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

Date of Decision: 03.12.2019

+ **FAO (OS) (COMM) 173/2019 and C.M. No.32963/2019**
EMPLOYEES STATE INSURANCE CO. LTD

..... Appellant

Through: Mr. S. Wasim A. Qadri, Sr.
Adv. with Mr. Tasim Qadri &
Mr. Saeed Qadri, Adv.

versus

M/S RAVI ASSOCIATES Respondent

Through: Mr. P.R. Ramasesh &
Mr. Abdul Azeem Kalebudde,
Adv.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J. (ORAL)

This appeal under Section 37 of the Arbitration and Conciliation Act 1996, read with Section 13 of the Commercial Courts Act 2015, impugns judgment/order dated 12.04.2019 rendered by the learned Single Judge of this court in O.M.P. No. 59/2016 titled *Employees' State Insurance Corporation vs. M/s Ravi Associates* whereby the Single Judge has dismissed the challenge under Section 34 of the Arbitration Act to Arbitral Award dated 16.12.2015. For completeness, it may be stated that a cross-petition, being OMP (COMM) No. 79/2016 had also been preferred before the Single Judge

by M/s Ravi Associates, impugning certain aspects of the Arbitral Award, which was also dismissed by the Single Judge.

2. The genesis of the disputes between the parties is a contract agreement dated 11.11.2008 that was executed between the appellant/Employees' State Insurance Corporation ('ESIC', for short) and the respondent M/s Ravi Associates ('RA', for short) under which ESIC engaged the services of RA for rendering Architectural & Engineering Consultancy Services for the construction of a Medical College and Hospital at Paripally Kollam, in the State of Kerala ('Project', for short). The contract for executing the civil works on the Project had been awarded by ESIC to an entity called M/s Hindustan Lifecare Limited ('HLL', for short) ; and as per the record, ESIC allocated construction work to HLL only on 29.10.2009. The estimated cost of the Project was Rs.4,80,79,74,137/-. The time frame provided for completion of the Project was stipulated as three years ; and considering that the date of contract agreement was 11.11.2008, it could be inferred that the Project was required to be completed by 10.11.2011. RA was required to be remunerated at 3% of the final value of work executed.

3. As per the record however, before the term of the contract agreement could come to an end, on 01.02.2010 ESIC terminated the contract with RA. At this time, ESIC also encashed the bank guarantee in the sum of Rs. 65,00,000/- furnished by RA.

4. Consequent upon exchange of communications between ESIC and RA in this behalf and filing of a petition seeking appointment of

an Arbitrator, a Sole Arbitrator came to be appointed by ESIC on 07.03.2012. RA preferred 8 claims having a cumulative value of Rs.13,85,17,661.32 ; and ESIC preferred 7 counter-claims in the sum of Rs.75,27,00,000/- before the learned Arbitrator. Upon conclusion of the proceedings, the Arbitrator partially allowed RA's claim in the aggregate sum of Rs.1,74,42,816/- ; and rejected ESIC's counter-claims in their entirety.

5. Considering the nature and scope of proceedings before us under Section 37 of the Arbitration Act, namely that it is not the scope of the present proceedings that the arithmetic of each claim or counter-claim be re-assessed by this court, it is not necessary for this court to delve into the details or merits of how each claim or counter-claim was decided by the Arbitrator or dealt with subsequently by the learned Single Judge.

6. Reference in this regard is made to the decision of Supreme Court in *MMTC Ltd. v. Vedanta Ltd.* reported as (2019) 4 SCC 163, which is one of the recent judgments setting-out the scope of proceedings under Section 37 of the Arbitration Act, the relevant para of which is reproduced as under :

“14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the

scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

7. In the submissions made before us, the appellant has only impugned the findings of the Arbitrator and of the Single Judge in relation to claim No. 4 for refund of bank guarantee alongwith interest ; counter-claim No. 1 towards cost escalation of the project due to delay in compliance ; and counter-claim No. 2 towards liquidated damages at 10% of the consultant fee. The challenge so raised has been rebutted by the respondent. Learned counsel for the respondent submits that as far as claim No. 5 is concerned, this amount already stands received by RA.

