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

Reserved on: 3rd May, 2019
Pronounced on: 17th May, 2019

+ **O.M.P. (COMM) 179/2019, I.A. 6494/2019 & I.A. 6495/2019**

rites ltd.

..... Petitioner

Through: Mr. R.P. Agrawal, Advocate with Ms.
Sonali Rastogi and Mr. Prateek
Kushwaha, Advocates.

versus

MR. SUBRATA KUMAR GHOSE

..... Respondent

Through: None.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. The present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act" in short) read with Section 10 (2) of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 challenges the arbitral award dated 7th January 2019 passed by the Ld. Sole Arbitrator Sh. T.K. Dhar.

Brief Facts

2. Petitioner is an Engineering Consultancy Company incorporated under the provisions of the Companies Act, 1956, specializing in the field of Transport Infrastructure. Respondent runs a sole proprietorship business

under the name and style of Dawn Engineering Company.

3. Petitioner floated a Tender dated 8th May 2012 for "Survey, Data Collection and Preparation of Drawings, Documents Related to Railway Electrification of New Dedicated Freight North-South Corridor (Delhi-Chennai) for DFCCIL". Respondent participated in the same and was declared the successful bidder. He was awarded the said work vide Letter of Acceptance (LOA) dated 9th July 2012 for an amount of Rs. 25,00,680/-.

4. As per the LOA the said work was to be completed within a period of 6 months from the date of issuance of LOA or from the date of handing over of site, which ever was later. However on request of the Respondent, Petitioner extended the date of completion from 9th January 2013 to 8th March 2013. In terms of the LOA the Respondent was required to furnish an irrevocable performance guarantee (PG) for an amount of Rs. 1,25,034/- and additional PG (APG) for Rs. 2,86,193/- (amount of both PGs aggregating to Rs. 4,11,227/-) within 15 days. The Respondent failed to furnish the same and instead submitted two FDRs for a total amount of Rs. 4,11,227/- on 14th December 2012, after the stipulated period. Despite the Respondent's failure to provide the bank guarantees within the stipulated period, Petitioner issued directions to him to deploy his survey team and submit report for the track and balance alignment of the Route Kilometers (RKM). On 26th December 2012, the survey report along with the bill for the survey of 1200 RKM was submitted and the same was also paid. The 2nd Bill dated 22nd January 2013, for completing survey upto 2096 RKM out of

a total of 2184 RKM was submitted later, but the same was returned by the Petitioner.

5. Subsequently, on 24th June 2013, after the expiry of the contractual period the Respondent was directed to survey and provide alignment of the detour section. Respondent refused to undertake the said survey unless the same was treated as extra/varied RKM contending that he had already completed more than 96% of the survey and undertaking survey for the detour section meant repetition of the entire work. On 12th November 2013, Petitioner issued a show-cause notice to the Respondent, directing him to accelerate the progress of the work failing which his case would be recommended to the Competent Authority for determination of Contract. The Respondent did not to reply the same. Subsequently, another show-cause notice dated 16th December 2013 was issued to him, followed by the termination of the contract vide notice dated 28th April 2014. Aggrieved by the termination, Respondent vide letter dated 3rd August 2016 wrote to the Petitioner requesting for appointment of a sole Arbitrator. In response thereto, on 22nd September 2016, the Petitioner through its competent authority appointed Sh. T.K. Dhar, Retd. ED, NTPC Ltd. as the Sole Arbitrator.

6. The moot question before the Ld. Arbitrator was whether the Petitioner failed to keep its own commitment by not providing the relevant details in a timely manner and by directing the Respondent to carry out survey for the detour sections of the alignment after the expiry of the contractual period for completion of the job.

7. Before the Arbitrator, Respondent filed several claims. The learned Arbitrator in para No. 5.33 of the Award has held that the Termination of the Contract by the Petitioner was illegal and beyond contractual stipulations. The Petitioner had no authority to forfeit - the earnest money BG amount, Security money deducted on account bills etc. The Ld. Arbitrator has allowed the Claims raised by the Respondent as under: -

Claim No.	Particular of Claim	Amount Claimed	Amount Awarded (Rs)
1.	Claim towards forfeited Performance Guarantee, EMD, Security Deposit deducted and unpaid amount towards work done	18,07,010/-	11,20,911/-
2.	Claim on account of Mental Harassment	50,00,000/-	NIL
3.	Claim towards Loss of goodwill and reputation	100,000,00/-	NIL
4.	Claim towards Loss of Business	70,000,00/-	3,75,102/-
	TOTAL	2,38,07,010/-	14,96,013/-
5.	Cumulative Interest @ 18% PA to be		

	calculated from the date of termination till the date of payment		
	Pre-Award interest		Nil
	Post-Award interest		10% S.I. p.a. after 3 months from the date of award
	GRAND TOTAL	2,38,07,010/-	14,96,013/-

