

\$~4

\*

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

%

*Date of Judgment: 16<sup>th</sup> January, 2019*

+

**FAO(OS) (COMM) 196/2018**

**M/S SREDDY INFRA TECH PVT LTD**

..... Appellant

Through: Ms. Geetanjali Mohan, Mr. Ashish  
Mohan, Mr. Akshit Mago & Mr.  
Shashwat Panda, Advocates.

Versus

**M/S OVERSEAS INFRASTRUCTURE ALLIANCE (INDIA)  
PVT LTD**

..... Respondent

Through: Mr. Manish Sharma & Mr. Ninad  
Dogra, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE G.S. SISTANI**

**HON'BLE MS. JUSTICE JYOTI SINGH**

**G.S. SISTANI, J. (ORAL)**

1. This is an appeal under Section 13 of the Commercial Courts Division and Commercial Disputes Act, 2015 read with Section 10 of the Delhi High Court Rules and Section 37 of the Arbitration and Conciliation Act, 1996. The prayer is to set aside the judgment and order dated 01.06.2018 passed by a learned Single Judge of this Court by which the majority arbitral award dated 03.02.2018 has been upheld and the objections have been dismissed.
2. The necessary facts required to be noticed for disposal of this appeal are that the parties entered into an agreement dated 13.08.2012. The agreement pertains to construction of housing units in Maldives. The appellant in terms of the agreement was required to furnish two bank guarantees; one for securing an advance and the other bank guarantee was a performance bank guarantee - each for a sum equivalent to 10%

of the contract value of Rs.126 crores. The bank guarantees were furnished on 31.10.2012 and 07.11.2012. Having found the bank guarantees to be forged, the agreement was terminated by a notice dated 11.01.2013. The appellant herein invoked the arbitration clause and raised as many as 20 claims, which were rejected by a majority award dated 03.02.2018. By the impugned award dated 03.02.2018, it was found that the termination of the agreement was not wrongful. Before the learned Single Judge, the appellant herein, did not contest the decision of the Arbitral Tribunal in rejecting the appellant's claim with regard to termination being wrongful. The appellant has challenged the order of the learned Single Judge as far as it relates to rejecting 20 claims, which we detail below :

*(i) ₹63,00,000/- as expenditure incurred for preparation of initial drawings and bill of quantities; (ii) ₹25,00,000/- for payment made to Team Ventures Private Ltd. for facilitating the contract with the respondent; (iii) ₹5,60,000/- incurred by the petitioner in engaging the services of a consultant to obtain approvals and ₹1,75,000/- for registration with the Ministry of Housing and Infrastructure, and approvals/license from the concerned Ministries of Government of Maldives; (iv) ₹1,25,000/- as expenditure incurred for registration with the Export Promotion Council of India; (v) ₹2,00,00,000/- paid to Mr K.K. Menon towards arrangement of bank guarantees; (vi) ₹8,12,000/- incurred towards travelling to India for procurement of material; (vii) ₹32,650/- being expenditure incurred for testing of material; (viii) ₹2,00,000/- for making advance payment for materials; (ix) ₹7,84,012/- being the expenditure incurred towards retrofitting existing tools and machinery for being exported to Maldives; (x) ₹6,46,657/- as expenditure for the visits of the petitioner to Mumbai; (xi) ₹2,35,000/- as expenditure for petitioner's visits to Delhi; (xii) ₹3,00,940/- being the expenditure incurred for travelling to various ports for finalizations of logistics; (xiii) ₹76,33,000/- as overheads; (xiv) ₹9,00,000/- being expenditure for travelling of staff to*

*Maldives; (xv) ₹10,30,000/- expenditure in respect of staff at Maldives; (xvi) ₹5,55,870/- as expenditure incurred for visiting China for procurement of machinery, furniture and tools for Maldives; (xvii) ₹5,00,000/- as loss of furniture procured from China; (xviii) ₹18,90,00,000/- as loss of profits; (xix) Cost of arbitration; and (xx) Interest at the rate of 24% p.a.*

