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

+ O.M.P. (COMM) 243/2019 & I.A.Nos. 8744, 8746/2019

Date of Decision : 4th July, 2019

GAIL (INDIA) LIMITED

..... Petitioner

Through: Mr.Sanjay Jain, ASG with
Ms.Gunjan Arora, Mr.Niteen
Sinha and Ms.Anindita Deka,
Advs.

versus

VRC CONSTRUCTION (INDIA) PVT. LTD..... Respondent

Through: Mr.J.P. Sengh,Sr. Adv. with
Mr.Manoj Kumar Das,
Mr.Deepak Kumar, Mr.Shashi
Pratap Singh, Mr.Zubin Sengh
and Ms.Manisha Mehta, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 15.03.2019 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Fax of Acceptance ('FOA') dated 31.12.2012 issued by the petitioner whereby the tender of the respondent for construction of Additional Buildings/Facilities in Township of the petitioner at Vijaypur, Madhya Pradesh having total

contract value of Rs. 13,43,09,285/- with completion period of nine months from the date the FOA was accepted by the petitioner.

2. The disputes between the parties arose due to the termination notice dated 16.04.2013 whereby the petitioner cancelled the above FOA *inter alia* contending as under:-

“As per Clause No. 37.1 of GCC, no part of the contract shall in any manner or degree be transferred/assigned or sub-let without the consent in writing of the Engineer-in-charge/ Employer. However, it has come to our notice that the awarded job has been assigned to a third party, which were required to be carried out by M/s.VRC. This is in violation to the terms and conditions or the tender/contract.”

3. The Arbitrator has held the cancellation of the FOA to be invalid and *inter alia* awarded an amount of Rs. 1,34,30,929/- as damages/loss of profits in favour of the respondent.

4. The learned Additional Solicitor General for the petitioner submits that the finding of the Arbitrator that the cancellation of the FOA was illegal cannot be sustained. He submits that under Clause 37.1 of the Contract, the contractor was forbidden from transferring, assigning or subletting the Contract, directly or indirectly, to any person without the consent in writing of the Engineer/Employer. In the present case, the respondent had transferred the Contract in favour of one Mr. S.K. Jain by executing a Special Power of Attorney wherein Mr. S.K. Jain was to carry out all obligations under the Contract. He further submits that the factum of such transfer was not even denied

by the respondent in its reply dated 22.04.2013 to the termination notice.

5. I have considered the submissions made by the learned ASG, however, find no merit in the same. The Power of Attorney relied upon by the learned ASG authorizes Mr. S.K. Jain to do the following acts:-

- “1. To sign & authenticates tender documents, contract agreement, work order and all other relevant papers/records including non-schedule items concerning thereto for the said work contract.*
- 2. To issue requisitions/instructions/orders for issuing of all type of material, store and goods to be issued by the client, it needed.*
- 3. To sign all records, statements, books relating to store and goods including cement, steel etc.*
- 4. To sign and authenticate site order books etc.*
- 5. To do all such acts, deeds, things and matters, as may be considered necessary, incidental or relating to the works directly or indirectly.”*

The same does not in any manner amount to the assignment of the Contract in favour of Mr. S.K. Jain.

6. Even the reply to the termination notice that has been relied upon by the learned ASG does not, in my opinion, support the contention of the petitioner. The termination notice does not give any basis for arriving at a conclusion that the respondent has assigned the Contract. It does not even give the name of the person to whom this Contract has been allegedly assigned or disclose any document, much

less the Special Power of Attorney on the basis of which such conclusion has been reached by the respondent. Admittedly, the termination notice is not preceded by any Show Cause Notice to the respondent. The respondent in its reply dated 22.04.2013, highlighted this fact while denying the allegation of the petitioner in the following words:-

“In the present case, GAIL/ EIL has not brought sub-contracting issue to our notice verbally or in writing, nor given us any notice, nor given us any opportunity to clarify misunderstanding if any regarding engaging sub-contractor without approval; rather hastily served termination letter, which is total injustice to VRC and beyond comprehension.”

