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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) 176/2019, I.A. 6485/2019 & I.A. 6486/2019**

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 learned Sole Arbitrator Sh. T.K. Dhar.

Case of the Petitioner

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 Corridor "East - West" (Kolkata - Mumbai) 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 5th October 2012 for an amount of Rs. 21, 38,000/-

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. on or before 4th April 2013 or from the date of handing over of site, whichever was later. In terms of the LOA, Respondent was required to furnish an irrevocable performance guarantee (PG) for an amount of Rs. 1,06,900/- and additional performance guarantee (APG) for Rs. 4,27,000/- (amount of both PGs aggregating to Rs. 5,33,900/-) within 15 days.

5. The Respondent failed to furnish the aforementioned Guarantees within the stipulated period. Despite the failure, Petitioner directed him to carry on work in terms of the LOA. The Respondent vide his letter dated 5th November 2012, requested the Petitioner to waive the condition of furnishing Additional Performance Guarantee of Rs. 4,27,000/- and informed them that he had completed the Survey. Vide letter dated 24th June 2013, a draft report as per the Track Alignment Details was provided to the Petitioner. The said report was returned on 16th July 2013 with comments to be incorporated in the Report. The Respondent thereafter re-submitted the report on 14th August 2013. On 8th November 2013, a notice was issued to

the Respondent to restart/accelerate the progress of work and also to deposit PG & APG within 7 days, failing which the case would be recommended to the Competent Authority for determination of Contract. Subsequently, on 26th November 2013, a joint meeting was held, wherein the Respondent unconditionally promised that the survey and site detail of left-over detour section will be done and deliverables will be submitted for the section ANDEL (ASANSOL) - NAGPUR by 15th January 2014 and for the balance section by 31st January 2014. However, the Respondent failed to comply with the promise made in the said meeting.

6. Finally, on 16th December 2013, another notice was issued to the Respondent highlighting the failures on his part in calculating the awarded Contract and his failure to comply with the commitment of PG and APG. On 17th April 2014, the Petitioner terminated the Contract. Aggrieved by the said termination, Respondent vide letter dated 3rd August 2016 requested the Petitioner for appointment of a sole Arbitrator. The competent authority of the Petitioner then appointed Sh. T.K. Dhar, Retd. ED, NTPC Ltd. as the Sole Arbitrator, in terms of the Arbitration Agreement as contained in the LOA.

7. Before the Arbitrator, Respondent filed several claims including recovery of unpaid dues and payment for work done. The learned Arbitrator in para No. 5.35 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.	Description of CLAIM	Amount Claimed	Amount Awarded (Rs)
1.	Claim towards refund of Earnest Money Deposit	28,500/-	28,500/-
2.	Claim towards work done but not paid	16,56,950/-	12,18,660/-
3.	Claim towards Loss of Goodwill and Reputation	1,00,00,00/-	NIL
4.	Claim towards Loss of Business entailing Loss of Profitability	70,00,00/-	3,20,700/-
5.	Claim towards Mental Harassment	50,00,00/-	NIL
6.	Claim towards payment of interest@ 18% PA (a) Pre-award interest (b) Post-award interest		NIL 10% PA after 03 months from date of award
	TOTAL AWARDED AMOUNT	2,63,85,450/-	16,03,213/- (Say) 16,03,210/-

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 Nos. 2 and 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, whereunder an aggregate amount of Rs. 24, 17, 225/- 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 of the Petitioner, it is essential to deal with the preliminary objections. Sh. T.K. Dhar, Retd. ED, NTPC Ltd. was appointed as the sole arbitrator on 22nd September 2016. 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 an arbitrator. The contents of the letter of appointment 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.”

The 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. The learned Arbitrator in para 5.35 of the award has 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. Referring to the contents of the letter of appointment, the Arbitrator concluded that Petitioner did not restrict the scope of arbitration. These observations and findings do not call for any interference and at this stage after the completion of the arbitration proceedings this objection of the Petitioner is untenable and is liable to be rejected.

11. Petitioner's contention that the Arbitrator could not have entertained claims in excess of the amount mentioned in the letter of invocation dated 3rd August 2016 is also misconceived. The letter of appointment dated 22nd September 2016 does not define the terms of reference. The wording of the appointment letter is clear, unambiguous and permits the parties to raise all such claims as may arise under the agreement. Petitioner's next submission 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

12. Learned counsel for the Petitioner argues that the Ld. Arbitrator failed to appreciate and consider the terms of the Letter of Acceptance dated 5th October 2012. No payments could have been made until the Respondent had furnished the PG and APG in terms of the LOA and hence he was not entitled to payment for the works done by him. It is argued that the learned Arbitrator failed to notice that the aforesaid claim was without merit as the Respondent did not raise any official Bill for the works done by him under the Agreement. Learned counsel further submits that the Arbitrator has awarded a sum of Rs. 12,18,660/- merely on the basis of the letter dated 15th March 2013 without any further proof. 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

13. Learned Arbitrator has held that the termination of the contract by the Respondent to be illegal and unlawful. Further, he has also attributed the delay in execution of the work to the Petitioner itself. The learned Arbitrator has 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, contract could have been terminated. The contract elaborately noting and discussing the conduct of the Petitioner, it has held that despite the delay on part of the Respondent in furnishing the PG and APG and other stipulations as per the

LOA, Petitioner has allowed the Respondent to continue with the execution of the contract. Since the Petitioner granted extension and also insisted upon the completion of the work notwithstanding Respondent's failure in furnishing the PG and APG, the claim for payment for the work done under the contract cannot be denied. 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 obligations 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 finding on question of delay and termination are purely findings of fact based on well grounded reason and require 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 in terms of the said Claim is upheld.

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

14. Learned counsel for the Petitioner precludes his submissions on Claim no. 4 by contending that Arbitrator has wrongly allowed an amount of Rs. 3,20,700/- 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 interpretation of 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 an assumptive ground that in Commercial Contracts 15% of profits normally accrue. The evidence led by the Respondent to justify his claim for loss of profits/loss of business being the balance sheet/Income Tax Returns for the year 2004-05 to 2008-09 show annual profits of Rs. 35,00,000/- . The said documents show profit instead of loss and are also irrelevant as the Contract/dispute pertained to the year 2012 to 2014.

15. 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 his letter dated 3rd August 2016 where under an aggregate amount of Rs. 24,17,225/- was raised.

16. 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

17. 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 while allowing the said claim 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. 3,20,700/- 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. The second limb of submissions of the learned counsel against the supposition of profit margin being 15% to 20% is also untenable. The learned Arbitrator has rejected Respondent's contention that he was entitled to loss of business for 70 lakh. The Arbitrator has instead allowed 15% profits taking into consideration the Bill of Quantities (BOQ) submitted to the Petitioner vide letter dated 15th June 2012 (prior to issuance of LOA). In the said letter the Respondent has provided a detailed bifurcation of the costs and profits he expected to incur/earn on completion of the project to justify the tender cost quoted by him. 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, and it is difficult to calculate the same, 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. 3,20,700/- against the contract value of more than Rs.21 lakhs is nominal. 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.

18. 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.

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

May 17th, 2019

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SANJEEV NARULA, J.