3. The claims so made relate to the expenditure incurred for preparation of initial drawings, payments made to a company for facilitating the contract, payments made in engaging services of a consultant to obtain approval for registration with the Ministry of Housing and Infrastructure and approval/license from concerned Ministries. Interestingly, the claims not only make a reference to amounts spent by the Director in travelling to Maldives but also a sum of Rs.2 crores paid to Mr. K.K. Menon, who, though a Director of respondent company had promised to secure bank guarantees for the appellant.
4. Mr. Mohan, learned counsel appearing for the appellant submits that the learned Tribunal has fallen in error and so has the learned Single Judge by rejecting all the 20 claims for the work, which was done. It is contended before us that even if the agreement stood terminated, all the 20 claims are liable to be allowed and the respondent should not be allowed to reap advantage for the work done by the appellant herein. Reliance has been placed on Sections 64 and 65 of the Indian Contract Act before the learned Single Judge and also before us.
5. Learned counsel has laboured hard to contend that once the agreement had commenced, the claims with regard to the amount spent herein were liable to be allowed. Reliance is placed on clause (E) of sub-contract agreement dated 13.08.2012, which reads as under:

***“E Commencement Date :***

*The Commencement date shall be the date on which Advance Payment has been released by OIA to ASRIPL. OIA shall release advance payment after receipt of both Advance Bank Guarantee and Performance Bank Guarantee from ASRIPL, each being 10% value of Contract price.”*

6. Mr. Mohan has also relied on clause 6(b)(b) & (3) of the sub-contract agreement dated 13.08.2012 to submit that the procedure in terms of the agreement with regard to termination was not followed. Attention of this Court has also been drawn to Annexure-1 stating that the mode of payment shall be fixed on the basis of Mile stone for each activity. The relevant clause 6(b)(b) & (3) of the agreement reads as under :

*“6(b)(b) OIA finds reasonable evidence that ASRIPL has committed fraudulent acts against OIA.*

xxx      xxx      xxx

*(3) In case this Agreement is terminated by either Party for reasons mentioned hereinabove neither Party shall be discharged from any other obligation or liability to the other Party under this Agreement, incurred prior to the date of termination unless otherwise explicitly agreed in writing.”*

7. Counsel for the appellant has also contended that there is no specific finding with regard to the fraud having been played by the appellant. In fact, the amount of Rs.2 crore was paid by the appellant to Mr. K.K. Menon, who was none other than a Director of the respondent, who had volunteered to procure two bank guarantees on behalf of the appellant and thus, the appellant cannot be blamed for the act done by the Director of the respondent company. The bonafide of the appellant would be evident from the fact that a large sum of Rs.2 crore was paid and the appellant was under the impression that Mr. Menon would use

his good office and his connections with the bank to procure two bank guarantees which he did and under the bonafide belief, the same were tendered to the respondent.

8. The present appeal is opposed by the learned counsel for the respondent. Mr. Sharma submits that there is no infirmity, illegality in the majority award passed by the Tribunal. Mr. Sharma further submits that for all practical purposes, the agreement did not commence as the date of commencement is to be considered in the light of the fact that two bank guarantees were to be furnished by the appellant at the first instance. It is contended that within the shortest span of time, it was realized that the bank guarantees were forged and fabricated and thus, the agreement was rightly terminated on 11.01.2013. Mr. Sharma has drawn attention of the Court to paras (li) to (lxx) of the award wherein the learned Arbitrators have dealt with the claims sought to be urged and rejected.
9. Mr. Sharma further submits that the appellant has connived with one of the Directors of the respondent, which is evident from the fact that the appellant was communicating with Mr. K. K. Menon on his personal email and further it is not expected that any bank would furnish a bank guarantee worth Rs.25.20 crores without payment of any margin money whereas as per the ordinary bank practices, either full amount or at least 75% of amount is to be deposited with the bank to secure a bank guarantee. It is further contended that the claims, which have been rejected by the learned Tribunal and by the learned Single Judge are pertaining to the amount spent prior entering into the contract. The claim with regard to initial drawings was rightly

