20 Evidently, the respondent, thereafter, moved for execution of the Award. Consequently, an execution petition, being OMP (ENF.) (COMM.) No.142/2018, was filed in this Court. On 30.05.2018, notice was issued in the execution petition.

21 Furthermore, the respondent, via reply dated 04.06.2018, also responded to the petitioner's request for constitution of a fresh Arbitral Tribunal.

22 Given this exchange of correspondences qua the constitution of a fresh Arbitral Tribunal, the petitioner moved this Court, once again, under

Section 11 (6) of the 1996 Act via an arbitration petition numbered as: Arb. Petition No.515/2018.

23 On 23.07.2018, notice was issued in this petition and time was given to the respondent to file a reply.

23.1 In the order, though, certain observations were made by the Single Judge qua which the petitioner preferred a review petition. This petition was numbered as: Review Pet. No.341/2018.

24 On 04.09.2018, the petitioner filed another petition, this time, under Sections 14 and 15 of the 1996 Act. The prayer made in the petition was for appointment of a substitute Arbitrator in exercise of powers under Section 15 (2) of the 1996 Act. This petition was pivoted on the ground that the learned Arbitrator, who was appointed by this Court, by an order dated 21.04.2014, had terminated the proceedings without final adjudication of claims preferred by the petitioner.

25 In the meanwhile, the Review Petition No.341/2018 along with Arb. Petition No. 515/2018 came up for hearing before a Single Judge of this Court on 05.09.2018.

25.1 On that date, the learned Single Judge dismissed the review petition with costs of Rs.25,000/-, which was directed to be deposited with Kerala Chief Minister's Distress Relief Fund.

25.2 Insofar the Arb. Petition No. 515/2018 was concerned, it was, at the request of senior counsel appearing for the petitioner, directed to be relisted on 14.09.2018.

26 On 14.09.2018, the learned Single Judge took up for hearing, not only the Arb. Petition No. 515/2018 but also the petition filed under Sections 14 and 15 of the 1996 Act which was numbered as: OMP (T) (COMM.) No.93/2018. After recording the entire history of the case, the learned Single Judge dismissed both petitions.

27 Being aggrieved by the order dated 14.09.2018, the petitioner preferred two Special Leave Petitions. These Special Leave Petitions were numbered as: SLP (C) No.31826/2018 and SLP (C) No.31822/2018. The Supreme Court dismissed both the SLPs in limine vide order dated 10.12.2018.

28 As indicated at the very outset, the instant petition has been filed in the background of the aforementioned facts to assail, at this point in time, the Award dated 30.03.2015 and the order dated 17.05.2018, whereby, the learned Arbitrator had indicated that the arbitration proceedings stood concluded.

29 Mr. Datta, who, appears for the petitioner, submits that the petitioner was entitled to agitate its claims, which had not been adjudicated upon by the learned Arbitrator. In this behalf, Mr. Datta contended that the Arbitrator himself had reopened the proceedings and, therefore, there was no occasion for him to terminate the proceedings. This, according to Mr. Datta, railed against the notion of fair play and justice and, therefore, the petitioner was entitled to assail not only the Award dated 30.03.2015 but also the order dated 17.05.2018.

29.1 Mr. Datta further submitted that this was a fit case in which this Court should exercise powers under Section 14 of the Limitation Act, 1963 (in short 'Limitation Act') and exclude the period of 141 days spent in pursuing actions filed in this Court. A similar plea was made qua condonation of delay application as well.

30 On the other hand, Mr. Aggarwal, based on the record, contended that no interference was called for, on merits, and especially not after such a long lapse of time.

