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

\+ O.M.P. (COMM) 208/2019

**<u>Date of Decision: 20 May, 2019</u>**

HINDUSTAN CONSTRUCTION COMPANY LIMITED ..... Petitioner

Through Mr. Dayan Krishnan, Sr. Advocate with Mr. Rishi Agrawala, Advocate

versus

IPEX INFRASTRUCTURE (P) LIMITED ..... Respondent

Through Mr. CP Khurana, Sr. Advocate with Mr. Sachin Sood & Ms. Priya Soni, Advocates.

**CORAM:**
**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**<u>RAJIV SHAKDHER, J.</u> (ORAL):**

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as '1996 Act') to assail the award dated 08.01.2019.

2. Brief facts, which, one would be required to notice to adjudicate upon the instant petition, are as follows:

2.1 The Petitioner i.e. Hindustan Construction Company Limited (hereafter referred to as 'HCC') on 15.07.2014 entered into a Contract with Delhi Metro Rail

Corporation Limited (in short 'DMRC') to carry out certain works for Design and Construction of twin tunnel by Shield TBM, Underground ramp, Depot Entry-Exit Line and one underground station namely Najafgarh Station including architectural finishing, water supply, sanitary installation and drainage works from Chainage 2580.000 to 4121.170 on Dwarka- Najafgarh Metro Corridor of Phase-III of Delhi MRTS ("the main contract works").

2.2 The respondent i.e. IPEX Infrastructure Private Limited (hereafter referred to as 'Ipex') was appointed as a sub-contractor for executing a part of the main contract works awarded by DMRC in favour of HCC (in short "sub-contract works"). For this purpose, Ipex was issued a Letter of Intent dated 19.12.2014 (in short 'LOI'). The LOI, *inter alia*, required Ipex to execute work comprising 3% of the value of the main contract works awarded to HCC by DMRC.

2.3 The total value of the sub-contract works was Rs. 1025.96 lakhs. The sub-contract works required the construction of 800 mm thick Diaphragm Wall (D-wall) at Najafgarh Station. Towards this end, Ipex was required to provide the necessary service and labour input and also deploy the requisite equipment required to construct the D-wall of specified thickness. Importantly, the sub-contract works had a timeframe fixed. The time for execution of the sub-contract works commenced from 24.12.2014 and was to expire on 30.11.2015.

2.4 The record shows that Ipex was not able to complete the work by 30.11.2015. The case set up by Ipex before the learned arbitrator to explain the delay was that HCC had made a false representation, which, *inter alia*, pertained to the following:

i. That it was in possession of hinderance free site.

ii. That HCC had obtained all clearances and approvals from statutory authorities, including DMRC.

iii. That the parcel of land on which work was to be executed by Ipex had been acquired and was in possession of HCC.

iv. That payment to Ipex by HCC as per the schedule was adverted to in the LOI.

2.5 According to Ipex, these representations though false were made by HCC to draw Ipex into a situation which would require it to mobilize and employ plant and machinery, labour and staff at the earliest as the time for execution of the sub-contract works commenced from 24.12.2014.

2.6 Insofar as Ipex is concerned, it also claimed before the learned arbitrator that as required under Clause 4 of the LOI, the security deposit was to be created by crediting in favour of HCC 5% from the running bills that Ipex would submit during the course of execution of the sub-contract works, which ultimately was to be released to it upon submission of a bank guarantee of an equivalent value. The bank guarantee though was required to be kept alive till the expiry of the defect liability period which spanned a period of 12 months commencing from the date provided in Clause 4. This apart, Clause 5 of the LOI required Ipex to furnish a performance bank guarantee (in short 'PBG') equivalent to 5% of the value of the sub-contract works. The PGB was required to be kept valid till 31.12.2015 and for a further period of 60 days thereafter; being the claim period. As required, Ipex furnished the PBG.

2.7 The record shows that there is much correspondence on the subject involving failure of HCC to furnish hinderance free site and the consequent losses caused to Ipex, *inter alia*, in the form of idling cost. There are also letters on record which demonstrate the concern of Ipex in HCC's failure to divert the utilities at the site which were causing hindrance and the resultant loss to it.

