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

Judgment reserved on 29.11.2018

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Judgment pronounced on 05.08.2019

+ **O.M.P. (COMM) 417/2017 & I.A. 13744/2017**

M/S PRABHAKAR NIRMAN

..... Petitioner

Through: Mr. Sahil Sethi with Mr. Shivam
Sharma, Advs.

versus

M/S TELECOMMUNICATIONS CONSULTANTS
INDIA LTD.

..... Respondent

Through: Mr. Shivram, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

1. This petition is preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act") to assail the award dated 8.8.2017 ("impugned award"). Sans unnecessary details, the following broad facts are required to be noticed to contextualize the background in which the impugned award has been assailed by the petitioner.

2. For the sake of brevity, the petitioner i.e. M/s Prabhakar Nirman, would be referred to hereafter as 'PN' while the respondent i.e. Telecommunications Consultants India Ltd., would be referred to as 'TCIL'. Likewise, the petitioner and the respondent will be collectively referred to as 'parties' unless the context requires them to be referred to separately.

Prefatory Facts:

3. On 4.8.2006, Madhya Pradesh Rural Road Development Authority (hereafter referred to as 'Authority') floated a tender for construction and maintenance of rural roads in Vidisha district in the State of Madhya Pradesh. The Authority intended to carry out construction and maintenance work qua 15 roads under the Pradhan Mantri Gram Sadak Yojana (PMGSY). The aforesaid work was required to be carried out by the successful bidder in two packages i.e. Package Nos. MP4516 and MP4555.
4. TCIL, being interested, preferred bids for 15 roads work. The bids preferred by TCIL were accepted by the Authority on 2.9.2006 and 18.9.2006.
5. The record shows that TCIL, concededly, sub-contracted the works to PN *vis-a-vis* 15 roads work pursuant to five (5) tenders floated in that behalf. It appears that PN was the sole bidder and, hence, its bids after due negotiations were accepted by TCIL. The acceptance of PN's bids and, consequent, issuance of five (5) Letters of Intent (LOI) followed by five (5) Letters of Award (LOA) took place on 26.10.2006 and 08.11.2006 respectively.
6. Consequent thereto, five (5) agreements of even date i.e. 13.11.2006 were executed between PN and TCIL (hereafter referred to as "agreements"). Notably, the agreements between PN and TCIL involved, *inter alia*, the supply of material/equipment, *albeit*, in connection with construction work to be carried out by TCIL in respect of 15 roads work. The cumulative value of the agreements executed between PN and TCIL was a sum of Rs.18.03 crores. Even though, as noted above, the agreements executed between PN and TCIL adverted only to supply of

material/equipment, it is common ground that the cumulative value of the agreements was, as indicated above, which was pegged at Rs.18.03 crores, referred to the value of the construction work inclusive of cost of the material and equipment which PN was required to deploy in carrying out the construction work.

7. This aspect is being mentioned by me at this stage itself because of PN raising an issue, *albeit*, after the disputes had arisen between itself and TCIL that the agreements entered into between PN and TCIL only required it to supply material/equipment and did not oblige PN to carry out construction work.

7.1 Furthermore, while making such an assertion, PN also appears to have set up a case that TCIL assured PN that it had obtained the necessary permission from the Authority to sub-contract the entire construction work to PN.

8. Continuing with the narrative, PN, admittedly, submitted six bank guarantees with a cumulative value of Rs.60 lakhs in favour TCIL as collateral security for mobilization advance extended by TCIL in its favour.

9. PN, concededly, carried out work of the value of not more than Rs.9 crores. This amount was spent in the construction of 13 roads.

10. In and about September 2007, disputes arose between the parties which led to issuance of a series of termination letters by TCIL. The termination letters issued by TCIL with respect to various road works are dated 11.9.2007, 26.10.2007, 9.4.2008, 29.4.2008, 11.5.2008 and 24.5.2008.

11. The non-payment of the outstanding amount after the issuance of the termination letters adverted to above became the trigger for PN to invoke the arbitration agreement obtaining between the parties. Accordingly, vide

communication dated 23.10.2009, PN triggered Condition No.12 of the tender documents which encapsulate the arbitration agreement. It is not in dispute that these tender documents form part of the agreements.

