

\$~11

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

+ O.M.P. (COMM) 60/2019 & I.A. No.1978/2019 (Stay)

Date of Decision : 19th February, 2019

DELHI STATE INDUSTRIAL AND INFRASTRUCTURE
DEVELOPMENT AND CORPORATION LTD. Petitioner

Through Ms.Anusuya Salwan, Ms.Nitika
Salwan and Ms.Shreya
Sharma, Advs.

versus

PNC DELHI INDUSTRIAL INFRA. PVT LTD. Respondent

Through Mr.Sandeep Sethi, Sr. Adv.
with Mr.Abhishek Kumar and
Ms.Arushi Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 05.10.2018 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the Concession Agreement dated 19.07.2011 for Redevelopment and Management of Narela Industrial Estate, Delhi.

2. PNC Infratech Ltd. was the successful bidder for the said work, while the respondent is the Special Purpose Vehicle formed by the said bidder for the purposes of the Concession Agreement.

3. The primary dispute between the parties before the Arbitrator was on a claim of Annuities payable to the respondent by the petitioner under Claim no.1. The Arbitrator in his Impugned Award has held that the respondent was entitled to claim Annuities with effect from 01.11.2013 as the Provisional Certificate of Completion was issued by the Third Party Engineer (TPE) with effect from 31.10.2013.

4. The learned counsel for the petitioner submits that in passing the above Award, the Arbitrator has misinterpreted Section 11.7 of the Concession Agreement which not only mandates the respondent to maintain books of account but also provide all such documents to the Auditor appointed by the petitioner to conduct an audit of the concessionaire's books of account. She submits that the respondent was in breach of this condition and, therefore, was not entitled to claim Annuities.

5. In support of her submission she also relies on Section 12.1 to submit that as the respondent had failed to perform its obligations under the Agreement, which is a pre-condition for payment of Annuities, the respondent was not entitled to claim Annuities.

6. Section 11.7 and Section 12.1 of the Concession Agreement are reproduced hereinbelow:

“12.1 Annuity

*In consideration of the Concessionaire accepting the Concession and undertaking to perform and discharge its obligations in accordance with the terms, conditions and covenants set forth in this Agreement, and subject to: (i) the provisions of this Agreement, and (ii) the Concessionaire achieving Annuity Commencement Date, DSIIDC agrees and undertakes to pay to the Concessionaire, on the Annuity Commencement Date and on each subsequent Annuity Payment Date as set forth in **Schedule 13 ("Annuity Payment Schedule")**, the sum of Rs.21.5 Cr. (Rupees Twenty One Crore Fifty Lakhs Only) (the "**Annuity**") as set forth in its Bid.”*

xxxxxx

“Section 11.7 Audit and Account

(a) Appointment of Auditors

(i) The Concessionaire shall appoint and have during the subsistence of this Agreement, as its statutory auditors, a reputed firm of chartered accountants duly licensed to practice in India. All fees and expenses of the statutory auditors shall be borne by the Concessionaire.

(ii) Any claim or document provided by the Concessionaire to DSIIDC relating to receipts, income, payments, costs, expenses, accounts or audit, and any matter incidental thereto, in connection with the Project shall, be valid and effective only if effective by the Concessionaire's statutory auditors.

(b) Maintenance of Accounts

(i) The Concessionaire shall, during the subsistence of this Agreement, maintain books of account recording all its' receipts from all sources derived or on account of the Project, income, expenditure, payments and assets and

liabilities, on accrual basis in accordance with this Agreement, the Applicable Laws, applicable accounting standards and Good Industry Practice. The Concessionaire shall provide DSIIDC 2 (two) copies of its audited balance sheet and profit and loss account along with a report thereon by its statutory auditors, within 120 (one hundred and twenty) days of the close of the Accounting Year to which they pertain,

(ii) The Concessionaire shall establish and maintain a quarterly reporting system to provide storage and ready retrieval of data related to the construction and operation of the Project in a format to be mutually agreed between DSIIDC and the Concessionaire. The Concessionaire shall provide copies of such reports to DSIIDC within 15 (fifteen) days of the end of each quarter.

(c) Audit by DSIIDC

(i) The DSIIDC shall have the right to conduct an audit of the Concessionaire's books of account, either itself or through its authorized representative, at any time after providing three (3) days notice to the Concessionaire, which notice shall provide the identity of the auditors being appointed for this purpose by DSIIDC.