31 As noticed by me at the very outset, the instant petition under Section 34 of the 1996 Act is, *inter alia,* accompanied by I.A. No.1586/2019

whereby the petitioner seeks exclusion of 141 days spanning between 23.07.2018 and 10.12.2018 and also I.A. No.1588/2019 whereby condonation of delay of 13 days in filing the instant petition is sought. The application for exclusion of time is preferred under Section 14 of the Limitation Act, 1963. The said provision empowers the Court to exclude time which is spent in prosecuting, with due diligence, another civil proceeding, whether in a Court of first instance or of appeal or revision against the defendant, where proceeding relates to the "same matter in issue" and is "prosecuted in good faith" in a Court which on account of defect of jurisdiction or other cause of like nature is unable to entertain the action. Apart from anything else, while pressing its application under section 14 of the limitation Act, the petitioner would need to demonstrate that it had prosecuted its actions with due diligence and good faith.

32 The narration of facts, hereinabove, would show that the petitioner, after obtaining the interim consent Award, failed to discharge its obligation to pay moneys to the respondent. The petitioner, on three occasions, between November of 2015 and February of 2016, sought, on its own, extension of time to make payments. The petitioner having failed to make the payments to the respondent, changed its tactics by seeking to project that it had money ready for payment to the respondent, and that the respondent, on the other hand, was not in position to handover the subject complex to the petitioner, by virtue of an order of status quo with regard to its assets, having been passed by the Company Law Board in a petition filed a third party.

32.1 The petitioner, thereafter, once again, changed course by moving two applications, one for setting aside the interim consent Award dated 30.03.2015 and other for amending the Statement of Claim. While, these applications were still pending before the learned Arbitrator, the petitioner gave the impression to the learned Arbitrator that it would discharge its obligations by paying the agreed amounts to the respondent. The Arbitral Tribunal, taking into account the fact that the interim consent Award had not borne fruit, despite several opportunities, in its proceedings dated 19.09.2017, decided to revive the arbitration proceedings, which was in tune with the terms of the settlement agreement arrived at between the parties.

32.2 The petitioner, instead of making use of this opportunity and agitating its claims on merits before the learned Arbitrator, (as it now seeks to contend) approached this Court for appointment of another Arbitrator. This petition, however, was withdrawn on 09.05.2018.

33 The petitioner, as the narration of facts set out above, would show, thereafter, filed another petition under Section 11 along with a petition under Sections 14 and 15 of the 1996 Act. Both these petitions were dismissed by this Court on 14.09.2018.

33.1 In these petitions, the stand taken was that the petitioner wishes to have additional claims adjudicated which arose after passing of Award dated 30.03.2015.

33.2 In the interregnum, i.e. on 17.05.2018, based on the consent of the senior counsel for the parties, the learned Arbitrator terminated the arbitration proceedings pending before him.

33.3 Besides this, on 30.05.2018, in an execution petition filed by the respondent, notice was issued by the Court.

34 The malafides of the petitioner are demonstrable from the fact that on the one hand, in the petition, it is averred that after passing the interim consent Award dated 30.03.2015, the Arbitrator had become *functus officio* and on the other hand, applications, as noticed above, were filed, not once but on three occasions to extend the time frame for making payments under the very said Award to the respondent. The petitioner, having failed to

persuade the learned Single Judge, in the second Section 11 petition (i.e. Arb. Petition No. 515/2018), that he could press additional claims, is now wanting via this route to reopen proceedings, which were terminated with its consent.

35 The entire gamut of facts and circumstances show that the petitioner was not prosecuting its petitions in this Court with good faith and certainly not with due diligence.

36 Therefore, having regard to the conduct of the petitioner, I am not inclined, at this juncture, to exclude the period of 141 days, which spans between 23.07.2018 and 10.12.2018 for the purpose of calculation of period of limitation. For the very same reason, I am also not inclined to condone the delay of 13 days in filing the instant petition.

37 Resultantly, I.A. No.1586/2019 and I.A. No.1588/2019 are dismissed.

38 Since the aforementioned I.A.s have been rejected; the main petition filed under Section 34 of the 1996 Act and the accompanying application for stay i.e. I.A. No.1585/2019 would axiomatically be rendered infructuous.

38.1 Consequently, both, the main petition and the application for stay, are closed.

RAJIV SHAKDHER, J

FEBRUARY 01, 2019
A