2.8 Besides this, there is also correspondence on record which shows that HCC was not in possession of requisite permission from statutory authorities *qua* aspect such as diversion of road. The aforementioned aspects come to fore on a perusal of letters dated 23.06.2015, 06.07.2015, 14.08.2015, 17.10.2015, 09.11.2015, 09.01.2016 and 14.01.2016.

2.9 It appears that despite HCC failing to live up to its representation, it wrote to Ipex on 10.02.2016 to extend the validity period of the PBG furnished by it. This request was made by HCC with a caveat that if the validity period of the PBG was not extended, it would seek its encashment.

3. Ipex, it appears, given the aforesaid difficulties and losses faced by it, vide letter dated 15.02.2016 sought waiver of the request made for the extension of the PBG.

3.1 Since HCC did not comply, Ipex moved this Court by way of a Section 9 petition. This petition was numbered as OMP(I)(COMM) 50/2016. The petition was, however, withdrawn by Ipex in view of HCC's letters dated 14.01.2016 and 18.02.2016. The net impact of these letters was that HCC had given up its stand conveyed in its letter of 10.02.2016. HCC, in fact, agreed that Ipex could furnish a PBG for a reduced value of Rs. 25 lakhs and extend its validity period for another six months.

3.2 Since Ipex was incurring costs, it wrote to HCC on 23.02.2016 for payment of its outstanding dues. This led to a meeting being convened which was held on

16.03.2016. The decisions taken at the meeting were recorded in Minutes of Meeting (MoM) of even date i.e. 16.03.2016. According to Ipex, the MoM of 16.03.2016 was confirmed by HCC vide e-mail dated 30.03.2016. Notably, the decisions which were taken on 16.03.2016 find mention in paragraph 27 of the award.

3.3 Suffice it to say, amongst other obligations undertaken by HCC, it was required to open a Letter of Credit (LOC) for an amount of Rs. 2.6 Crores *vis-à-vis* balance work to be carried out by Ipex on the south side of the road. This work comprised, approximately, 50% of the sub-contract works to be executed by Ipex. It appears that HCC failed to open a LOC despite an assurance given in that behalf. In the meanwhile, the losses and dues payable to Ipex mounted.

3.4 Despite such a situation obtaining, HCC on 08.08.2016, once again, called upon Ipex to extend the validity period of the PBG. The record shows that there was a lot of back and forth on this issue. Ipex was reluctant to take such a step not only on account of mounting losses but also due to the fact that it was unable to make payment to its own staff and vendors.

3.5 Ipex's grievances with regard to HCC's: failure in opening the LOC, its losses on account of idling charges and non-payment of bills, and the resultant non-payment by Ipex of its dues *qua* staff and vendors are captured in the following communications exchanged between them: 13.05.2016. 23.06.2017, 07.07.2016, 25.07.2016 and 08.08.2016.

3.6 It was because of these reasons that Ipex, apparently, resisted the extension of the validity period of the PBG.

3.7 However, ultimately, *albeit*, under protest, Ipex on 13.09.2014 extended the validity of the PGB by a further period of six months.

3.8 Ipex followed this up by triggering the arbitration agreement on 29.09.2016. On 14.10.2016, HCC wrote to Ipex that it should submit its dispute to the project manager/construction head/Vice-President sub-contracts. Ipex, as advised, took the necessary steps and, in fact, on 10.12.2016 made attempts to resolve the disputes amicably. It appears that there was no amicable resolution of the disputes. Since, once again, the validity period of the PBG was reaching its end, HCC on 16.01.2017 called upon Ipex to extend its validity period for a further period of six months.

4. Ipex being exasperated moved this court once again by way of Section 9 petition. This petition was numbered as OMP(I)(COMM) 71/2017. The petition was allowed on 28.02.2017. HCC was injuncted from invoking and/or encashing the PBG subject to Ipex keeping it alive. The main dispute was referred to Delhi International Arbitration Centre (DIAC) for the appointment of an arbitrator. Consequently, DIAC appointed an arbitrator to adjudicate the disputes obtaining between parties.

4.1 The first meeting of the arbitrator was held on 19.02.2018. On that date, HCC was given time to file its reply and counterclaim on or before 22.03.2018. Likewise, Ipex was given time to file a rejoinder, *albeit,* by 25.04.2018.