rejected as drawings are to be prepared by any contestant or any participant to the tender proceedings and required to be submitted at the pre-initial stage. Mr. Sharma also highlights the fact that the respondent cannot be burdened for any expenditure made by the appellant; be it for procuring furniture or tools or cost of arbitration proceedings, visits to Delhi and Maldives, amount paid to the consultant as all these payments relate to preparation of the appellant for participating in the tender and not for the benefit of the respondent.

10. We have heard learned counsel for the parties and perused the material available on record.
11. We may note that as far as termination of contract is concerned, the same was not contested either before the learned Single Judge or before us.
12. We have detailed in paragraph, the nature of the claims, which were made before the Arbitrators and the same were declined.
13. In paragraphs (li) to (lx) of the Award, the learned Arbitrators have taken into consideration the fact that Shri K.K. Menon had informed the appellant the alternate email ID being *krss59@yahoo.com*. The email of 06.06.2012 was not denied by the appellant herein and, in fact, placed on record of the Arbitrators. The learned Arbitrators have further taken note of the fact that post the email of 06.06.2012, there were communications between the Director of the appellant and Shri K.K. Menon on this email account. The learned Arbitrators were unimpressed by the submissions made before them that the respondent had forced them to deal with K.K. Menon on the issue of two bank guarantees for the reason that this issue was not proved on record and,

on the contrary, there were many communications between the appellant and other officers of the respondent but the appellant was not able to explain as to why they started corresponding with K.K. Menon on his personal email. The learned Arbitrators did not find merit in the submission of the claimant/appellant herein that they were not aware of the illegality of the two bank guarantees. The learned Arbitrators rightly did not find any merit as it is not expected that the appellant would be unaware about the basic procedures for securing a bank guarantee or the charges or the formalities of charges/margin money.

14. Another important factor which cannot be ignored is that the appellant/claimant was the sole beneficiary of the two bank guarantees which were to be furnished as a pre-condition to the commencement of the contract. It does not stand to reason that the respondent company would be involved in securing a fabricated bank guarantee of which they would be beneficiaries in case of default. It would be useful to produce paras (lxii) to (lxx) of the award where the specific claims raised by the appellant have been rejected:

*“lxii. The Claimant has made 20 claims in total. Claims No. 1 & 2 relate to work allegedly done by the Claimant prior to issuance of even the letter of intent. We do not see as to how the Respondent can be made liable for these two claims. The Claimant from the documents filed by it has not been able to show any agreement or concurrence by the Respondent to make the said payments as raised in claims No. 1 & 2. The same are therefore rejected. Claims. No. 3 & 4 relate to expenditures allegedly made by the Claimant after the LOI. Again we do not find any reason to award the said claims in favour of the Claimant on account of our finding that the sub contract agreement had not commenced in terms of clause E. Moreover there is nothing on record to show or*

*prove that the Respondent had ever agreed or consented to pay the amounts mentioned in the claims No. 3 & 4.*

*lxiii. Claim No 5 to our understanding is completely untenable. By the said claim the Claimant seeks Rs. 2 crore that it paid to Mr. K. K. Menon for procuring the two fraudulent bank guarantees. The act of procurement of the two bank guarantees was completely between the Claimant, its directors and Mr. K. K. Menon in his personal capacity and had nothing to do with the Respondent company or its other officials. It is an admitted fact that the two bank guarantees were not genuine. The Claimant is seeking to recover the monies spent by it towards an, illegal act from the party on whom the illegality was sought to be practiced. The claim is dismissed.*