8. CLAIM No. 4 : Refund of bank guarantee alongwith interest
Mr. S. Wasim A Qadri, learned senior counsel appearing for the appellant contends that the bank guarantee amount which was encashed by ESIC on 23.02.2010 was refunded to RA on 29.03.2010 after final settlement of *inter se* accounts and therefore there was no basis for the Arbitrator to allow claim No. 4 directing refund of bank guarantee amount alongwith interest for a second time. Senior counsel contends that in fact, since it was ESIC’s view that the bank guarantee amount had been incorrectly refunded to RA, ESIC had preferred counter-claim No. 6 for refund of the excess bank guarantee amount paid, which counter-claim was however rejected by the Arbitrator. Furthermore, senior counsel contends that the Single Judge has simply

approved the findings of the Arbitrator, without appreciating the appellant's stand. In response Mr. PR Ramasesh, learned counsel for the respondent contends that ESIC's action of invoking the bank guarantee after illegally terminating the contract was impermissible in law; and ESIC was therefore not entitled to withhold the bank guarantee money. Counsel for the respondent further contends that ESIC had failed to establish any lack of failure of performance on RA's part and that therefore the invocation of the bank guarantee, which was in the nature of a performance guarantee, was contrary to the terms of the contract. RA further contends that it was paying interest of Rs.48,750/- per month to the Oriental Bank of Commerce, Bengaluru from the date of encashment of bank guarantee i.e. 23.02.2010 ; and therefore had claimed the loss thereby suffered at Rs.48,750/-p.m. from 23.02.2010 till the date of payment. It is RA's contention that the Arbitrator had held forfeiture of performance security amount/bank guarantee amount to be contractually invalid as a sequitur to the termination of the contract having been held to be invalid and not in accordance with the contract. The Arbitrator had further upheld RA's claim of interest @ Rs.48,750/- per month which works-out to 9% per annum, not being unreasonable ; and thereby awarded simple interest @ 9% per annum on the bank guarantee amount of Rs.65,00,000/- from 23.02.2010 till the date of award, being a period of 5 years, 9 months and 24 days, aggregating to a total interest amount of Rs.34,02,750/-. The Single Judge had upheld the award relating to claim No. 4 on the basis that ESIC had terminated the contract 21 months prior to the date of expiration of the term, and

that too, without a 60-day prior notice as contemplated in the contract; thereby observing, that the conclusion of the Arbitrator was a plausible view in the facts and circumstances of the case.

9. Counter-claim No. 1 : Towards cost escalation of the project due to delay in execution and completion amounting to Rs.58.50 crores.

According to ESIC, although on the one hand the Arbitrator had found that RA was responsible for the delay of 200 days in relation to the contract, yet the Arbitrator rejected this counter-claim holding that ESIC has terminated the contract prior to the time stipulated for completion of the project by RA. ESIC contends that the civil contractor HLL had claimed from ESIC huge sums towards cost escalation by reason of delay, which claim is subject of ongoing arbitration proceedings ; and further, that the Arbitrator had not rejected certain facts/documents placed before the Tribunal to evidence delay on the part of RA but without rejecting such facts/documents, and without RA having disputed the same, the Arbitrator had proceeded to reject counter-claim No. 1. ESIC contends that in support of counter-claim No. 1, it had in fact placed documents before the Arbitrator ; and the Single Judge was therefore wrong in upholding the rejection of counter-claim No. 1 by the Arbitrator, on the premise that no documents were filed before the Arbitrator.

10. In response to counter-claim No. 1, RA contends that the delay in keeping-up with the work schedule was entirely due to non-compliance, non-cooperation and delay in decision making on the part

of ESIC and not due to any fault on the part of RA, which, according to RA, is established by the correspondence between the parties placed on record during the arbitral proceedings.

11. It is further pointed-out that the Arbitrator had decided this issue upon interpretation of Clause 3.1.1. of the contract, holding that the said provision contemplates action beyond the contract period and not for any delay at an intermediate stage, on the reasoning that it is possible that delay at an intermediate stage can be made good during the remaining period of the contract. The Arbitrator had further reasoned that ESIC never communicated to RA about any lapse on account of such delay nor showed any interest by imposing liquidated damages thereafter. These findings of the Arbitrator had been upheld by the Single Judge holding *inter alia* that ESIC was required to prove before the Arbitrator as to what part of the delay was attributable to RA, even if it was to be assumed that monies towards cost escalation were paid by ESIC to HLL, failing which the Single Judge had held that the claim would fall in the category of remote and indirect loss.

12. Counter-claim No. 2 : towards liquidated damages @ 10% of consultant fee.

Insofar as counter-claim No. 2 is concerned, being a claim towards liquidated damages @ 10% of the consultant fee, as per Clause No. 3.1.1 of the General Conditions of the Contract, the Arbitrator had rejected the claim on the ground that a claim under the said clause only contemplates delay beyond the contract period and not for any delay within the tenure of the contract. Interpretation of

Clause 3.1.1 given by the Arbitrator had been accepted by the Single Judge, thereby upholding the Arbitrator's decision on counter-claim No. 2.

