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

\+ O.M.P. (COMM) 261/2019

INDIAN INSTITUTE OF MANAGEMENT,LUCKNOW..... Petitioner

Through: Mr. Darpan Wadhwa, Sr. Adv. with Mr.Saurabh Kumar, Mr. Anmol and Ms.Swikriti Singhania, Advs.

versus

N. S. ASSOCIATES PVT. LTD. ..... Respondent

Through: Mr. M. Tarique Siddiqui, Ms. Reetika Gupta and Mr. Aamir Zaidi, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **11.07.2019**

SANJEEV NARULA, J.:

I.As. 9186-9187/2019 (Exemptions)

1. Exemption allowed subject to all just exceptions.

CAV 687/2019

2. Mr. M. Tarique Siddiqui, learned counsel for the Respondent has put in appearance. Accordingly, the caveat stands discharged.

I.A. 9185/2019 (delay)

3. For the reasons stated in the application, the delay in filing/re-filing the application is condoned and the application is disposed of.

O.M.P. (COMM) 261/2019 & I.A. 9188/2019 (stay)

4. The present petition under Section 34 of the Arbitration and Conciliation

Act, 1996 ("Act") challenges the Interim Arbitral Award dated 21st January, 2019 as well as the final Arbitral Award dated 1st May, 2019 ("the final Award").

Brief Background

5. Sometime in the year 2009, the Petitioner issued a notice inviting tender for construction of Seminar Block, Staff quarters, Dormitory including internal and external water supply, sanitary installations, roads and paths, S,W. drains, rain water harvesting, sewerage, internal and external electrical works, networking and telecom, firefighting system and other related works at Indian Institute of Management, Lucknow, Noida Campus. Respondent's bid was accepted for the negotiated tender amount of Rs.16,58,77,403.00/-. Accordingly, a Letter of Intent (LoI) was issued in favour of the Respondent which was followed by a work order contract dated 24th December 2009 (hereinafter, "the work contract"). A time period of 12 months was provided to finish the entire work.

6. The estimation costing, etc. was to be done by one M/s Suresh Goel & Associates **("the Consultant")** who was the Architect and was the principal associate. Since the project was conceived and designed by the aforesaid consultant, the final bills submitted by the Claimant were to be forwarded for verification and checking before the release of payment. The Respondent failed to complete the works within the prescribed period of 12 months. At one point the Petitioner was constrained to withhold 2% of the tender value, which was later released to the Respondent. Certain disputes arose between the parties which were settled by execution of Deed of Settlement dated 16th

April 2014. As per Clause 1 of this deed, it was mutually agreed between the parties that *"a sum of Rs. 1,01,09,419 (Rs. One crore, one lakh, Nine Thousand Four Hundred and Nineteen only) + hold amount as per account section of IIM lucknow + Retention money as per contract shall be paid to the second party by the first party as full and final settlement of all claims pertaining to Contract dated 24.12.2009 which is acceptable to the second party and now no payment is due to the second party. "*

7. In compliance of the settlement deed, Petitioner made certain payments to the Respondent. Thereafter, further disputes arose between the parties and the Respondent approached this Court for appointment of Arbitrator and vide consent order dated 6th May 2017, an Arbitrator was appointed who conducted the proceedings under the aegis of Delhi International Arbitration Centre (DIAC).

8. During the course of the arbitration proceedings, on 5th August 2018, an application was filed by the Respondent under Section 17 and Section 31 (6) of the Act along with the Statement of Claim. The same was finally adjudicated upon vide Award dated 21st January, 2019, wherein the Learned Arbitrator on the basis of the terms and conditions stated in the settlement deed directed the Respondent to pay the agreed amount as mentioned in the settlement deed. The learned Arbitrator also noted that the Respondent has not denied the execution of the settlement deed. The execution of the settlement deed was accepted to be the voluntary expression of the intention of the parties to settle their disputes and accordingly, the first impugned Award was passed. The relevant portion reads as under:-

"The Respondent has not denied the execution of the aforesaid settlement Deed. The execution of the aforesaid settlement Deed voluntarily by *both* the parties has not at all being disputed by the Respondent. In the reply filed by the respondent to the application, referring to clause (6) of the settlement Deed, it has very vaguely and ambiguously averred about the Claimant not submitting compliances with respect to the completion of the contract work etc., without at all controverting its obligation to pay the aforesaid amount to the Claimant. In the entire settlement Deed, the only obligation of the Claimant as a condition precedent for being paid the aforesaid agreed amounts is that the Claimant shall obtain NOC from Fire Department of the local body and other related equipments. There is no condition or stipulation either in clause 6 or elsewhere that the payment shall be made to the claimant only if the claimant submits compliances regarding completion etc.

Now it is not the case of the Respondent that the Claimant did not obtain and submit the NOC from the Fire Department. The communication on record clearly suggests that indeed the Claimant did so.

Under the circumstances therefore, first and foremost the execution of the settlement Deed being admitted by both the parties, both the parties not disputing the liability of the Respondent to pay the aforesaid amounts to the claimant and there being no condition precedent for such payment to be made, except obtaining of NOC from Fire Department which the Respondent has admitted, this Tribunal has no option but to allow the aforesaid prayer of the Claimant and pass an interim Award directing the Respondent to pay the aforesaid total amount of Rs.1,87,47,542.00 within four weeks from today, to the Claimant"

9. Thereafter, the Respondent accepted this order and final award was passed on 1st May 2019 on the claim under the settlement deed.