(ii) The Concessionaire shall fully co-operate in enabling such audit to be undertaken by DSIIDC including providing such information as requested by the auditors undertaking such audit. In the event the Concessionaire fails to provide the information requested by the auditors within a period of a maximum of five (5) working days, the Concessionaire shall be liable to pay a fine of Rs. 2, 000 per day of delay in providing such information, which amount shall increase to Rs. 5, 000 per day for each day of delay beyond the first seven days of delay.”

7. Learned counsel for the petitioner further submits that in the present case the respondent had subcontracted all works under the contract in favour of M/s PNC Infratech Ltd. When the Auditor appointed by the petitioner sought inspection of the books of account of the respondent, the Auditor was handicapped in completing such audit as the books of accounts and supporting vouchers and bills of PNC Infratech Ltd were not made available to it. She submits that therefore, the respondent was in breach of its obligation under Section 11.7 of the Concession Agreement and not entitled to claim Annuity.

8. On the other hand, the learned senior counsel for the respondent submits that Annuity is payable in terms of Section 9.10 of the Concession Agreement on issuance of the Provisional Certificate by the TPE. In terms of Section 12.3 of the Concession Agreement, the invoice raised by the Concessionaire has to be verified by the TPE in accordance with Section 12.5 of the Agreement. The TPE has not recommended any deduction on account of purported failure of the respondent to comply with Section 11.7 of the Concession Agreement. He further submits that in any case, the respondent was not in breach of Section 11.7 of the Concession Agreement. The petitioner or the Auditor never demanded from the respondent the books of accounts or the supporting invoices/vouchers of PNC Infratech Ltd. In fact, the Auditor in his report has clearly opined that demand of such documents from the respondent would be beyond the scope of work assigned to the Auditor.

9. I have considered the submissions made by the learned counsels for the parties. The Arbitrator has interpreted various Clauses of the Concession Agreement, including the ones quoted hereinabove and has held as under:

“On careful reading of the provisions in Article 12 relating to Annuity, it is found that the clauses - "subject to: (i) the provisions of this agreement, and (ii) the Concessionaire achieving Annuity Commencement Date, DSIIDC agrees and undertakes to pay to the Concessionaire " creates a clear liability upon DSIIDC to pay the Annuity to the Claimant on its achieving the Annuity Commencement Date. Only in some cases the TPE is authorized to decide the amount recoverable from the Concessionaire from the Annuity which is made subject to dispute resolution provisions in the CA. There is no provision in the agreement containing the stipulation that on account of any alleged default in maintenance of account etc., the Annuity payment can be withheld. The provision in Section 12.3 is specific as to how the invoices, adjustment and certification for Annuity payment have to be done. Provisions in Sub-section (d) and (e) make it further clear that these special provisions relating to Annuity have greater binding force and bind DSIIDC to ensure payment of Annuity upon receipt of the invoices together with recommendation payment forwarded by the TPE. The payment is required to be made notwithstanding any dispute, of course, it has to be without prejudice once the dispute is resolved amicably or through arbitration.

*24. Learned counsel for the Claimant has rightly placed reliance upon judgment of the Apex Court in the case of **Poddar Steel Corporation Vs Ganesh Engineering Works & Ors** (1991)³ SCC 273 in support of his submissions that the provisions relating to Audits and Accounts do not contain any material conditions so as to*

make them mandatory and further no consequences are provided for non-compliance with such provisions, although it is the case of the Claimant that it has complied with essence of all these provisions.

xxxx

“The allegations of non-observance relate to such provisions which do not appear to be material and clearly do not affect the right of the Claimant to claim the due Annuity on achieving Annuity Completion Date. Since the TPE has verified the invoice for Annuity claimed and recommended for payment as per Section 12.3, the respondent is obliged to” make the payment regardless of even a dispute.”

10. I am in full agreement with the finding of the learned Arbitrator. It is not the case of the petitioner that the Concession Agreement was on a revenue sharing model or that the respondent would have been entitled to lesser amount of Annuities in case it had produced the books of PNC Infractech Ltd. It is also not the case of the petitioner that the TPE had recommended any deduction from the Annuities payable to the respondent on this account. I therefore, find no merit in the objection raised by the petitioner.

