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

+ **ARB. A. (COMM) 3/2019**

Date of Decision : 31st January, 2019

GAIL INDIA LIMITED

..... Petitioner

Through: Mr.Sandeep Kumar Mahapatra,
Adv.

versus

TRIVENI ENGINEERING AND INDUSTRIES LIMITED

..... Respondent

Through: Mr.Sourav Roy & Mr.Gaurav
Majumdar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No. 1437/2019 (Exemption)

Allowed, subject to all just exceptions.

ARB. A. (COMM.) 3/2019 & IA No. 1436/2019

1. This appeal has been filed by the appellant challenging the Order dated 23.10.2018 passed by the Sole Arbitrator directing the appellant to return the Performance Bank Guarantee to the respondent.

2. The disputes between the parties are in relation to the work of Demineralized (DM) Water Plant and Condensate Polishing Unit (CPU) awarded by the Appellant to the respondent for its Pata Petrochemical II project, Uttar Pradesh.

3. The respondent filed its Statement of Claim before the Arbitrator praying for the following relief:-

- a) Award a sum of Rs. 4,31,21,138 (Rs. Four Crore Thirty One Lakh Twenty One Thousand One Hundred and Thirty Eight Only) on account of retention money unpaid (inclusive of interest on the principle amount till 1.7.2018) due under this head;*
- b) Award a sum of Rs. 1,87,81,000 (Rupees One Crore Eighty Seven Thousand Eighty One Thousand Only) on account of the money withheld for fictitious 'CPS' component (inclusive of the interest on the principle amount till 1.7.2018) due under this head;*
- c) Award a sum of Rs. 30,49,000 (Rupees Thrity Lakh Forty Nine Thousand Only) on account of extra works performed under the contract (inclusive of the interest on the principle amount till 1.7.2018) due under this head;*
- d) Award a sum of Rs. 3,46,000 (Rupees Three Lakh Forty Six Thousand Only) on account of charges incurred in keeping the PBG alive;*
- e) On the aforesaid sums mentioned in prayers (a) to (d), award a perndente-lite interest at the rate of 18% from 1.7.2018 (two days prior to filing of Statement of Claims) till date of final award;*
- f) Award an interest of 18% on the sums awarded to the Claimant in the final award from date of final award till date of actual payment by the Respondent to the Claimant;"*

4. Alongwith the Statement of Claim, the respondent also filed an application under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for the following relief:-

“a. Direct the Respondent to release the Performance Bank Guarantee issued in its favour by the Claimant;

b. Direct the Respondent to pay the difference between Rs. 3,95,82,138/- and Rs. 1,20,00,000/-, i.e., the balance of Rs. 2,75,82,138/- (Rupees Two Crore Seventy Five Lakh Eighty Two Thousand One Hundred Thirty Eight Only) which has been rounded off to Rs. 2,75,00,000/- (Rupees Two Crore Seventy Five Lakh Eighty Two Thousand One Hundred Thirty Eight Only) retained without any basis, forthwith.”

5. The Arbitrator by the Impugned Order has allowed prayer (a) of the respondent, while rejecting prayer (b) made by the respondent in its application under Section 17 of the Act.

6. The Arbitrator in passing the Impugned Order has held that the date of completion of work by the respondent was 31.12.2015 and in terms of Clause 80.1, the Defect Liability Period ended one year therefrom. The Arbitrator further held that in terms of Clause 24.1 of the General Conditions of Contract (GCC), the Contract Performance Security was to be refunded to the respondent on expiry of the Defect Liability Period and therefore, the respondent was entitled to the release of the bank guarantee.

7. The learned counsel for the Appellant has placed reliance on Clause 1.1.17 of the GCC to contend that the Defect Liability Period would end only on the issuance of the “Final Certificate”. He further

submits that the term “Final Certificate” has been defined in Clause 1.1.16 of the GCC and therefore, is a specific term of the Contract. As a Final Certificate has not been issued by the Engineer In-Charge, the Defect Liability Period would continue till the same is issued and the bank guarantee could not have been released. In this regard he also places reliance on the Judgment of the Supreme Court in ***United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal***, (2004) 8 SCC 644, to contend that once a party has agreed to a particular definition in the Contract, it is bound by it and the general definitions available in other laws/Contract would not be applicable.

8. I have considered the submissions made by the learned counsel for the appellant, however, find no force in the same. Clause 1.1.15 defines “Completion Certificate” as under:-

“1.1.15 The “COMPLETION CERTIFICATE” shall mean the certificate to be issued by the ENGINEER-IN-CHARGE when the works have been completed entirely in accordance with CONTRACT DOCUMENT to his satisfaction.”

9. Clause 1.1.16 defines “Final Certificate” as under:-

“1.1.16 The “FINAL CERTIFICATE” in relation to a work means the certificate regarding the satisfactory compliance of various provision of the CONTRACT by the CONTRACTOR issued by the ENGINEER-IN-

CHARGE/EMPLOYER after the period of liability is over.”