10. Mr. Wadhwa, learned senior counsel for the Petitioner challenges the

aforesaid impugned awards on the limited ground that the learned Arbitrator has failed to appreciate clause – 6 of the settlement deed which reads as under:

> "6. Second Party will carry out the works of obtaining NOC from fire department of local body and other related equipments, before taking the final payment.
> Withheld amount will be released after completion of contractual compliances"

11. Mr. Wadhwa contends that the aforesaid clause provides that the release of withheld payment was subject to Respondent furnishing the Completion Certificate from the Noida Authority and since the same was not done, the learned Arbitrator has wrongly allowed the application.

12. Mr. M. Tarique Siddiqui, learned counsel for the Respondent on the other hand draws the attention of this Court to the previous order dated 11th April, 2019 passed by the Arbitrator, which records as under:

> "It is worthwhile to mention here that this Tribunal had passed in Order which was an interim award on 21.01.2019.
> Mr. Pawan Upadhyay, Ld. Counsel appearing for the Respondent today made the following statements upon instructions: -
> 1. That the Respondent has accepted the aforesaid interim award and therefore has no intention of challenging the same in Court.
> 2. That the Respondent accepts the Settlement Deed dated 16.04.2014 and considers itself bound by the terms thereof. In other words, Respondent undertakes to pay the amount to the Claimant as forms the subject matter of the aforesaid settlement.
> 3. The Respondent even though, in view of the aforesaid two statements therefore undertakes to make payment to the Claimant, it needs a week or so to: report to this Tribunal the time line within which this payment would be made.
> xxxxxx
> <u>In the light of the fact that the Respondent feels itself bound by</u>

the Settlement Deed and this Tribunal in the order dated 21.01.2019 had clearly indicated that the issue whether the Claimant would be entitled to receive any payment from the Respondent over and above the amount mentioned in the Settlement Deed is an issue which was left open. Mr. Tarique Siddiqui, Ld. Counsel appearing for the Claimant very fairly conceded and stated before the Tribunal that the Claimant itself has no intention of pressing any claim in this arbitration before this Tribunal, over and above the claims arising out of the Settlement Deed, except the claim for interest and costs, as enumerated by the Claimant against Clam Nos. 17, 18 &19 of the SOC.

What therefore emerges today is that both parties are in full agreement that the order dated 21.01.2019 alone has to be implemented and that the Claimant has no other or further claims against the Respondent, except the interest and costs as mentioned above. In view of this, therefore, this is no question of the Claimant leading any evidence since oral submissions added and helped by the documents on record would be enough to help the Tribunal in determining the interest liability of the Respondent, if at all, the extent thereof and the costs component of this litigation."

Emphasis Supplied

13. The aforesaid order makes it clear that the Petitioner had accepted the interim award dated 21st January, 2019 and had no intention to challenge the same. Further, undertaking of the Petitioner is also recorded that they would make the payments to the claimants within a period of one week and the compliance thereof would be reported to the Tribunal. On the basis of aforesaid undertaking given by the counsel for the Petitioner, the claimant/Respondent did not press other claims and accordingly, the learned Arbitrator finally passed the final award dated 1st May, 2019. The relevant portion of the Award reads as under:

"As far as the interest element is concerned, in the aforesaid

> Settlement Deed dated 16/04/2014, in clause (5) thereof the parties have agreed inter alia that the "remaining" amount would be released by the respondent to the Claimant after the successful completion of defect liability period of one year from the date of completion of the work which was 12/09/20l3. In this clause it has itself been clearly mentioned that the defect liability period is up to 11/09/2014. Reference is also invited to a communication dated 15/07/2014 from the Claimant addressed to the Respondent, a copy whereof has been filed at page 153 of the SOC, (Receipt of this document has been admitted by the Respondent.) In this communication, the claimant has demanded from the respondent the payment of the amount covered by the aforesaid Settlement Deed. Even if this communication is ignored, the aforesaid clause (5) of the Settlement Deed clearly speaks that the defect liability period being up to 11/09/2014, the respondent was liable to pay to the claimant the amount covered by the aforesaid settlement deed *on* or before that date, that is 11/09/2014.The respondent not having paid the aforesaid amount to the claimant on that day, not having paid the same till today also, as well as not offering any explanation, for such non-payment or advancing any reason or ground in support thereof, undoubtedly the claimant is entitled to be compensated for the delay in the receipt of the amount from the respondent (delay being more than four and a half years) and the only mode by which the claimant can be compensated is the payment of interest to the claimant on the aforesaid principle amount. Now comes the question about the rate of interest after taking into consideration all relevant aspects of the case and the market trends as well as the current bank interest rate, this tribunal is of the opinion that 9% per annum will be a reasonable and·fair rate of interest to be calibrated on the principal amount for the aforesaid period."

14. The contention of Mr. Wadhwa is bereft of merits. Once the Respondent has undertaken before the Arbitral Tribunal that they have accepted the interim award, the Arbitral Tribunal rightly proceeded to pass the final

Award. Further the interpretation as sought to be given by Mr. Wadhwa, that the completion of contractual compliance was necessary for release of the amount, is a question that was solely within the domain of the Arbitral Tribunal and calls for no interference. Moreover, this contention of the Petitioner was rejected by the Arbitrator in its order dated 21st January 2019. The said order was accepted as is evidenced from the Respondent's subsequent conduct when its counsel made a statement accepting the said order.

15. Thus, there is no merit in this case and accordingly the same is dismissed.

SANJEEV NARULA, J

JULY 11, 2019
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