

\$~48

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

Decided on: 7th May, 2019

+ **FAO 52/2019**

HIL (INDIA) LTD.

..... Appellant

Through: **Ms.Sadiqua Fatma & Mr.Amir Zafar
Khan, Advocates**

versus

M/S INDOGULF CROPS SCIENCES LTD

..... Respondent

Through: **None.**

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

%

CM APPL. 21805-21806/2019*(exemption)*

Exemption allowed, subject to all just exceptions.

The applications are disposed of.

CM APPL. 21804/2019*(early hearing)*

For the reasons stated in the application, the application is allowed,
and the appeal is taken on board.

FAO 52/2019

1. The present appeal is directed against a judgment dated 01.11.2018, passed by the learned Additional District Judge-05, New Delhi District, Patiala House Courts in Arbt.No.3347/2017. By the impugned judgment, the Court has dismissed the appellant's petition under Section 34 of the

Arbitration and Conciliation Act, 1996 ["the Act"] against an arbitral award dated 21.02.2017.

2. The appellant, a government owned company, issued a tender dated 19.02.2013, for purchase of various quantities of Agro Chemicals. The respondent submitted a bid in respect of eight products and furnished earnest money of ₹6,90,000/-. In the Techno Commercial bid submitted by the respondent, it agreed to the following stipulation of the appellant:-

“TECHNO COMMERCIAL BID PROFORMA

xxxx xxxx xxxx xxxx		
6	<i>Our normal payment terms are 100% payment with 60 days clean credit from the date of receipt but subject to acceptance of the material by our respective unit through cheque. However, any deviation from this term has to be specifically mentioned. In this regard Please see our Methodology for evaluation of tender (Annexure - IV)”</i>	Agreed/Not agreed
xxxx xxxx xxxx xxxx		

However, while submitting the price bid, the respondent incorporated a condition that, in the event payment was not made within 60 days, it would charge interest at the rate of 2%. The respondent's bid, being the lowest of all participating parties, was apparently accepted by the appellant and several purchase orders were placed upon the respondent between 17.04.2013 and 02.05.2013. However, it is the case of the appellant that, instead of accepting the purchase orders, the respondent sought a confirmation that its stipulation, as to payment of interest on amounts

outstanding beyond 60 days, was accepted by the appellant. However, as the appellant was not agreeable to this condition, it placed orders upon other parties and, by a noting dated 18.06.2013, forfeited the earnest money deposited by the respondent.

3. The present dispute is in respect of the respondent's claim for refund of earnest money. By an order dated 23.11.2015, this Court appointed Shri.Virender Mehta, Adv. as the sole arbitrator. He made an award dated 21.02.2017 in favour of the respondent, directing refund of the earnest money along with interest. The relevant discussion in the impugned award is as follows:-

"I have heard the contentions of both the parties and carefully perused the exhibits relied by them. In my opinion it is not the case of deviation from the terms and conditions of the tender documents as alleged by respondents. In both the documents Techno Commercial Bid as well as Price Bid the claimant has agreed to the terms of 60 days credit. There is no document on record that shows that the claimant was not in agreement with respondent over 60 days credit payment. The 2% interest on delayed period beyond 60 days was no deviation from the term as mentioned in clause 19 of the General Terms and Conditions of the Tender Document and clause 6 of the Techno Commercial Bid. This counter offer by the claimant of 2 % interest on the payment if made beyond 60 days of receipt of material was not deviation but is in addition to the General Terms and Conditions of the tender documents. It is evident from the Exhibit CW1/9 (Colly) that the claimant had sought confirmation on 2 % interest on delayed payment beyond 60 days period much prior to the purchase order placed by the respondent Exhibit RW1/6. It is further evident from the exhibit CW1/10, CW1/11, CW1/12 and RW1/6 that claimant had requested the respondent to confirm the 2% interest on delayed

payment beyond 60 days but the respondent without confirming counter offer of the claimant of 2% interest on delayed payment insisted upon to supply the material.