Grounds/Submissions of the Petitioner

8. Learned counsel for the Petitioner, during the course of arguments, confined the scope of challenge in the present petition in respect of findings on Claim No. 4. He however raised a preliminary objection that the Arbitrator could not have decided the disputes referred to it as the Respondent had failed to comply with the pre-arbitration conditions as prescribed in Clause 25 of the General Conditions of Contract (GCC), which reads as under: -

"CLAUSE 25

Settlement of Disputes and Arbitration

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or

, otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

1) If the Contractor considers any work demanded of him to be outside the requirements of the Contract, or disputes any drawings, record or decision given in writing by the Engineer on any matter in connection with or arising out of the Contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Engineer-in-charge in writing for written instruction or decision. Thereupon, the Engineer-in-charge shall give his written instructions or decision within a period of one month from the receipt of the Contractor's letter.

If the Engineer-in-charge fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the instructions or decision of the Engineer-in-charge, the Contractor may, within 15 days of the receipt of the Engineer-in-charge decision, appeal to the Appellate Authority specified in Schedule 'F' who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Appellate Authority shall give his decision within 30 days of receipt of Contractor's appeal. If the Contractor is dissatisfied with this decision, the Contractor shall within a period of 30 days from receipt of the decision, give notice to the Appointing Authority specified in Schedule 'F' for appointment of Arbitrator, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator. "

9. He argues that in terms of the said aforesaid Clause, the Respondent could have first approached the Engineer-in-Chief for adjudication of the disputes arising out of the LOA. Thereafter, if the Respondent was aggrieved by the decision of the Engineer-in-Chief, he could have approached the Appellate Authority as specified in Schedule F of the LOA. If the Respondent was not satisfied with the decision of the Appellate Authority, only then he could

have approached the learned Arbitrator for adjudication of the disputes. He further argues that the Respondent requested the Petitioner for appointment of the Arbitrator after 28 months for the date of termination is barred by limitation in terms of Clause 25.1 that requires the Respondent to seek appointment of the Arbitrator within 30 days of receipt of the decision of the Appellate Authority. He further submits that the learned Arbitrator failed to take into consideration the exaggeration of claims made by the Respondent in contrast to his letter dated 3rd August 2016, for appointment of an Arbitrator, where under an aggregate amount of Rs. 18,07,010/- was claimed, without any demand for loss of profits/ business. Lastly, he submits that the learned Arbitrator has failed to take note of the aforementioned preliminary objections before deciding the specific claims of the Respondent and the Arbitral Award is thus bad in law and should be set aside.

Findings and Analysis on Preliminary Objections

10. Before deciding the challenge to the findings of the Arbitrator on the specific claims, it is essential to deal with the preliminary objections. Sh. T.K. Dhar, Retd. ED, NTPC Ltd. was appointed as the sole arbitrator. His appointment was pursuant to the invocation notice dated 3rd August 2016 sent by the Respondent requesting for constitution of the arbitral tribunal in consonance with the provisions of the GCC. In response to the letter dated 3rd August 2016, the Petitioner without any reservation or insisting upon the pre-reference procedure proceeded to appoint the arbitrator. The contents of the letter of appointment of arbitrator are being reproduced hereunder:-

“Whereas M/s Dawn Engineering Company, Kolkata have written letter to Group General Manager/EE vide their letter dt. 0308.2016 referred at Sr. no. (iii) that certain disputes have arisen between the above noted parties in respect of the above noted work. I, Executive Director (RI)/RITES by power conferred on me under Clause 25 of the said Agreement hereby appoint as Sole Arbitrator to decide and make his award regarding the claims/disputes by the contractor as well as the Counter Claims of RITES, if any, arising out of the same contract, subject to admissibility of the Claims and the Counter Claims 25 of the aforesaid Agreement.

The Arbitrator shall give his award in respect of each Claim/Counter Claim and also give reasons for the award in respect of each Claim/Counter Claim.”

Petitioner was well within his rights to compel the Respondent to undergo the pre-arbitration process. However, it did not do so and appointed the arbitrator asking him to give his award in respect of each claim supported by reasons. Therefore, at this stage after the completion of the arbitration proceedings this objection of the Petitioner is untenable and is liable to be rejected.