11.1 Via this communication, PN called upon TCIL to appoint an arbitrator as disputes had arisen between them. Resultantly, TCIL on 13.11.2009 appointed, one, Mr. A.V.V. Krishnan as the sole arbitrator. Mr. Krishnan entered upon reference on 18.11.2009. Thereupon, PN filed its Statement of Claim (SOC) with the learned arbitrator on 12.3.2010. In the SOC, PN raised 11 claims including a claim for costs of arbitration, which, for obvious reasons could not be quantified at that stage.

12. The total value of claims, at that stage, was pegged at Rs.8,96,94,922/- inclusive of interest amounting to Rs.1,02,30,000/-. TCIL on its part filed not only its Statement of Defence (SOD) but counterclaims as well. Pleadings to this effect were filed by TCIL on 14.6.2010. TCIL's counterclaims were 10 in number and amounted to Rs.10,57,89,965/-.

12.1 In the interregnum, parties engaged in a round of litigation before the District Court, Bhopal and, thereafter, in appeal, before the Madhya Pradesh High Court concerning the issue of encashment of bank guarantees furnished by PN in favour of TCIL.

12.2 The record shows that PN failed to obtain an injunction and, as a matter of fact, against the order dated 7.12.2009, passed by the Additional District Judge – VI, Bhopal, preferred an appeal with the Madhya Pradesh High Court which was withdrawn on 14.12.2009 with the liberty to approach the learned arbitrator.

13. The record also shows that between August 2010 and November 2013, PN made attempts at obtaining documents from TCIL to shore up its

case. Since TCIL resisted, PN took recourse to the Right to Information ('RTI') route. PN was finally successful in obtaining the documents, *albeit*, through the RTI route upon an order being passed in its favour by the concerned Appellate Authority. Consequent thereto, PN filed certain documents in support of its case before the learned arbitrator on 30.11.2013.

14. Because of the latitude given to PN, it appears, arbitration could not be closed by Mr. Krishnan. Mr. Krishnan, ultimately, withdrew himself from the reference on 13.12.2013. This impelled TCIL to appoint, one, Mr. P.K. Mandal as the substitute arbitrator on 26.12.2013. Mr. Mandal entered upon reference on 2.1.2014.

15. PN then made attempts at reaching an amicable settlement in the matter with TCIL. Intimation in that behalf was given to the learned arbitrator on 28.1.2014. Since no settlement could be reached, TCIL informed the learned arbitrator of the failure of settlement talks on 12.9.2014.

16. I must also note that, in between, opportunities were granted to PN to file a rejoinder to the SOD filed by TCIL. At one stage, PN vide e-mail dated 21.10.2014 expressed its unwillingness to file a rejoinder in the matter. This stand was, however, reversed when PN finally filed a rejoinder at the hearing held before the learned arbitrator on 12.5.2015.

16.1 Importantly, at the hearing held on 30.6.2015 before the learned arbitrator, parties agreed that they would only rely upon pleadings and the documents filed to agitate their respective stands. In other words, filing of witness statements, cross-examination of witnesses as the procedure for adjudication was given up by the parties.

16.2 The record shows that, on 18.12.2015, counsel for PN explicitly conveyed to the learned arbitrator that PN did not wish to lead oral evidence in the matter. Thus, the only other procedure that the parties adopted was admission and denial of documents which was completed on 6.11.2015.

16.3 I must incorporate a caveat here, which is, that at the hearing held on 29.7.2016, before the learned arbitrator, TCIL's counsel had raised an issue to the effect that its application dated 6.11.2015 had not been ruled upon and that no admission and denial of documents filed along with that application had been carried out by PN. In response, PN had indicated to the learned arbitrator that admission and denial of the documents filed with TCIL's application dated 6.11.2015 would be carried out. The record discloses that counsels for parties were not only allowed to address oral documents but also were given an opportunity to file their written arguments. The directions to that effect were issued by the learned arbitrator on 11.11.2016 upon conclusion of final arguments in the matter.