*lxiv. Claim Nos. 6, 7, 8 & 9 are linked being related to alleged material procurement and other actions in relation to the material. To our understanding the project was to take place in the Maldives. The commencement date of the project did not arrive. We are not aware about the material which was required to be procured or the supposed action done towards it. We have gone through annexures 1 & 2 on the basis of which claims No. 6 & 9 are sought to be proved and we do not see anything in the two annexures to convince us that claims No. 6, 7, 8 & 9 were towards the sub contract in question or that the Respondent had ever agreed to make the payments regarding the said claims even though the commencement date of the sub contract had not come into effect.*

*lxv. Claim Nos. 10, 11, 12, 14 & 16 are related to travel of the Claimant and its directors / officers to Mumbai / Delhi and other places. The said claims are supported by annexures 3, 4, 5, 6 & to the statement of claim. We do not see any reason to award any of the claims relating to travel as the sub contract firstly did not commence and secondly because there was no agreement between parties that the Respondent, would pay for the travel of the Claimant or its officers. Moreover the claims are lacking in particulars and are extremely sketchy and have not been proved in any manner.*

lxvi. Claim No. 13 related to overhead expenditure while claim 15 related to expenditure on staff in the Maldives and claim 17 related to loss on furniture procured from China. It has to be kept in' mind that all actions of the Claimant towards the sub contract were based on their submitting the two bank guarantees on the basis of which the commencement date could be decided. The two bank guarantees as we have already held turned out to be fraudulent and not genuine. It is a possibility that some' expenditure was incurred by the Claimant in relation to the project but could the Respondent be made liable, for it specially in view of the conduct of the Claimant. We do not think so .as that would amount to putting premium on an illegal act. The Claimant was aware the risk it was taking and termination of the sub contract has left it without any rights qua the Respondent. The Claimant has not challenged the termination per se and has also not sought to have it set aside as no relief to this effect has been claimed. The Claimant by its own conduct has disentitled itself to any relief towards expenses incurred by it relating to the project and therefore we have no hesitation in rejecting the claims in question.

lxvii. Claim No. 18 related to loss of. profit. Undoubtedly the Claimant has suffered loss of profit but it has brought this situation upon itself. The Claimant took a risk with regard to submission of the two non genuine bank guarantees and in doing so forfeited any right that it had to claim a loss of profit on account of early termination of the sub contract. Based on the conduct of the Claimant, the Respondent to our understanding had no choice but to forthwith terminate the sub contract on the grounds of loss of faith and confidence. We do not see any breach of the sub contract agreement on the part of the Respondent but there was a distinct breach by the Claimant in so far as the submission of the two bank guarantees was concerned. Nothing has come on record to show that the Respondent was working in collusion with Mr. K. K. Menon for submission of the two fraudulent bank guarantees. The Claimant by its own conduct foreclosed its own claims that might have arisen against the Respondent in a case of a termination of contract under other circumstances. We do not find any reason to award claim no. 18 in favour of the Claimant. Since none of the

*claims of the Claimant have been awarded, there is no question of any interest and therefore claim No. 20 is decided accordingly. The Claimant has relied upon two judgments in its written submission with regard to loss of profit and wrongful termination of the sub contract. The first is M/s A.T. Brij Paul Singh and others Vs. State of Gujrat (1984) 4 SCC 59. The said judgment is based on a claim for loss of profit on an improper rescission of a contract which is not the case in the present circumstances and therefore the Claimant does not get any benefit from the said judgment. The second, judgment being Dwaraka Das Vs. State of MP was also on the same lines.*

*lxviii. Claim No. 19 which relates to cost of arbitration etc. shall be decided at the end of the award.*