11. The counsel for the petitioner has further submitted that in terms of Section 10.8 of the Concession Agreement, the respondent was under an obligation to provide a video recording covering the status and progress of work for every calendar quarter. The respondent failed to do so in spite of a request by the petitioner vide its letter dated 27.01.2017 and therefore, the respondent was not entitled to its claim of Annuities.

12. On the other hand, the learned senior counsel for the respondent submits that this plea was not taken before the Arbitrator in its Statement of Defence filed by the petitioner. In any case, for the period in question there were no such grievances raised nor any deduction in the Annuities recommended by the TPE on this account.

13. I have considered the submissions made by the counsels for the parties. The petitioner is unable to show if the TPE had recommended any deduction in the Annuities on account of this alleged default by the respondent. A demand raised in January 2017 cannot be used to deny a claim for Annuity which became due in November, 2013. Reasons stated while rejecting the submission of the petitioner with respect to the alleged failure of the respondent to maintain books of accounts would also apply here. I, therefore, do not find any merit in the present objection as well.

14. It is further submitted by the counsel for the petitioner that the TPE vide its letter dated 24.10.2013 had rejected the request for issuance of Provisional Completion Certificate. It was only by the letter dated 23.12.2013 that the TPE forwarded the Provisional Completion Certificate to the petitioner. The TPE, thereafter by letter dated 03.03.2014 forwarded the final Completion Certificate to the petitioner. Learned counsel for the petitioner submits that in view of the above fact, the Annuities would become payable with effect from 03.03.2014, that is, the date of issuance of final Completion Certificate or at best from 23.12.2013, that is, the date of communication of

issuance of Provisional Completion Certificate by the TPE to the petitioner.

15. I am unable to agree with the said submission of counsel for the petitioner. In terms of Section 9.10, the date of issuance of the Provisional Certificate is considered as the Annuity Commencement Date entitling the respondent to receive Annuities from the petitioner in accordance with provision of Article 12 of the Concession Agreement. In the present case, the Provisional Certificate clearly indicates the provisional work completion date as 31.10.2013. Therefore, the Annuities have rightly been held to have become payable from that date. Mere delay of the TPE in forwarding the Provisional Completion Certificate to the petitioner, cannot deprive the respondent of its legitimate and contractual claim.

16. I may note that before the Arbitrator a submission had been made by the petitioner that there were delays and mistakes of TPE because of which the Provisional Certificate could not be relied upon. The Arbitrator negated this submission of the petitioner by holding as under:

“27. The alternative plea of the respondent that the date of completion must be taken as 14.3.2014 and not 31.10.2013 as claimed by the Claimant, also does not deserve acceptance. Such defense has to be rejected in view of facts already discussed and the prime and singular role assigned to the TPE in the matter of issuance of Certificate of Completion and/or Completion Certificate. This role could not have been abrogated by DSIIDC and it could not have disregarded Provisional Certificate of Completion/Provisional Certificate issued

by the TPE. As per Provisional Certificate of Completion issued by the TPE the date of completion is with effect from 31.10.2013. Claimant have based their Relief No.1 on the basis of this very date and the stand of the Claimant cannot be faulted with. Hence, Relief No.1 i.e. claim for payment of 4+1 Annuities (one falling due during the pendency of this proceeding) are found fit to be allowed along with a direction to the Respondent for payment of all further Annuities in terms of thy Concession Agreement(CA). Hence, Relief No.1 is allowed. It is clarified, however, that the respondent will be entitled to adjust the amount of Rs.43 crores paid under interim orders. The Bank Guarantee furnished for the said payment by the Claimant shall stand discharged.”

17. I do not find the above reasoning of the Arbitrator to be incorrect in any manner.

18. It is further submitted by the learned counsel for the petitioner that apart from allowing the claim of payment of 4+ 1 Annuities in favour of the respondent, the Arbitrator has issued a further direction to the petitioner for payment of all future Annuities. She submits that no such direction could have been issued by the Arbitrator.

19. I have considered the submissions made by the counsel for the petitioner. The Arbitrator has directed payment of all future Annuities “in terms of the Concession Agreement”. This, in any case, is an obligation of the petitioner and mere reiteration of the same by the Arbitrator is of no additional consequence.

