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

+ O.M.P. 1164/2012

+ O.M.P. 1225/2012

Date of Decision : 23rd July, 2019

**DELHI STATE INDUSTRIAL DEVELOPMENT
CORPORATION LTD**

.....Petitioner

Through Ms.Anusuya Salwan, Ms.Nikita
Salwan and Mr.Ayush
Srivastava, Advs.

versus

IVRCL-TANTIA (JV)-G-1 AND ORS.

..... Respondents

Through None

IVRCL-TANTIA (JV)

..... Petitioner

Through None

versus

**M/S DELHI STATE INDUSTRIAL AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD.**

..... Respondent

Through Ms.Anusuya Salwan, Ms.Nikita
Salwan and Mr.Ayush
Srivastava, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. These petitions have been filed by the parties to the arbitration proceedings challenging the Arbitral Award dated 17.08.2012 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the contract dated 19.02.2001, for execution of certain civil works in Sector V, Udyog Vihar, Bawana, Delhi awarded by the Delhi State Industrial Development Corporation

(DSIDC) (hereinafter referred to as the 'Petitioner') to IVRCL-Tantia (JV)(hereinafter referred to as the 'Respondent').

2. The primary dispute between the parties is in relation to certain recoveries made by the petitioner on account of defects in the work noticed by the petitioner pursuant to the report of the Central Road Research Institute, New Delhi (CRRI) appointed by the petitioner for conduct of post construction quality audit of the work carried out by the respondent and the report of the Chief Technical Examiner (CTE), Central Vigilance Commission.

3. The petitioner had placed reliance on Clause 11,16,16-A and 29(ii) of the contract to contend that the petitioner was within its right to order a post construction quality audit and based on the report of CRRI, certifying defects in the work carried out by the respondent, make deductions/recoveries from the amount payable to the respondent. The Arbitrator has found merit in the said submission and has held that the petitioner indeed has the right to order such post construction quality audit and in case of any defects being found, make recovery against the respondent for such defects, however, has further held that such recoveries would be subject to final adjudication by a Court/Arbitrator.

4. On merit of the deductions, the Arbitrator has held that as the petitioner had failed to prove the CRRI report and consequently the defects in the work carried out by the respondent, it could not justify the deductions made by it against the respondent.

5. Learned counsel for the petitioner submits that the report of CRRI is a third party report of experts, which could not have been doubted by the Arbitrator. The said report was duly given to the respondent and the comments of the respondent had also been obtained and considered by the petitioner before making the deductions. As held by the Arbitrator, the petitioner had a right to make such deductions under various Clauses of the Agreement which have been referred hereinabove. Such deductions, therefore, could not have been challenged by the respondent before the Arbitrator and in any case, the Arbitrator erred in accepting such challenge.

6. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same. As held by the Arbitrator, the petitioner indeed had a right to make recoveries/deductions incase it found any defects in the work carried out by the respondent. However, once the respondent challenges the factum of such defects and the parties proceed to arbitration for adjudication of such challenge, it was for the petitioner to have proved such deductions. It cannot discharge the onus merely by filing a copy of the report without proving the same in accordance with the law.

7. The respondent, though admitted the receipt of the report, had denied its contents before the Arbitrator. The Arbitrator by his order dated 24.11.2009 had given opportunity to the parties to consider whether they would like to lead evidence to prove the document, including leading any oral evidence in support of their pleas. The petitioner chose not to avail of this opportunity. Having failed to do

so, it cannot now challenge the Award as the Arbitrator has held that the contents of the CRR report remain unproved before him.

8. In any case, this being a matter of appreciation of evidence by the Arbitrator, which cannot be said to be perverse or unreasonable, cannot be interfered with by this Court in exercise of its limited jurisdiction under Section 34 of the Act.

9. Learned counsel for the petitioner has further challenged the Award of certain claims where the Arbitrator has relied upon BOQ items in the contract. For these claims the petitioner had made a recovery relying upon the Specifications for Roads and Bridges, Ministry of Surface Transport (Road Wing), which were made applicable to the Agreement as per Clause 4.1.

10. It is not denied that these payments had been made to the respondent over a period of time without any objection. The Arbitrator has further held that having provided for such BOQ items, the petitioner was not entitled to fall back of such general specifications. I do not find any reason to disagree with the finding of the Arbitrator.

11. I therefore, find no merit in the petition filed by DSIDC.

12. The respondent has also challenged the Impugned Award on the ground that the Award wrongly rejects the claims of the respondent for interest on the amount awarded.

13. Though, none has appeared on behalf of the respondent, I have considered the said plea.

14. The Arbitrator in the Impugned Award has rejected the award of Interest relying upon Clause 29 of the Agreement, which is reproduced hereinbelow:

"CLAUSE 29

With-holding and lien in respect of sums due from contractor

i) Whenever any claim or claims for payment of a sum of money arises out of or under the contract or against the contractor, the Engineer-in- Charge or the D.S.I.D.C, shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any deposited by the contractor and for the purpose aforesaid, the Engineer-in-Charge or the Government shall be entitled to withhold the security deposit, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Engineer-in-Charge or the D.S.I.D.C shall be entitled to withhold and have a lien to retain to the extent of such claimed amount or amounts referred to above, from any sum or sums found payable or which may at any time thereafter become payable to the contractor under the same contract or any other contract with the Engineer-in-Charge of the D.S.I.D.C or any contracting person through the Engineer-in-Charge pending finalization of adjudication of any such claim. It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above by the Engineer-in-Charge or

D.S.I.D.C will be kept withheld or retained as such by the Engineer-in-Charge or D.S.I.D.C till the claim arising out of our under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause) by the competent court, as the case may be and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to above and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the Engineer-in-Charge or the D.S.I.D.C shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company as the case may be, whether in his individual capacity or otherwise.”

(Emphasis Supplied)

15. A reading of the above clause would show that no interest is payable on the amount withheld or retained by the petitioner. Reference in this regard may be made to judgment of Supreme Court in ***Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat & Ors.***, (2010) 8 SCC 767.

16. I therefore find no merit in the objection raised by the respondent against the Impugned Award. Consequently, the petition filed by the respondent is also dismissed.

17. In view of the above, both the petitions are dismissed. The parties shall bear their own cost.

NAVIN CHAWLA, J

JULY 23, 2019/Arya