13. It is the appellant's contention that under the contract agreement, a timeline for performance of different jobs had been stipulated and therefore it was mandatory upon RA to complete the tasks within the time-frame stipulated for each such task. The appellant further contends that in fact the Arbitrator has given a finding that there was delay of 200 days attributable to RA, which findings are based only upon such time-frames for individual tasks ; and further Clause 3.1.1 does not say that the aggrieved party has to wait till the last date of completion of contract before invoking the said provision. Senior counsel further points-out that clause 3.1.1 relating to liquidated damages is titled 'Action for Deficiencies in Services' ; and when both the time period for further service and schedule for such services are provided in the contract, RA ought to have followed such time-lines. The essential thrust of the submission is that it was not permissible for the Arbitrator to go beyond the terms of the contract while rendering the award ; and that the impugned award is contrary to public policy as well as to the terms of the contract ; and is therefore liable to be set-aside.

14. In response to the appellant's contention on counter-claim No. 2, counsel for RA submits that the contract agreement was terminated by ESIC on 01.02.2010 while the contract period was up-to 10.11.2011, whereby evidently there were more than 21 months still

remaining for RA to perform its obligations under the contract ; and that as per the wordings of clause 3.1.1, action can only be taken for delay beyond the contract period and not for any delay at an intermediate stage, since it is possible to make-up for delays at the intermediate stage during the remaining period of the contract. Counsel for RA further points-out that ESIC never pointed-out any deficiency in the services rendered by RA, other than the delay in invoking the arbitration clause ; ESIC never informed RA of any losses that it alleges it incurred ; nor did ESIC have any intention of imposing liquidated damages upon RA. This, counsel contends, is evident from the fact that ESIC never issued any notice or order relating to a claim of liquidated damages. On this point, the Single Judge has held that the interpretation to clause 3.1.1 given by the Arbitrator is a plausible view and no interference was called for with the conclusion reached by the Arbitrator with regard to counter-claim No. 2.

15. Insofar as the aforesaid claims and counter-claims are concerned, we have before us two concurrent views, one by the Arbitrator and the second by the Single Judge, upholding the decision of the Arbitrator ; which views do not appear to be contrary to the facts of the case, or to the terms of contract, or implausible in any manner. These concurrent views also do not appear to be such that no reasonable person would arrive at these views on the basis of the record. The question on these views being perverse, therefore does not arise.

16. A major bone of contention before us however, was as to whether the Arbitrator and the Single Judge have erred in holding that ESIC had refunded to RA the wrongfully appropriated sum of Rs.65,00,000/- under the bank guarantee furnished by RA to ESIC. According to ESIC, the said sum of Rs.65,00,000/- stands refunded on 28.03.2010 upon final settlement of accounts ; which position has consistently been disputed by RA. The Arbitrator had accordingly directed for refund of the bank gurantee amount of Rs.65,00,000/- alongwith interest of Rs.34,02,750/-, calculated @ Rs.48,750/- per month for the period of delay. The said amount of Rs.34,02,750/-was claimed by RA to be the interest paid by RA to the bank from the date of invocation of the bank guarantee i.e. 23.02.2010 till the date of the award.

17. In view of the dispute as regards refund of bank guarantee amount by ESIC to RA, *vide* order dated 24.09.2019 made in these proceedings, we had directed ESIC to produce relevant documents to show that the bank guarantee amount had indeed been refunded to RA. In compliance of order dated 24.09.2019, ESIC filed an affidavit dated 14.11.2019 on record alongwith certain documents purportedly to prove refund of the bank guarantee amount.

18. In affidavit dated 14.11.2019, ESIC has explained the position as under :

“[2]. Regarding the Claim No.4 i.e. Refund of the Bank Guarantee with interest, it is submitted that the Bank Guarantee was encashed by ESIC on 23.02.2010 after

withdrawing the work. Thereafter the respondent vide letter dated 04.03.2010 submitted an appeal in ESIC with request to make the payments towards his fees, incurred expenditures and refund the Bank Guarantee. The true and correct copy of the letter dated 04.03.2010 issued by respondent is enclosed herewith and marked as ANNEXURE-A-1. [Page No. _ to _]

“[3]. That the said letter of the respondent was processed and based on said request a note was prepared and final payment was worked out based on "tender cost" i.e. Rs.292.58 crores. In the settlement of account it was found that excess payment was made to respondent, which was adjusted from the amount of Bank Guarantee (encashed on 23.02.2010) and a settlement chart was prepared on 29.03.2010. Thereafter the approval of balance payment of Rs.28,32,934/- after adjustment of bank guarantee was accorded by the Chief Engineer ESIC on 07.06.2010. The true and correct copy of the file noting dated 23.03.2010 and the settlement chart dated 29.03.2010 and the approval dated 07.06.2010 are enclosed herewith and marked as ANNEXURE-A-2. [Page No. _ to _]

“[4]. In this respect it is submitted that in all the respondent was allowed payment of Rs.2,25,00,000/- on 08.04.2009, Rs.75,00,000/- on 02.06.2009 and Rs.28,32,934/- on 07.06.2010; which come to Rs.3,28,32,934/-. This payment has been admitted by the respondent as stated in the Award at internal page 29. The particular of said payment is tabulated, which is enclosed herewith and marked as ANNEXURE-A-3. [Page No. _ to _]