4.2 Thereafter, the arbitrator convened a meeting on 27.04.2018. On that date, further time was sought on behalf of HCC to file its reply/counterclaim. This prayer of HCC was rejected. The matter was adjourned to 23.07.2018. On 23.07.2018, affidavit of evidence was filed by Ipex. However, there was no appearance on behalf of HCC. The matter was posted for further proceedings on 31.07.2018. On that date, adjournment was sought by the lawyer for HCC on the ground that the arbitrator's order dated 27.04.2018 had been challenged by preferring a petition under Section 34 on the 1996 Act.

4.3 The record shows that, on 07.09.2018, an application was filed on behalf of HCC to recall the order dated 27.04.2018. The learned arbitrator issued notice on the application and gave time to Ipex to file a reply. This application, however, was dismissed on 30.10.2018.

4.4 Thereafter, the matter was taken up by the learned arbitrator on 12.11.2018 to enable counsel for the parties to make oral submissions. Though counsel for HCC was present at the hearing, an indication was given that HCC would like to place on record written submissions. The learned arbitrator gave time to the counsel for HCC to place on record its written synopsis, *albeit*, on or before 30.11.2018. Likewise, Ipex's counsel was given time till 07.12.2018 to file written synopsis in the matter. Counsel for the parties were also directed to exchange their written synopsis before filing the same with the learned arbitrator.

4.5 Admittedly, HCC failed to file its written submissions before the deadline set down by the learned arbitrator. The record filed before me shows that the written submissions were filed on behalf of HCC by its counsel on 14.12.2018, *albeit,* with the DIAC. As indicated above, the learned arbitrator had indicated that counsel for the parties will exchange their respective written submissions before filing the same with the learned arbitrator.

4.6 On being queried, counsel appearing for the HCC conceded that neither Ipex nor its counsel was served with a copy of the written submissions.

4.7 Given this position, the learned arbitrator proceeded to decide the matter based on the record placed before it. Via the impugned award, the learned arbitrator examined the six claims lodged before him by Ipex. These were: (i) claim in the sum of Rs. 75,72,369/- towards running bills raised by Ipex which remained unpaid; (ii) claim towards money in the sum of Rs. 25,52,807/- retained by HCC from running bills; (iii) release of bank guarantee amounting to Rs. 25 lakhs along with reimbursement of guarantee charges in the sum of Rs. 57,481/-; (iv) compensation in respect of idling cost incurred on account of machinery, labour and staff deployed by Ipex and other overheads. Under this head, Ipex sought payment of a sum of Rs. 6,79,43,726/-; (v) claim on account of loss of profit.

4.8 Insofar as unpaid amounts towards running bills are concerned, a sum of Rs. 67,30,994/- was awarded. As regards money retained by HCC from running bills, a sum of Rs. 22,69,162/- was awarded. HCC has also been directed to release and handover the PGB of the value of Rs. 25 lakhs. As regards extension charges, the full amount, as claimed, has been awarded. In other words, HCC has been directed to pay a sum of Rs. 57,481/-. Qua claim for compensation in respect of idling cost, the learned arbitrator has awarded a sum of Rs. 6,03,94,423/. Besides this, pre-litigation interest on amounts awarded under Claim Nos.1, 2 and 3 has been granted. The total amount quantified is Rs. 11,31,407/-. *Pendente lite* interest at the rate of 12% per annum for the period spanning between 7.07.2017 and 8.01.2019 has been awarded. Interest in this behalf has been awarded on a sum of Rs. 7,19,52,060/-. The learned arbitrator has quantified interest as Rs. 1,29,50,370/-. In addition, thereto, post-award interest at the rate of 12% per annum has been awarded on an amount equivalent to Rs. 8,60,33,837/-/ Towards cost, Ipex has been awarded a sum of Rs. 8 lakhs.