11. The next contention, that the Arbitrator could not have entertained claims in excess of the amount mentioned in the letter of invocation of the arbitration clause dated 3rd August 2016 is also misconceived. The letter of appointment dated 22nd September 2016 does not define the terms of reference. The learned Arbitrator in para 5.27 of the award has also noted that the claimant has never raised the aforesaid contention in the claim petition and the same was brought up for the first time during the course of arguments after the conclusion of trial. Referring to the contents of the letter

of appointment, the Arbitrator has concluded that Petitioner did not restrict the scope of arbitration. The wording of the appointment letter is clear, unambiguous and permits the parties to raise all such claims as may arise under the agreement. These observations and findings are based on documents and do not call for any interference. Petitioner's contention that the invocation of the arbitration clause after 28 months from the date of termination of contract is barred by limitation is contrary to the settled position of law. The Supreme Court in *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co.*, [1997] 3 SCR 202 has held that the period of limitation cannot be curtailed by parties by way of a contractual stipulation. The invocation of arbitration, being the commencement of the proceedings as envisaged under Section 21 of the Arbitration and Conciliation Act, 1996, is within time and cannot be said to be barred by limitation. This objection is also rejected.

Claim No. 4.- Claim towards Loss of Business entailing Loss of Profitability

12. Learned counsel for the Petitioner precludes his submissions on Claim no. 4 by contending that the Arbitrator wrongly allowed an amount of Rs. 3,75,102/- towards loss of profit, failing to take note that the Respondent had claimed the said amount under the head of loss of business. He argues that loss of profits and loss of business cannot be considered to have the same meaning. He submits that the Claim has been erroneously allowed by the Arbitrator on assumptive grounds that in Commercial Contracts, 15% of profits normally accrue. The only evidence led by the Respondent to justify his claim for loss of profits/loss of business was his balance sheet/Income

Tax Returns for the year 2004-05 to 2008-09. The said documents instead of proving loss, show annual profits of Rs. 35,00,000/- and are also irrelevant as the Contract/dispute pertained to the year 2012 to 2014. It is also contended that the claim of loss of business filed before the learned Arbitrator was merely an afterthought as the Respondent did not raise any Claim of loss of profits/business in its letter dated 3rd August 2016 where under an aggregate amount of Rs. 18,07,010/- was sought. Lastly, it is contended that the Claim ought not to have been allowed by the learned Arbitrator on the ground that Respondent had sought an exaggerated amount of Rs. 70,00,000/- towards loss of business despite his Annual Business Report reflecting an annual profits up to Rs. 35,000,00/- only.

Findings and Analysis on Claim No. 4

13. While allowing this claim the Arbitrator has held the Respondent to be entitled to marginal profits which he would have yielded on completing the work in terms of the agreement between the parties. The findings of the learned arbitrator are based on the finding that termination of the contract was unjustified and arbitrary and the failure of the Respondent to complete the work was attributable to the Petitioner. The learned arbitrator while allowing the said claim awarded a nominal amount of Rs. 3,75,102/- as compensation for the wrongful termination of the contract. Hence, the distinction that the Petitioner has tried to raise between loss of profit and loss of business is completely bereft of merit. Since the Petitioner has been held to be at fault, it was legally bound to compensate the other party to the agreement. As a direct consequence of the unlawful termination, the

Respondent is to be presumed to have sustained damages, it may be liquidated damages or in some cases nominal damages. In absence of actual loss of profit, the Arbitrator can award nominal damages in favour of the party not in breach of the agreement however, such damages can only be nominal in nature. What is to be the amount of nominal damages depends on the facts of each particular case. In the present case award of damages of Rs. 3,75,102/- as compensation for the wrongful termination of the contract is nominal and reasonable. The courts have also recognized the position that in a works contract, if the party entrusting the work commits breach of the contract, the contractor is entitled to claim damages for loss of profit, which he expected to earn by undertaking the works contract. In such cases, the Court without insisting for direct proof of the measure of lost profit, have granted 10-15 per cent of the contract value as damages. Since the amount awarded is nominal and keeping in view that the scope of interference by the Court with an arbitral Award has been considerably narrowed down by the Supreme Court in several decisions, the court is not inclined to interfere with the findings in the impugned award on this claim. Court also finds the reasoning given by the Arbitrator to be proper and sound and is accordingly upheld.

14. Lastly, relying on well-worn principles laid down by the Supreme Court in *Associate Builders v. Delhi Development Authority* reported in (2015) 3 SCC 49, *H.B. Gandhi, Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons* reported in 1992 Supp (2) SCC 312, *State of Orissa v. M/s. Samantary Constn. Pvt. Ltd.* reported in 2015 (9) SCALE 685 and *P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H.*

Securities Private Limited, reported in (2012) 1 SCC 594 to the effect that a court exercising jurisdiction under Section 34 of Act does not sit in appeal over the award to re-assess or re-appreciate evidence; and that where there is nothing perverse or irrational, the Court will not interfere in an arbitral award, this court holds that there is no ground for interference in the award.

15. In view of the above, the petition along with all pending applications are dismissed with no order as to costs.

May17th, 2019

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SANJEEV NARULA, J.