*lxix. This brings us to the counter claims of the Respondent which are 6 in number. Counter Claim No. 1 related to various administrative and overhead expenses incurred by the Respondent for the period 13.08.2012. to 11,01.2013 said period being the date of execution of the sub contract agreement up till the date on which the sub contract was terminated by way of a legal notice. The Respondent has divided this counter claims into 4 parts. To our understanding the expenditures incurred by 'the Respondent are expenditures it would have incurred anyways in the normal course as it was, after all a contractor in terms of the main contract that had been signed between it and the Govt. of Maldives and therefore the ultimate responsibility for completing the construction would have been its. Even otherwise it is difficult' to accept that ail expenses as mentioned in counter claim No.1 were to the account of the Claimant only and was not towards any other reason. The expenses incurred in our opinion would have been incurred anyway by the Respondent regardless of whoever its sub contractor was. Therefore we do not deem it necessary to award the Respondent any amount towards its counter claim No.1.*

*lxx. Counter claims No. 2 &. 3 are expenditures by the Respondent towards salaries of its employees in relation to the project in the Maldives and losses on account of currency hedging / forward booking of currency. We feel that the reasoning given for*

*rejecting counter claim No. 1 would apply here as well since expenditures on salaries would have been incurred by the Respondent regardless of the Claimant or any other sub contractor. Similarly the Respondent would have done this practice regardless of the sub contractor and from the document on record (Annexure R-19) it cannot be stated with absolute certainty that this exercise was done by the Respondent for the Maldives project only, since the Respondent had many foreign projects underway.”*

15. We have also reproduced the relevant paragraphs of the award to show the manner in which the learned Arbitrators have dealt with the claims so urged by the appellant. We find no force in the submission made by the learned counsel for the appellant that the amount incurred were post the commencement of the contract as reading of the claims itself leave no room for doubt that these were amounts prior to the commencement of the contract. As far as the drawings are concerned, the claims itself suggest that the same were incurred for preparation of initial drawings and thus it cannot be said that the respondent has gained any advantage of the drawings so submitted.
16. With regard to the submission that the amount of Rs.2 crore was paid to one of the Directors of the respondent, who had promised to secure the bank guarantee on behalf of the appellant is concerned, we find it as not acceptable and the arbitrators have already dealt with this issue in detail. We see no reason to take a different view as the view taken is the only view plausible, reasonable and acceptable. It is not expected and is hard to believe that a company would expect that a bank guarantee in the sum of Rs.25.20 crore would be procured without any margin money or commission being paid to the bank and simply by paying Rs.2 crore to an individual, who in his personal capacity had

interacted on his personal email and not on the official email which was available and which could be accessed by all employees of the respondent.

17. Another submission made is with regard to clause 6(3) of the sub contract agreement. According to the appellant, he had prepared the designs in accordance with Annexure-1. In our view, this argument is without any force as the statement of claims itself shows that the drawings were at the pre-initial stage and thus no relief of this clause can be granted, even otherwise, the agreement is not commenced. Prima-facie, the appellant was in hand in glove with Mr. K.K. Menon and the arbitrators while rendering the award left it for the criminal court to decide this issue.
18. Undoubtedly, the scope of an appeal under Section 37 of the Arbitration and Conciliation Act is narrower. The Division bench of this Court in the case of **MTNL vs. Fujitshu India Private Limited** reported at **2015 SCC OnLine Del 7437**, held in para 19 as under:

*“19. The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34.”*

19. Moreover, this court time and again in its earlier judgments titled as **M/S. L.G. Electronics India Pvt. Ltd. Vs. Dinesh Kalra** reported at

**2018 SCC Online Del 8367, FAO(OS)(COMM) 55/2018** titled as ***M L Lakhanpal vs. Darshan Lal & Anr. and ADTV Communication Pvt. Ltd Vs. Vibha Goel & Ors.***, reported at **2018 SCC Online Del 8843** reiterated the limited scope of intervention in an appeal under Section 37 of the Arbitration and Conciliation Act and held as under:-

*“30. It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence.”*

20. Resultantly, we find no illegality or infirmity in the order passed by the learned Single Judge. The appeal is devoid of any merit. Accordingly, the same is dismissed with cost of Rs.2 lacs.

**G.S.SISTANI, J.**

**JYOTI SINGH, J.**

**JANUARY 16, 2019**

//ck