7. The learned Arbitrator has also considered this issue at length and I may do no better than to reproduce the same as under:-

“35. With the said view taken by me, the issue of alleged assignment of part of the contractual work by the Claimant in favour of Shri S.K. Jain become totally inconsequential. However, on this ground of alleged subletting as well, I do not find any merit in the contentions raised by the Respondent on this score. First and for most, for the reasons best known to the Respondent it failed to name Shri S.K. Jain as the alleged sublette in the cancellation letter dated 16.04.2013. As already stated above, the Respondent did not serve any show cause notice on the Claimant before taking the decision of cancelling the contract of the Claimant and in the cancellation letter also, it remained totally vague and evasive by not disclosing the name of Shri S.K. Jain therein, in whose favour the Respondent alleged assignment of the Contract by the Claimant. Further, neither the Respondent nor their Project Consultant namely Engineering India Limited sent any communication to the Claimant so as to inform them

about the said assignment of contract in favour of S. K. Jain without taking any prior consent of Employer. It is also a matter borne out from the record that the engagement of Shri S.K. Jain by the Claimant was well known to the Respondent right from the inception of contract as Shri S.K. Jain had filed his Special Power of Attorney duly executed by the Claimant in his favour and also five affidavits filed by Shri S.K. Jain along with the other proofs to show his ownership over the vehicles engagement by him at the site, as was required by the Respondent to facilitate entry of vehicles and machineries to be brought by him inside the project site. It is an admitted fact, that due to security reasons, the security guards of the Respondent would not allow entry of any vehicle or person to enter the premises unless there is a proper authorisation in favour of the person seeking entry in the premises so that necessary gate passes etc. could be issued in his favour. I, thus hardly find any merit in the contention raised by the Id. Counsel for the Respondent that the language of Special Power of Attorney executed by the Claimant in favour of Shri S.K. Jain by itself would be sufficient enough to infer subletting of the Contract. The Respondent has further failed to prove that at any stage after the stage of bid, the Claimant was put to notice regarding Shri S.K. Jain indulged in transgression of integrity pact and his name being put in the 'holiday list' by the Respondent. RW-1 in his cross examination in answer to question nos. 33 & 37 deposed that he did not find any document on record through which Respondent had intimated the Claimant about blacklisting the name of Shri S.K. Jain or putting his name on 'holiday list'. He further added in his voluntary statement that the Respondent never felt it necessary to send any intimation to the Claimant in this regard. In answer to question no. 50, RW-1 admitted that Shri S.K. Jain was only providing the vehicles, equipments and machineries to the Claimant to be used in the contractual works and with this answer given by RW -1, the Respondent had admitted that there was no assignment of contractual work by the Claimant in favour of Shri S.K. Jain. I also do not find any merit in the argument

raised by the Ld. Counsel for the Respondent that CW-1 in answer to Q.No. 24 has admitted that Mr. S.K. Jain was asked to excavate the site for clearance which item has been included by the Claimant as Item No. 3 while giving details of losses suffered by it in their letter dated 19.07.2013. Throughout it has been the case of the Claimant that it availed the services of S.K. Jain for enabling works i.e. clearing, leveling and construction of site office, laboratories, stores etc. and not for any other work which falls within the scope of work awarded by the Respondent in favour of the Claimant. The onus to prove subletting of the contracted work by the Claimant in favour of S.K. Jain was on the Respondent which it has failed to prove and if we compare of deposition of CW-1 in answer to Q.No. 24 with the answer given by RW-1 to Q. No. 50 where he made a candid admission that S.K. Jain was only providing the vehicles, equipment and machineries to the Claimant to be used in the contractual works. RW-1 did not refer to the said job of excavation of site clearance as part of the work carried out by Mr. S.K. Jain. As regards the inclusion of the said work of 'earthwork in excavation' in the list of losses suffered by the Claimant in the letter dated 19.07.2013, it is suffice to mention that the Respondent itself has acknowledged the fact that the Claimant did carry out part of the contract work for which the Respondent has owned his liability to pay a sum of Rs.12,00,000/- to the Claimant. I also do not find any force in the argument raised by the Ld. Counsel for the Respondent that mere fact that stamp paper to execute a SPA was purchased on 08.10.2012 just four days before the last date of the bid, therefore, this fact by itself establishes cartelization of the Claimant with the Respondent even before the award of the contract. The argument of ld. Counsel for the Respondent is self defeating and this fact rather proves that the Claimant had been evading the services of S.K. Jain for the limited purpose of hiring vehicles, machineries etc. and for which in advance he had purchased the stamp paper to execute Special Power of Attorney in his favour. Taking into consideration the aforesaid circumstances, I do not find any