20. The petitioner further challenges the award of Rs.1,41,70,767/- in favour of the respondent under Claim No.2 which was for the payment of maintenance charges.

21. The challenge of the petitioner is premised again on the very submission made by her in challenge to the claim of Annuities and therefore, stands rejected. The said claim was premised on the fact that from the Annuity Commencement Date the respondent was entitled to collect maintenance charges from the individual plot holders in the Industrial Estate. As the petitioner was contesting Annuity Commencement Date, it kept collecting the maintenance charges from the individual plot holders. The Arbitrator having held that the Annuity Commencement Date would be 01.11.2013, has rightly directed that the payment received by the petitioner as maintenance charges should be paid to the respondent with effect from the said date. In fact, the direction to pay is on the basis of the chart handed over by the petitioner itself to the Arbitrator showing the amount collected by it from the plot holder since that date and therefore, no fault can be found to the grant of said claim in favour of the respondent.

22. The petitioner further challenges the grant of claim no.3 in favour of the respondent. Claim no.3 was for the alleged loss caused to the respondent due to non reduction of interest rate of term loan by Oriental Bank of Commerce (OBC).

23. Learned counsel for the petitioner submits that the said claim has been awarded in favour of the respondent based on assumptions and without there being any proof of the same.

24. I do not find any merit in the submission made by the counsel for the petitioner. The Arbitrator in partially granting the said claim, has relied upon the letter dated 09.06.2014 addressed by the OBC to the respondent which showed that OBC was not willing to accept the request of the respondent for reduction of interest rate because the first Annuity had not been released by the petitioner. The bank had assured the respondent that the request would be considered after the Annuity payment was made and after respondent's credit rating is revised upwards. The Arbitrator also took note of the reliance of respondent on documents in relation to another project of the parent company of the respondent wherein the bank had reduced the interest rates. Based on this evidence, the Arbitrator has allowed 50% of the claim of the respondent. This being an assessment of damages by the Arbitrator, which is not found to be unreasonable or perverse, cannot be interfered with by this Court in exercise of its power under Section 34 of the Act.

25. The last challenge of the petitioner is to the Award of interest at the rate of SBI PLR rate plus 2% compounded yearly in favour of the respondent. The learned counsel for the petitioner challenges the rate as also the direction of it being compounded yearly. She submits that such rate of interest is highly exorbitant and cannot be sustained.

26. As far as the rate of interest is concerned, the Arbitrator has granted the same on basis of Section 20.21 of the Concession Agreement, which is reproduced hereinbelow:

“Section 20.21 Interest and Right of Set Off and Lien

Any sum which is due and payable under any of the provisions of this Agreement by one party to the other shall, if the same is not paid within the time allowed for payment thereof, be deemed to be a debt owed by the Party responsible for such payment to the Party entitled to receive the same. Such sum shall until payment thereof carry interest at the rate specified herein, and if not specified at the rate of SBI PLR plus 2% (two percent) per annum, from the due date and until the date of payment or otherwise realisation thereof by the Party entitled to receive the same .

Without prejudice to any other right or remedy available under this Agreement or under law, the Party entitled to receive such amount shall also have the right of set off.

Provided this provision for payment of interest for delayed payment shall not be deemed or construed to (i) authorise any delay in payment of any amount due by a party or (ii) be a waiver of the underlying breach of the payment obligation.

Provided further, in the event any sums whatsoever are due and owing to DSIIDC from the Concessionaire under this Agreement, DSIIDC shall recover the same by appropriating such dues from the Annuity, Performance Security and/ or exercising lien over the revenue of the Concessionaire generated from the Project.”

27. In view of the stipulation in the Contract itself, the rate of interest awarded by the Arbitrator cannot be faulted.

28. As far as the direction of the Arbitrator that the interest shall be compounded annually, the same does not flow from Section 20.21 of the Concession Agreement. Learned senior counsel for the respondent also submits that he has no objection if the said direction is set aside by this Court thereby directing the petitioner to pay interest at the rate of SBI PLR plus 2% per annum on the awarded amount.

29. In view of this submission, direction of the Arbitrator under claim no.4 is set aside only to the limited extent so far as it directs the interest to be compounded annually.

30. In view of the above, the petition is partially allowed in the above terms, with no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 19, 2019/Arya