It is evident from the Exhibit RW1/10 the respondent had forfeited the Earnest Money Deposit on non-supply of material in terms of purchase orders of the respondent.

I am of the view that this was a case of counter offer from claimant which was neither rejected or accepted by the respondent. In the absence of any confirmation the claimant was justified in not supplying the material to the respondent and the forfeiture of the Earnest Money Deposit of Rs. 6,90,000/- by the respondent deposited by the claimant is not legal and the claimant is entitled to the refund of the same.”

4. While rejecting the appellant's petition under Section 34 of the Act, the learned ADJ has relied upon the judgment of the Supreme Court in *Associate Builders vs. DDA*, (2015) 3 SCC 49, and of this Court in *Mahanagar Telephone Nigam Ltd. vs. Telephone Cable Ltd.*, 190 (2012) DLT 227 to delineate the limited scope of interference under Section 34 of the Act. The impugned order thereafter reads as follows:-

“14. There is no dispute regarding the process of selection of tender. The arbitration clause provides that all disputes and differences arising between the parties in respect of the order/contract or breach thereof will be decided by Ld. Sole Arbitrator. Thus, the dispute before the Ld. Arbitrator was an arbitral dispute. Reliance placed on clause 10 of the general terms and conditions of tender by the petitioner is misplaced and the same has no application as the respondent never withdrew from the tender nor it modified/alterd any condition after the opening of tender. The counter offer made by the respondent of 2% interest on the payment if made beyond 60 days of receipt of material was not a deviation but was in

addition to the general terms and conditions of the tender documents. It is the settled law that this court is not to sit as a court of appeal and the objections taken by the petitioner against the award are in the nature of appeal. Ld. Arbitrator has taken the entire material and documents into consideration while passing the impugned award. The impugned award is not vitiated by any illegality and the same has been passed after proper appreciation of evidence and merits of the case.”

5. Learned counsel for the appellant submitted that the respondent was bound by the tender conditions and was not entitled to insist upon payment of interest for delayed payments. She submitted that the appellant was entitled to forfeit the earnest money under Clause 22 of the tender conditions in view of the respondent's failure to supply the material. Clause 22 of the tender conditions states as follows:-

“22. RISK PURCHASE: In the event of failure or delay on the part of the supplier to fulfil his obligation in the execution of the order/contract to HIL's satisfaction, HIL shall have the right to terminate the order/contract and make necessary alternate arrangements for completion of the order/contract through other means at delinquent suppliers risk and cost. In such an event the earnest money deposit will be forfeited without prejudice to HIL's right to claim compensation from supplier for the loss incurred by HIL as a result of supplier's failure to fulfil his obligation under the contract/order conditions. The damages so claimed by HIL will be in addition to the liquidated damages recoverable by HIL as mentioned in our liquidated damages clause. The supplier shall have no claim for compensation for any loss that may accrue from any material he might have collected or engagements, he may have entered into on account of the order/contract.”

Her contention was that the respondent had pre-emptively failed to supply the goods on the baseless presumption that the appellant would not pay within the contractual period of 60 days.

6. Having heard learned counsel for the appellant, I am of the view that the impugned award of the learned arbitrator, and the impugned order dated 01.11.2018 do not call for any interference. If the appellant was not willing to accept the terms offered by the respondent, including as to payment of interest, the appropriate consequence would have been to reject the respondent's bid and to decline to place orders upon it. It is evident from the award that the parties were not, in fact, *ad idem* on this issue. Clause 22 was not intended to operate in such a situation. The contractual clauses and the documentary evidence have been duly considered by the learned arbitrator whose findings do not demonstrate any manifest arbitrariness or perversity. The limited grounds of interference under Section 34 of the Act, as elaborated by the Supreme Court, *inter alia*, in *Associate Builders (supra)* are therefore not attracted in the present case.

7. For the reasons aforesaid, the appeal is dismissed.

PRATEEK JALAN, J.

MAY 07, 2019

'j/pv'