substance or merit in the defense raised by Respondent of the alleged assignment/ subletting of the Contract by Claimant in favour of Shri S.K. Jain and the same stand outrightly rejected.”

8. I find no reason to disagree with the above finding of the Arbitrator.

9. It is next contended by the learned ASG that the award of damages/loss of profit, in any case, cannot be sustained. Relying upon Clause 80.3 of the GCC, he submits that the Agreement expressly forbids grant of loss of profit in the event of the breach of the Agreement. The Arbitrator being a creature of the Agreement, could not have therefore, awarded such claim. In this regard he places reliance on the judgment of the Supreme Court in ***Union of India v. Varindera Constructions Ltd. and Ors.***, (2018) 7 SCC 794 as also of this Court in ***M/s National Highways Authority of India v. M/s HCC Ltd.***, (2014) 211 DLT 656.

10. I have considered the submission made by the learned ASG, however, find no merit in the same. Clause 80.3 falls in the scheme of the “Defects Liability Period” under Clause 80 of the GCC. Clause 80 of the GCC is reproduced hereinbelow:-

***“80 Defects Liability Period
(Twelve months period of
liability from the date of Issue
of completion certificate):***

80.1 The CONTRACTOR shall guarantee the installation/WORK for a period of 12 months from the date of completion of WORK as certified by the ENGINEER-IN-CHARGE which is indicated in the Completion Certificate. Any damage or defect that may arise or lie undiscovered at the time of issue of Completion Certificate, connected in any way with the equipment or materials supplied by him or in the workmanship, shall be rectified or replaced by the CONTRACTOR at his own expense as deemed necessary by the ENGINEER-IN-CHARGE or in default, the ENGINEER-IN-CHARGE may carry out such works by other work and deduct actual cost incurred towards labour, supervision and materials consumables or otherwise plus 100% towards overheads (of which the certificate of ENGINEER-IN-CHARGE shall be final) from any sums that may then be or at any time thereafter, become due to the CONTRACTOR or from his Contract Performance Security, or the proceeds of sale thereof or a sufficient part on thereof.

80.2 If the CONTRACTOR feels that any variation in WORK or in quality of materials or proportions would be beneficial or necessary to fulfil the guarantees called for, he shall bring this to the notice of the ENGINEER- IN-CHARGE in writing. If during the period of liability any portion of the WORK/equipment. is found defective and is rectified/ replaced, the period of liability for such portion of WORK shall be operative from the date such rectification/ replacement are carried out and Contract Performance Guarantee shall be furnished separately for the extended period of liability for that portion of WORK equipment only. Notwithstanding the above provisions the supplier's, guarantees/warantees for the replaced equipment shall also be passed on to the EMPLOYER.

80.3 LIMITATION OF LIABILITY

Notwithstanding anything contrary contained herein, the aggregate total liability of CONTRACTOR under the

Agreement or otherwise shall be limited to 100% of Agreement / Contract Value. However, neither party shall be liable to the other party for any indirect and consequential damages, loss of profits or loss of production.”

11. A reading of the above clause would clearly show that it was dealing with the liability of the contractor during the Defect Liability Period and the last sentence in Clause 80.3 does not seem to reflect an Agreement between the parties, that even incase of an unlawful termination of the Agreement, the party in breach is absolved from paying damages to the other under Section 73 of the Indian Contract Act, 1872.

