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

Date of decision: 6th February, 2019

+ **O.M.P. (COMM) 139/2017**

M/S RAKESH BROTHERS Petitioners
Through: Mr. Avinash Trivedi, Advocate.

versus

AREVA T & D INDIA LTD Respondent
Through: Mr. Kaustubh Sinha and Ms. Surbhi
Mehta, Advocates. (M:9891068254)

AND

+ **O.M.P. (COMM) 140/2017**

ALSTOM T & D INDIA LTD. Petitioner
Through: Mr. Kaustubh Sinha and Ms. Surbhi
Mehta, Advocates.

versus

M/S RAKESH BROTHERS Respondents
Through: Mr. Avinash Trivedi, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present two OMPs have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter the 'Act'*) challenging the award dated 28th July, 2014 passed by the Ld. Sole Arbitrator.
2. The background of the case is that M/s. Rakesh Brothers (*hereinafter 'Contractor'*) was engaged as the Contractor for executing civil and building work at the IGI Airport, New Delhi by M/s. Areva T & D India Limited

(*hereinafter*, 'Areva'). Initially the contractual value was for a sum of Rs.8,53,96,880/- crores, which was thereafter revised to approximately Rs.17 crores. The work order was placed on 9th June, 2008 and the work was to be completed within six months i.e., on 29th October, 2008. In view of the additional work, which was awarded to the Contractor, work was finally completed and certificate of completion was issued on 24th November, 2009. There were outstanding claims by the Contractor.

3. The Respondent - Areva had grievances that various deficiencies and defects were there in the execution of the work, which were pointed out, but not rectified by the Contractor. Finally, the parties met and agreed to resolve the disputes. The Minutes of meeting dated 19th April, 2010 were entered into. There was a broad agreement as per the said minutes of meeting. One of the obligations of the Contractor was to remobilise the site and complete the pending work by 10th May, 2010. It is the admitted position that the Contractor did not remobilise the site or start any work after the said minutes were executed on 19th April, 2010. Accordingly, the case of Areva was that it got the outstanding work done at risk and cost of the Contractor and the expenses incurred of Rs.65 lakhs were also claimed. In fact, the case of the Areva is that in view of the defects being not rectified, it is entitled to levy 5% as pre-determined liquidated damages and not release the retained amount of Rs.84 lakhs.

4. Before the Id. Arbitrator, nine claims were raised by the Contractor out of which the Ld. Arbitrator allowed several of the claims of the Contractor. The only issue raised by the Contractor in its objection petition is in respect of the award of Rs.65 lakhs for the work completed at risk and cost. It is submitted by learned counsel for the Contractor that without there

being a plea of set-off and counter claim, the said amount could not have been awarded to Areva. Moreover, there was no notice issued by Areva that the work could be executed at the risk and cost of the Contractor. In the absence of a notice, the alleged expenses, which were denied by the Contractor, could not have been saddled upon the Contractor. It is also submitted that Areva had failed to establish on record that actual work was executed by it. Except copies of the purchase orders, which were denied by the Contractor, no evidence was placed on record. It is further submitted that the documents having been denied by the Contractor, the Ld. Arbitrator could not have taken the same into consideration.

5. On behalf of Areva, following submissions are made both in defence of the Contractor's objections and its own objections:

- 1) Minutes of meeting dated 19th April, 2010 clearly imposed an obligation upon the Contractor to remobilise the site and complete all the works. Terms of work included the deficiencies and defects, which were pointed out by Areva. Admittedly, the Contractor did not remobilise the site. Further, the Contractor was well aware of the deficiencies and the same were pointed out by various emails, which were written by Areva to the Contractor.
- 2) Areva challenges the deduction of only Rs .65 lakhs and not allowing the retention of the entire sum of Rs. 84 lakhs. It is its case that if the Contractor's conduct was found to be defective, pre-determined liquidated damages as stipulated in the contract could be held back by Areva without any deductions i.e. holding back the sum of Rs.84 lakhs was fully justified.
- 3) Next submission is that interest ought not to have been allowed

with effect from 1st July, 2012. Admittedly, since the determination of the amount payable was done, only by the impugned award the award of interest prior to the date of award is not justified. It is further submitted that insofar as the purchase orders placed on record are concerned, though the same are denied during recordal of evidence of witness of Alstom, no cross examination of the witness in respect of the said documents was conducted and hence the same ought to be read in evidence.

6. This Court has heard the Id. counsels for the parties. The first and foremost submission to be considered is in respect of award of Rs.65 lakhs in favour of Areva, which is challenged by the Contractor. The Minutes of meeting dated 19th April, 2010 records the agreement between the parties to the following effect.

“M/S Rakesh Brothers agreed to withdraw all claims and requested to consider following amendment:-

- a. The total value of the order should be increased and should be closed at Rs.17.43 crore.*
- b. All balance work would be finished within 15 days time and punch list will be attended within 30 days.*
- c. Amount to be reconcile and withheld amount would be released within a week time.*
- d. 5% Retention amount would be released within 1 month of finishing of work and agreement on the final contract value on submission of BG valid for one year.*
- e. NOC from their subcontractor like KLA.*
- f. Since this agreement is settlement on lump sum basis, balance billing of Rs.14,25,148.00 will be raised against fine items are pending in PO irrespective of work executed.*
- g. **Withhold amount Rs.11,95,512.25 and***

5,42,095.57 shall be released within week time.