5. Thus, as would be seen, there is a scaling down of some claims while others have been awarded in full.

6. The award, however, is assailed by Mr. Dayan Krishnan, learned senior counsel, appearing on behalf of HCC, on two grounds: (i) that the learned arbitrator despite giving an opportunity to HCC to file written submissions proceeded to decide the matter without taking into account the written submissions filed by HCC. For this purpose, my attention was drawn to the written submissions which were filed on 14.12.2018; an aspect which I have already noted hereinabove. (ii) that the learned arbitrator failed to take into account the provisions of the agreement dated 15.07.2014 executed between HCC and DMRC.

6.1 Besides the aforesaid two grounds, no other ground was pressed before me by the learned senior counsel.

7. Insofar as the first ground is concerned, as noted above, on 12.11.2018 when the matter came before the learned arbitrator for arguments, counsel for HCC chose not to advance any oral submission and instead sought an opportunity to file written submissions. The learned arbitrator acceded to this request and, accordingly, directed that the written submissions on behalf of HCC should be filed on or before 30.11.2018. A similar opportunity was given to Ipex. Ipex was required to file its written submissions by 7.12.2018. This fact is borne out from the procedural order dated 12.11.2018, which was handed over in the course of the arguments by Mr. Khurana, learned senior counsel, appearing on behalf of Ipex.

7.1 For the sake of convenience, the relevant part of the procedural order dated

12.11.2018 is extracted hereafter:

> *"...Arguments have been heard on behalf of the claimant. Ld. Counsel for the Respondent states that he would like to place on record written synopsis on or before 30.11.2018. Claimant also, if so advised may file written synopsis by 07.12.2018. Both parties will exchange the written synopsis before filing to the Arbitrator..."*

7.2 As noted hereinabove, it has been conceded by the counsel for HCC that written submissions dated 14.12.2018 filed on behalf of HCC were not served on Ipex or its counsel. As would be evident, the written submissions were to be filed with the learned arbitrator after the other side had been served.

7.3 To my mind, HCC having failed to meet the deadline stipulated by the learned arbitrator attempted to slip-in its written submissions by filing the same with the DIAC. No intimation whatsoever of this filing was given to the learned arbitrator.

7.4 It was sought to be argued by Mr. Krishnan that since it was an institutional arbitration, filing with the DIAC would suffice. In any other case, one may have accepted this submission, however, in view of the past conduct of HCC of not filing its statement of defence despite opportunity being given and given the fact that specific direction was issued that the opposite party i.e. Ipex, should be served with a copy of its written submissions, this plea cannot be accepted. Therefore, the argument sought to be raised that failure to consider the written submissions filed on behalf of HCC amounted to a denial of opportunity to defend its claim, in the facts and circumstances of this case, cannot be accepted.

7.5 I have carefully examined the award and the accompanying record. The learned arbitrator has scrupulously gone through each and every claim and only after giving due consideration to the material on record, he has reached his conclusion *vis-à-vis* the claims lodged by Ipex. It is this wholesome approach of the learned arbitrator that despite the absence of HCC's written submissions, the claim lodged by Ipex for loss of profit was declined and some of the claims were scaled down. Therefore, the submission made on this score on behalf of HCC by Mr. Dayan Krishnan cannot be accepted.

8. The other submission made on behalf of HCC by Mr. Krishnan that the learned arbitrator has failed to consider HCC's agreement with DMRC is again untenable. As pointed by Mr. Khurana, (and in my view quite correctly) the agreement dated 15.07.2014 is an agreement executed between HCC and DMRC. Ipex was not a party to the agreement. Therefore, this submission is unmerited and hence is rejected.

9. Before I conclude, I must indicate that apart from anything else, the learned arbitrator was to a very large extent persuaded to hold in favour of Ipex as the evidence on record demonstrated that the obligations undertaken by HCC at the meeting held 16.03.2016 were not discharged. The evidence on record also shows that bills had remained unpaid, monies had been retained from the running bills by HCC and that huge amounts had been incurred by Ipex by way of idling cost due to a misrepresentation made by HCC with regard to the availability of hindrance free site. The fact that HCC coerced Ipex to extend the PBG from time to time is an aspect which also emerges from the record.

10. Thus, for the foregoing reasons, I find no merit in the petition. Accordingly, the petition is dismissed. Costs will follow the result of the petition.

**RAJIV SHAKDHER, J**

**MAY 20, 2019**
**VKR**