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

*Reserved on: 3<sup>rd</sup> May, 2019*

*Pronounced on: 17<sup>th</sup> May, 2019*

+ **O.M.P. (COMM) 177/2019, I.A. 6487/2019 & I.A. 6488/2019**

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 7<sup>th</sup> January 2019 passed by the learned 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 and was acting as a constituted attorney of Steel Authority of India Limited (SAIL), Raw Material Division, Kolkata.

Respondent runs a sole proprietorship business under the name and style of Dawn Engineering Company.

3. Petitioner floated a Tender dated 23<sup>rd</sup> April 2012 for the DESIGN, SUPPLY, ERECTION, TESTING AND COMMISSIONING OF SWITCHING POST (SSP) at Bolani Ores Mines Railway Post, Chakradharpur Division of South Eastern Railway, on behalf of Steel Authority of India Limited, Raw Material Division, whereby the Respondent was declared the successful bidder and he was awarded the said work vide Letter of Acceptance (LOA) dated 18<sup>th</sup> September 2012 for an amount of Rs. 43,49,993/-.

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 i.e. 17<sup>th</sup> March 2013, or from the date of handing over of site, whichever was later. In terms of the LOA the Respondent was required to furnish an irrevocable performance guarantee (PG) for an amount of Rs. 2,17,500/- within 15 days. The Respondent failed to do so, but nonetheless the Petitioner directed him to carry on the SSP work in terms of the LOA.

5. The Petitioner issued several reminders to the Respondent to furnish the aforesaid PG and also requested him to expedite the work. A number of alterations in the approved drawings for the project (on the basis of which the work was to be completed) were made and as a result, the Respondent sought extension for completion of the work by upto 30<sup>th</sup> June 2013. The said request was not allowed. The Respondent then informed the Petitioner

that due to the amendments in the drawings and change of site there was a variation of 60% and material requirements were also enhanced by 68%. On 24<sup>th</sup> May 2013 Petitioner extended the date for furnishing the Performance guarantee to 5<sup>th</sup> June 2013, but despite the extension the Respondent failed to comply. On 8<sup>th</sup> November 2013 a show cause notice was issued stating as to why the contract should not be terminated. This was followed by the termination notice dated 17<sup>th</sup> April 2014 attributing delay and failure on the part of the Respondent to furnish the PG. Aggrieved by the said termination, Respondent vide letter dated 3<sup>rd</sup> August 2016 wrote to the Petitioner requesting for appointment of a sole Arbitrator. On 21<sup>st</sup> September 2016, the competent authority of the Petitioner appointed Sh. T.K. Dhar, Retd. ED, NTPC Ltd. as the Sole Arbitrator, in terms of the Arbitration Agreement.

6. Before the Arbitrator the Respondent filed several claims including recovery of dues and payment for the work done. After due consideration of the facts and material produced in trial, the Learned Arbitrator in Para 5.27 of the Award, has held that the termination of the contract by the Petitioner was illegal and beyond contract stipulations. The Petitioner had no authority to forfeit the earnest money deposited and other dues of the unpaid work. The Ld. Arbitrator has allowed the Claims raised by the Respondent as under: -

| <b>S. No.</b> | <b>Particular of CLAIM</b> | <b>Amount Claimed (Rs.)</b> | <b>Amount Awarded (Rs.)</b> |
|---------------|----------------------------|-----------------------------|-----------------------------|
|               |                            |                             |                             |

|    |                                                                                                |                      |                                                      |
|----|------------------------------------------------------------------------------------------------|----------------------|------------------------------------------------------|
| 1. | Claim towards refund of Earnest Money Deposit                                                  | 38,000/-             | 38,000/-                                             |
| 2. | Claim towards work done but not paid                                                           | 1,53,000/-           | 1,53,000/-                                           |
| 3. | Claim towards Loss of Goodwill and Reputation                                                  | 1,00,00,00/-         | NIL                                                  |
| 4. | Claim towards Loss of Business entailing Loss of Profitability                                 | 70,000,00/-          | 6,52,490/-                                           |
| 5. | Claim towards Mental Harassment                                                                | 50,000,00/-          | NIL                                                  |
| 6. | Claim towards payment of interest@ 18% PA<br>(a) Pre-award interest<br>(b) Post-award interest |                      | NIL<br><br>10% PA after 03 months from date of award |
|    | <b>TOTAL AWARDED AMOUNT</b>                                                                    | <b>2,21,91,000/-</b> | <b>8,43,940/-</b>                                    |

