$~12

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

\+ FAO(OS) (COMM) 207/2019 & C.M. Nos. 38809-810/2019

HINDUSTAN CONSTRUCTION CO LTD ..... Appellant

Through: Mr. Dayan Krishnan, Sr. Advocate with Ms. Shruti, Advocate.

versus

IPEX INFRASTRUCTURE (P) LTD ..... Respondent

Through: Mr. Sachin Sood and Ms. Priya Soni, Advocates.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 30.08.2019

1. The appellant is aggrieved by the judgment dated 20.5.2019, passed by the learned Single Judge dismissing a petition filed by it under Section 34 of the Arbitration and Conciliation Act, 1996 (in short '**A&C Act**') assailing an Award dated 08.1.2019.

2. The facts of the case as set out in paras 2.1 to 3.8 of the impugned order are undisputed and are extracted below without any embellishment:-

"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 subcontract works required the construction of 800 mm thick Diaphragm Wall (Dwall) 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 subcontract 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 subcontract 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."

3. On the respondent approaching Delhi International Arbitration Centre (in short '**DIAC**') for appointment of an Arbitrator, on 27.7.2017, an Arbitrator was appointed who commenced the proceedings on 19.2.2018. The appellant/respondent was granted time to file its reply and counter claim on or before 22.3.2018. Similarly, the respondent/petitioner was given time to file a rejoinder by 25.4.2018. Admittedly, that the appellant did not file its reply/counter claim within the stipulated timeline. Vide order dated 27.4.2018, the learned Sole Arbitrator rejected the request of the appellant

for grant of further time in that regard. Further, an application moved by the appellant on 07.9.2018, for recalling the order dated 27.4.2018, was also dismissed by the learned Arbitrator on 30.10.2018, whereafter he fixed 12.11.2018, as the date for the parties to address oral arguments. The Sole Arbitrator also granted time to the counsel for the appellant to file the written synopsis on or before 30.11.2018. Similarly, the respondent was granted time upto 07.12.2018, to file the written synopsis in response to the synopsis of the other side, while exchanging copies with each other in advance.

4. Yet again, the appellant failed to file its written submissions before the cut off date. The written submission came to be filed by the counsel for appellant only on 14.12.2018 and that too, not with the learned Arbitrator but in the office of DIAC. Though directions had been issued to the parties to exchange their written submissions before filing the same, the appellant did not serve an advance copy on the counsel for the respondent. Consequently, the learned Sole Arbitrator decided the matter on the basis of the available records. After examining six claims lodged by the respondent, while declining the claim for loss of profits and scaling down the remaining claims, the Award was made on 08.1.2019.

5. Aggrieved by the said Award, the appellant invoked Section 34 of the A&C Act and filed OMP (COMM) 208/2019 wherein, two grounds were taken before the learned Single Judge, as reproduced in para 6 of the impugned order, that is extracted herein below for ready reference:-

> *"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. The learned Single Judge also took note of the fact that besides the aforesaid two grounds, no other ground was urged during the arguments. Turning down both the grounds taken by the appellant to assail the impugned judgment, the Section 34 petition was rejected by the impugned order.

7. Mr. Krishnan, learned Senior Advocate appearing on behalf of the appellant states that the learned Single Judge has erred in arriving at the conclusion that the Sole Arbitrator was justified in ignoring the belated written submissions filed by the appellant. He submits that even though the written submissions filed by the appellant were belated, in view of the fact that the same were forwarded to the DIAC, they ought to have been examined. He contends that had the learned Sole Arbitrator examined the written submissions of the appellant and the several documents annexed therewith including the work order in question and the standard terms, then Clause 39 (h) which prohibits payment towards idle charges, would have been taken into account and the claim of the respondent towards idle charges

would not have been allowed in the impugned Award.

8. We have pointedly enquired from learned Senior Advocate appearing for the appellant as to whether, any of the above arguments were advanced before the learned Single Judge, more so when the twin grounds raised to assail the impugned Award have been set out in para 6 of the judgment extracted above, which specifically records that the first ground taken to assail the impugned Award was only on the aspect of refusal on the part of the Sole Arbitrator to take into consideration the appellant's written submissions, even though they were filed belatedly.

9. It is stated on instructions that though the aforesaid plea was not specifically urged, it forms a part of the grounds taken in the Section 34 petition relating to non consideration of the written submissions filed by the appellant. We are afraid, such a plea cannot be permitted to be taken in appeal for the first time. The impugned order shows that no such ground was urged on behalf of the appellant before the learned Single Judge by pointing out the effect and scope of Clause 39 of the General Conditions, which is now sought to be raised to assail the impugned judgment. Besides the above mentioned plea, no other ground has been taken to assail the impugned judgment.

10. In our opinion, the impugned judgment does not warrant interference and is accordingly upheld. The appeal is dismissed in *limine* along with the pending applications.

HIMA KOHLI, J

SANJEEV NARULA, J

AUGUST 30, 2019/ap