10. Defect Liability Period is defined in Clause 1.1.17 as under:-

“1.1.17 DEFECT LIABILITY PERIOD in relation to a work means the specified period from the date of COMPLETION CERTIFICATE upto the date of issue of FINAL CERTIFICATE during which the CONTRACTOR stands responsible for rectifying all defects that may appear in the works executed by the CONTRACTOR in pursuance of the CONTRACT and includes warranties against Manufacturing/Fabrication/Erection/Construction defects covering all materials plants, equipments, components and the like supplied by the CONTRACTOR works executed against workmanship defects.”

11. Though it is true that in Clause 1.1.17 the Defect Liability Period is to continue till the issuance of the Final Certificate, Clause 80.1 specifically deals with the Defect Liability Period in the following words:-

“80 Defects Liability Period (Twelve months period of liability from the date of issue of completion certificate):

80.1 The CONTRACTOR shall guarantee the installation/WORK for a period of 12 months from the date of completion of WORK as certified by the ENGINEERING-IN-CHARGE which is indicated in the Completion Certificate. Any damage or defect that may

arise or lie undiscovered at the time of issue of Completion Certificate, connected in any way with the equipment or materials supplied by him or in the workmanship, shall be rectified or replaced by the CONTRACTOR at his own expense as deemed necessary by the ENGINEER-IN-CHARGE or in default, the ENGINEER-IN-CHARGE may carry out such works by other work and deduct actual cost incurred towards labour, supervision and materials consumables or otherwise plus 100% towards overheads (of which the certificate of ENGINEER-IN-CHARGE shall be final) from any sums that may then be or at any time thereafter, become due to the CONTRACTOR or from his Contract Performance Security, or the proceeds of sale thereof or a sufficient part on thereof.”

(Emphasis Supplied)

12. There being a specific provision prescribing the Defect Liability Period, the general definition given in the definition Clause in the Agreement cannot prevail over the same. In the Interpretation of Contracts’ by Sir Kim Lewison, 5th Edition, this principle of interpretation is stated thus:-

“7.05 Where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the facts to which the contract is to be applied fall within the scope of the specific provisions.”

13. In any case, the Arbitrator has considered the facts and interpreted various Clauses of the Agreement to arrive at the conclusion that the Defect Liability Period has ended one year from

the date of the completion of the work, which admittedly is 31.12.2015. I do not find any reason to interfere with such finding of the Arbitrator.

14. The learned counsel for the Appellant has further contended that in the Statement of Claim the respondent has not prayed for release of the Performance Bank Guarantee. Such release was prayed for only in the application under Section 17 of the Act. He submits that the interim prayer cannot go beyond the final prayer made in the Statement of Claim and in any case, the grant of the interim prayer made in the application under Section 17 of the Act would in effect be the grant of the final relief in favour of the respondent.

15. Though in law the submission made by the learned counsel for the Appellant is correct, however, in the peculiar facts of the present case, I do not find the same to warrant any interference with the Impugned Order.

16. In the present case, as noted above, the respondent has filed an application under Section 17 alongwith the Statement of Claim. In the Statement of Claim, the respondent pleaded that the bank guarantee has to be released and that the petitioner herein was illegally forcing the respondent to keep the bank guarantee alive. The respondent also claimed damages on account of such insistence. Though it may be correct that the respondent should have prayed for release of the Performance Bank Guarantee even in the Statement of Claim, however, the said formal defect cannot be used to upset the relief which otherwise the respondent has been found entitled to. If the

submission of the Appellant is to be accepted, the only result would be that the respondent would have to file a formal amendment application before the Arbitrator and thereafter have the same order passed by the Arbitrator on amendment of the Statement of Claim. Certainly the policy of law cannot be to insist on formalities to be completed rather than addressing the substance of the dispute.

17. In ***Mahila Ramnkali Devi and Others v. Nandram and Others***, (2015) 13 SCC 132, it has been held as under:-

“20. It is well settled that rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost.”

18. It is also true that the relief granted by the Arbitrator is in the nature of final relief. However, it cannot be disputed that the grant of such final relief would have been within the jurisdiction of the Arbitrator. The present order, infact, partakes the character of an Interim Award.

19. In ***Deoraj v. State of Maharashtra and Others***, (2004) 4 SCC 697, the Supreme Court held that though lesser in percentage, there can be cases when an order tantamounting to a mandamus is required to be issued even at an interim stage. In such cases the availability of a very strong *prima facie* case of a standard much higher than just *prima facie* case, the considerations of balance of convenience and

irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself.

20. In the present case the Arbitrator has found that the Performance Bank Guarantee, which was offered as the Contract Performance Security, was liable to be released, in any event, on and from 01.01.2017. Arbitrator further held that the Damocles Sword in the shape of the Performance Bank Guarantee cannot be allowed to hang over the respondent when the Defect Liability Period is clearly over and the petitioner, although it has preferred a Counter-Claim, already retains substantial amounts claimed by the respondent.

21. I have no reason to interfere with the above findings.

22. I, therefore, find no merit in the present appeal and the same is dismissed, with no order as to cost.

NAVIN CHAWLA, J

JANUARY 31, 2019/rv