### **Grounds/Submissions of the Petitioner**

7. During the course of arguments learned counsel for the Petitioner confined the scope of challenge in the present petition to the findings on Claim Nos. 2 and 4. The Learned counsel however raised preliminary

objections 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. "

8. He argues that in terms of the said aforesaid Clause, the Respondent should 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 should have approached the Appellate Authority as specified in Schedule F of the LOA and only in the event the Respondent was not satisfied with the decision of the Appellate Authority, he could have approached the learned Arbitrator for adjudication of the disputes. He further submits that the request for appointment of the Arbitrator after 28 months for the date of termination notice is barred by limitation in terms of Clause 25.1 that requires the Respondent to seek appointment of 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 3<sup>rd</sup> August 2016, where under an aggregate amount of Rs. 2,73,926.85/- was claimed, without any demand for loss of profits/ business. Lastly, He submits that the learned Arbitrator has failed to take note of the 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**

9. 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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.

10. 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 3<sup>rd</sup> August 2016 is also misconceived. The letter of appointment dated 22<sup>nd</sup> 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. 2- Claim towards work done but not paid**

11. Learned counsel for the Petitioner argues that the Ld. Arbitrator failed to appreciate and consider the terms of the letter of appointment dated 5<sup>th</sup> October 2012. No payments could have been made until the Respondent had furnished the PG and APG in terms of the LOA and hence, the Respondent was not entitled to payment for the works done by him. The learned Arbitrator failed to consider that the Respondent did not raise any Bill for the works done by him under the Agreement. The Arbitrator has awarded a sum of Rs. 1,53,000/- merely on the basis of a Letter dated 15<sup>th</sup> March 2013 sent to the Petitioner stating the amount of work done by him. The said Claim ought not to have been allowed in absence of any cogent evidence to support the same.

**Findings and Analysis on Claim No. 2**

12. Learned Arbitrator while deciding the validity of the termination of the Contract between the parties has held that the termination to be illegal and unlawful. Further, he has also returned a finding of fact holding the petitioner guilty of delay in execution of the work. It is also observed that on account of the failure of the Respondent to furnish the PG and APG within the stipulated time as per the LOA, the Petitioner could have terminated the Contract. The conduct of the Petitioner has been elaborately discussed in the impugned award. Despite the delay on the part of Respondent in furnishing the PG and APG and other stipulations as per the LOA, Petitioner allowed the Respondent to continue with the execution of the contract. Petitioner granted Respondent extension of time to furnish the PG and APG and also

permitted him to carry on the work in terms of the LOA. Hence, the Petitioner has remitted the terms of the Contract which mandated the Respondent to furnish the PG and APG before any payment could be made to him for the work carried out in terms of the agreement. Respondent performed his obligation and executed the work till the date of termination. Since the termination has been held to be unlawful, the necessary corollary is that Respondent became entitled for the work done. On termination, right to payment for the work done but not paid remains unaffected. There was no counter-claim of the Petitioner and thus Respondent was entitled to be paid for the work done. The Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181*, has held that construction of contract between the parties is within the jurisdiction of the arbitrator and they cannot be said to have misdirected themselves in taking into consideration the conduct of the parties. The learned Arbitrator has rightly awarded the claim towards the work done and not paid. The said finding is based on well grounded reason and requires no interference by the Court. Moreover, it is trite law that when the decision of the arbitrator is based on sound reasoning and well established principles of law, the same cannot be interfered with by this Court in its jurisdiction under Section 34 of the Act. Hence, the challenge to the Claim No.2 is dismissed and the decision of the learned Arbitrator of the said Claim is upheld.

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

13. Learned counsel for the Petitioner precludes his submissions on Claim no. 4 by contending that the Arbitrator wrongly allowed an amount of Rs.

6,52,490/- 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 3<sup>rd</sup> August 2016 where under an aggregate amount of Rs. 2,73,926.85/- 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. 35,00,00,00/- only.

#### **Findings and Analysis on Claim No. 4**

14. 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. 6,52,490/- 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. 6,52,490/- 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.

15. 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.

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

**May 17<sup>th</sup>, 2019**

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**SANJEEV NARULA, J.**