“[5]. It is further submitted that after the order dated 24.09.2019 of this Hon'ble Court, the ESIC wrote letter

dated 04.10.2019 to the Manager State Bank of India, New Delhi, requesting to provide the payment confirmation with UTR No. made by ESIC to M/s Ravi Associates. The true and correct copy of the letter dated 04.10.2019 written by ESIC to the Manager State Bank of India regarding payment confirmation is enclosed herewith and marked as ANNEXURE-A-4. [Page No. _ to _]

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“[7] That the State Bank of India in its reply dated 19.10.2019 has confirmed the payment made to HLL. However regarding payment made to M/s Ravi Associate, it is stated by the State Bank that they have not been able to trace the record of transactions made by ESIC to M/s Ravi Associates. However at this juncture it is stated that the receipt of the amount of Rs.28,32,934/- has been recorded as its finding by the Ld. Arbitrator in the award at internal page 29, and same is not in dispute also. The true and correct copy of the letter dated 19.10.2019 written by Manager State Bank of India, New Delhi, regarding payment confirmation is enclosed herewith and marked as ANNEXURE-A-6. [Page No._ to _]”

Emphasis supplied

19. Upon a conjoint reading of the various assertions in the affidavit aforesaid, it would appear that ESIC claims to have paid to RA the following sums of money.

S.No.	Date	Amount
1.	08.04.2009	Rs.2,25,00,000/-

2.	02.06.2009	Rs.75,00,000/-
3.	07.06.2010	Rs.28,32,934/-
	Total	Rs.3,28,32,934/-

While according to ESIC, the State Bank of India (SBI) has confirmed the remittance of aforesaid amounts to RA on behalf of ESIC *vide* certificate dated 04.10.2019, a copy of which has been annexed to the affidavit ; ESIC states that SBI is unable to trace the records of transactions/payments made by ESIC to RA, which is recorded in another communication dated 19.10.2010 issued by SBI to ESIC.

20. Evidently therefore, what is stated in paras 4 and 5 extracted above is contradictory to what is stated in para 7 ; and in fact the figures representing payments supposed to have been made by ESIC to RA also do not add-up. What appears to be ESIC's contention is that the amount of bank guarantee has been 'adjusted' by ESIC against same excess payments supposed to have been made by ESIC to RA in the past ; and in that manner ESIC is not liable to refund any further sums towards encashment of the bank guarantee.

21. While ESIC asserts that receipt of the money after adjusting the bank guarantee amount is not disputed by RA, on its part RA, has plainly denied receiving refund of the bank guarantee amount of Rs.65,00,000/- at any point of time, whether by way of adjustment or

otherwise. In accordance with clause 5.4.3 (P) of the award, the discussion is as follows :

“5.4.3 (P) As regards the claim of interest of Rs 48,750/- per month as demanded by Claimant, which works out to a rate of interest of 9% p.a, the same is not considered to be unreasonable. Therefore, the Claimant is duly considered entitled to simple interest @ 9% per annum from the date of encashment of the Bank Guarantee of Rs 65 lakhs i.e. 23.02.2010 and till the date of award. The amount of interest for this period of 5 years, 9 months and 24 days works out to Rs 34,02,750/-.”

22. This direction of the Arbitrator has been upheld by the Single Judge in paras 21.8 and 21.9 of the impugned order, which reads as under:

“21.8 Therefore, the conclusion of the learned Arbitrator that R.A. was entitled to refund of performance security of Rs.65 lakhs, in my opinion, is a plausible view in the facts and circumstances obtaining in the case.

“21.9 For the very same reason, I find no error in the learned Arbitrator sustaining the claim for interest which works out to a simple rate of interest of nine (9) percent per annum and spans the period between the time when the performance bank guarantee was encashed, i.e., 23 February 2010 and the date of the award.”

23. Considering our remit under Section 37 of the Arbitration Act, and the clear finding and consequent direction of the Arbitrator to ESIC to refund the bank guarantee amount with interest, which has

been upheld by the learned Single Judge, we are of the view that it is not for this court in a proceedings under Section 37 to re-appreciate evidence, much less to get into the arithmetic and calculations of the claims and counter-claims leading upto the award, which has already withstood a challenge under Section 34 before the Single Judge.

24. In the above view of the matter, we are not inclined to interfere with the impugned order dated 12.04.2019 made by the learned Single Judge, which order we accordingly uphold.

25. The present appeal is therefore dismissed; without however, any order as to costs.

ANUP JAIRAM BHAMBHANI, J.

G.S.SISTANI, J.

DECEMBER 03, 2019/uj