12. Be that as it may, the learned Arbitrator has placed reliance on the judgment of the Supreme Court in ***G. Ramachandra Reddy and Company v. Union of India and Anr.***, (2009) 6 SCC 414 as also of this Court in ***Mittal Estates Pvt. Ltd. v. Delhi Development Authority & Ors.***, 166 (2010) DLT 99 to hold that a clause in a Contract cannot provide for non-payment of damages if the same are allowed in law. The Award, therefore, cannot be faulted on this ground.

13. It is lastly contended by the learned ASG that even assuming that the respondent was entitled to damages, as the respondent had failed to lead any evidence in support thereof, the Arbitrator has erred in awarding damages at 10% of the contractual value without there being any evidence in support thereof. In support of this contention, learned ASG places reliance on the judgments of the Supreme Court

in *Bharat Coking Coal Ltd. v. L.K. Ahuja*, (2004) 5 SCC 109; *State of Rajasthan and Anr. v. Ferro Concrete Construction Pvt. Ltd.*, (2009) 12 SCC 1, and of this Court in *National Projects Construction Corporation Ltd. v. M/s Ambika Engineers & Consultants*, 2018 SCC OnLine Del 11608 and *Ahluwalia Contract (India) Ltd. v. Union of India* (judgment dated 17.10.2017 passed by the Division Bench of this Court in FAO(OS) (COMM) 143/2017).

14. On the other hand, learned senior counsel for the respondent submits that as the Contract in question had been illegally terminated by the petitioner, the Arbitrator has rightly awarded damages in form of loss of profit confined to 10% of the contractual value. He places reliance on the judgments of the Supreme Court in *M/s A.T. Brij Paul Singh & Bros. v. The State of Gujarat*, 1984 (1) SCC 59; *Dwaraka Das v. State of Madhya Pradesh*, (1999) 3 SCC 500, and various judgments of this Court.

15. I have considered the submissions made by the learned senior counsels for the parties. As held by the Arbitrator and upheld in this judgment, the termination of the Agreement by the petitioner cannot be sustained. In *M/s A.T. Brij Paul Singh & Bros.*(supra), the Supreme Court has held that where the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, the damages for loss of profit can be measured at 15% of the value of the remaining parts of the work Contract. This judgment was followed by the Supreme Court in *Dwaraka Das* (supra). To the same effect is the judgment of Supreme

Court in *Mohd. Salamatullah v. Government of Andhra Pradesh*, AIR 1977 SC 1481.

16. In *Bharat Coking Coal Ltd.* (supra), the Supreme Court was considering the claim of loss of profit as an additional relief over and above compensation for delay in payment of amounts payable under the contract or for other extra work. The Supreme Court held that a situation where loss of profit on account of delay is claimed, what is to be established is that had the contractor received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit and unless such a plea was raised and established, the claim of loss of profits could not have been granted. As noted hereinabove, the present is the case of illegal termination of the contract and consequential damages suffered therefrom.

17. In *Ferro Concrete Construction* (supra), the claim for the damages by the contractor was for delay in execution of the work. The Court found that though the contractor had pleaded the basis for making such claim, he had led no evidence in support thereof. In my opinion, said judgment would also have no application to the facts of the present case.

18. In *National Projects Construction Corporation Ltd.* (supra), the Court found that the contractor itself was in breach of the contract. It was infact held that loss of profits can be awarded only if there is wrongful termination of the contract by the employer, which in the present case has been established before the Arbitrator.

19. In *Ahluwalia Contract (India) Ltd.* (supra), this Court was again dealing with a claim of loss of profit during the extended period of the contract and therefore, the said judgment again would have no application to the facts of the present case.

20. In view of the above, I find no merit in the present petition and the same is dismissed. There shall be no order as to cost.

JULY 04, 2019/vp

NAVIN CHAWLA, J