M/s AREVA responded point wise as under:-

- a. It is confirmed for the amount Rs.17,27,12,945.00 and request for Rs.17.43 Crore would be reviewed and convey at later stage if at all possible to revise the same.*
- b. Agreed*
- c. Agreed*
- d. Agreed*
- e. Agreed*
- f. Agreed*
- g. Agreed***

M/s. Rakesh Brothers confirm that they will remobilize site and work already commenced and all work would be completed by 10.05.10.”

7. From the above extract, it is clear that it the Contractor had to remobilise the site and all the pending work was to be completed by 10th May, 2010. The clear understanding between the parties, after the certificate of completion was issued on 24th November, 2009, was that there was outstanding work at site, which ought to have been completed by the Contractor.

8. Learned counsel for the Contractor has, candidly, stated that the Contractor did not remobilise the site. A perusal of the award shows that the Ld. Arbitrator has considered the various emails written by Areva pointing out the deficiencies and the snag list. These documents are not disputed by the Contractor. The Contractor was, therefore, well aware of the deficiencies, which were there at the site. Since the Contractor did not take any steps to remobilise the site and clear the deficiencies, Areva had no option but to get the work executed at risk and cost by a third party –

M/s.Alstom.

9. Coming to the purchase orders placed on record by Areva, in the evidence by way of affidavit filed, its witness deposed in paragraph 35 as under:

“35. I say that there was no abrupt changes made by the respondent in the scope of the work and created any hindrance at the site, thereby causing delay in execution of the work. I further say that no damage was caused by the other contractors to the work done by the claimant. I say that the claimant not only defaulted in its commitments, but also failed to address the issue which, emerged in the work as alleged to be completed by them. Accordingly the respondent was left with no other means other than engaging other agencies to fix the shoddy work undertaken by the claimant. I say that there was a serious and heavy problem of water seepage. Respondent had to incur additional costs of more than Rs. 65,00,000/- (Rupees Sixty Five Lakhs only) towards repair and rectification of the shoddy work executed by the claimant. I say that vide email dated 19.03.2009 (annexure C-18 of the claim) the respondent has categorically pointed out the defects and defaults to the claimant. However, the claimant failed to address all these issue and the respondent was forced to get the same rectified/addressed from third parties. All this resulted in incurring of additional expenses by the respondent. Copies of the purchase orders placed on third parties for the rectification work together with the closure reports are exhibited as DW-1/8.”

10. Thus, the witness deposed regarding the deficiencies and also placed the purchase orders issued by third parties on record. The purchase orders having been placed on record, and apart from simply denying the same, no other challenge has been raised qua the said purchase orders. The deposition

of the witness cannot be doubted. Strict provisions of CPC do not apply in arbitral proceedings i.e. in terms of admission/denial of the documents and other procedural formalities. Areva's witness, having stated on oath that various purchase orders were placed and the work got rectified through a third-party agency, there is no reason to disbelieve the same. Further, the Ld. Arbitrator having appreciated the evidence on record has held that holding back of sum of Rs.65 lakhs is justified. Though, no specific set-off and counter claim needs to be pleaded, Areva was justified in holding back the amount of retention to the extent of Rs.65 lakhs. A plea of set-off or filing of a counterclaim is not required under all circumstances. The contractor claims refund of the amounts withheld and Areva is providing justification for denying the refund. Under such circumstances no set-off or counterclaim is needed. The Minutes of Meeting constitutes admission of the following facts:

- That there were defects which required to be rectified;
- That the Contractor was to rectify the defects;
- That the contractor agreed to re-mobilise the site;
- That the entire work was to be completed by 10th May 2010.

Admitted position being that the Contractor, having not remobilised the site and being fully conscious of the defects which existed on the site, cannot question the award of Rs.65 lakhs.

11. Insofar as the objection by Areva that the entire 5% liquidated damages ought to have been awarded is concerned, even though the liquidated damages may be contained in the contract, settled position in law is that a person claiming liquidated damages ought to prove actual loss as per Sections 73 & 74 of the Indian Contract Act, 1872. In ***Kailash Nath O.M.P. (COMM) 139/2017 & 140/2017***

Associates v. Delhi Development Authority (2015) 4 SCC 136 (hereinafter, 'Kailash Nath Associates'), the Supreme Court observed as under:

“33. Section 74 occurs in Chapter 6 of the Contract Act, 1872 which reads “Of the consequences of breach of contract”. It is in fact sandwiched between Sections 73 and 75 which deal with compensation for damage which a party may sustain through non-fulfilment of a contract after such party rightfully rescinds such contract. It is important to note that like Section 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.

.....
43. *On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*

43.1. *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

43.2. *Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*

43.3. *Since Section 74 awards reasonable*

compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

12. Ld. Arbitrator having held that only a sum of Rs.65 lakhs is payable towards the actual expenses incurred on the basis of the evidence led as ‘risk and cost’, the retaining of the entire amount of Rs. 84 lakhs cannot be justified. There being no justification for holding back the amount, as clearly only expenses of Rs.65 lakhs were incurred in the rectification of defects and deficiencies, the objection of Areva on this count is untenable.

13. Insofar as the last issue of award of interest is concerned, the Contractor had claimed a higher rate of interest than what was awarded. Even as per the minutes of meeting, it is clear that there was outstanding payment, which Areva was fully conscious of. Thus, it cannot be said that the interest cannot be levied since 1st July, 2012. Remaining portion of the award in relation to interest and the date from when it is payable, does not

warrant any interference. Objections relating to the remaining claims are not seriously contested and in any case are bereft of any merit and are rejected.

14. Both the OMPs are, accordingly, disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 06, 2019/dk

Corrected and released on: 13th February 2019