17. It appears that, thereafter, the learned arbitrator fixed the matter on 9.2.2017 for seeking clarification. Both parties took time to furnish clarifications and this process reached culmination only on 16.6.2017 when a response was received by PN. As noted above, it was only thereafter that the learned arbitrator rendered the impugned award. Via the impugned award, the learned arbitrator rejected all 11 claims of PN save and except Claim F which concerned the monies received by TCIL from the insurance company. Claim F was allowed subject to the condition that TCIL was to remit the same if and when it was received by it from the concerned insurance company.

18. Insofar as the counterclaims were concerned, against the total sum of Rs.10,57,89,965/- , Rs.1,56,55,700 was allowed along with simple interest at the rate 8 percent per annum from the date of the award till the date of payment. The learned arbitrator, however, made it clear that no post-award interest would have to be paid by PN if the awarded amount is paid within three months of the pronouncement of the award.

19. It is in this backdrop that PN instituted the captioned petition on 18.11.2017. The petition came up for hearing for the first time on 28.11.2017 when it was adjourned at the request of PN for enabling it to file additional documents. Thus, arguments were heard in the matter and judgment was reserved on 29.11.2018.

Submissions of the counsel:

20. The arguments on behalf of PN were advanced by Mr. Sahil Sethi, Advocate, while submissions on behalf of TCIL were made by Mr. Shivram, Advocate.

21. The submissions made by Mr. Sahil Sethi can, broadly, be paraphrased as follows:

(i) Firstly, TCIL had no authority to sub-contract the work allocated to it by the Authority. At the highest, TCIL could have sub-contracted only 25% of the work in terms of Clause 7 of the contract obtaining between itself and the Authority.

(ii) Secondly, since TCIL was barred from sub-contracting the works allocated to it, TCIL executed agreements with PN which obliged PN to only supply the material and equipment.

(iii) Thirdly, there was no provision in the agreements, executed between PN and TCIL requiring PN to furnish bank guarantee as collateral security against mobilization advance.

(iv) Fourthly, the learned arbitrator had erroneously rejected Claim Nos.1 and 2 lodged by PN which pertained to 26th and 18th RA Bill, arising out of Package Nos. MP4555 and Package No. MP4516 respectively. In this connection, the argument advanced was that the rationale given in the impugned award that the aforementioned RA Bills bore dates which were beyond the dates on which termination letters were issued, was erroneous for the reason that RA Bills could be submitted only after the subject works were completed.

(v) Fifthly, that Counterclaim No.3 in the sum of Rs.1,22,43,398/- has been allowed based on a self-generated statement submitted by TCIL, which is not supported by any corroborative evidence.

(v)(a) On this aspect, the argument advanced was that since advance was given for the purchase of material which, in turn, was utilized for execution of the road works, PN should have been paid for the work executed by it upon payments being received by TCIL from the Authority.

(v)(b) In the alternative, it was sought to be argued that PN should have been paid amounts equivalent to twice the value of Counterclaim No.3. This argument was pivoted on the provisions of Clauses 9(d) and (e) of the tender conditions. In support of this submission, reference was made to Clauses 9(d) and (e) of the tender conditions.

(vi) The learned arbitrator erred in disallowing Claim No.3 lodged by PN. The submission was that the learned arbitrator had failed to appreciate that the claim was for the balance work executed by PN which had been

certified. In this behalf, reliance was placed on the written arguments filed with the learned arbitrator.

(vii) Seventhly, Counterclaim No.2 concerning the adjustment of consultancy charges made by TCIL ought not to have been sustained as the same was not contemplated in the contract obtaining between PN and TCIL. In support of this submission, reliance was placed on the provisions of Section 28(3) of the 1996 Act.

(viii) Eighthly, Counterclaim No.1 qua liquidated damages in the sum of Rs.10,05,504 was allowed even though no finding had been returned that the delay in execution of the work was attributable to PN. In this behalf, reference was made to Clause 14 of the tender conditions. The contention was that the learned arbitrator, in the first instance, was required to ascertain as to whether the delay was attributable to PN and, thereafter, allow liquidated damages to the extent capped by Clause 14 of the tender conditions. It was contended that the learned arbitrator failed to frame an issue in this behalf and give reasons qua the same. In support of this submission, reliance was placed on Section 31(3) of the 1996 Act.

(ix) Ninthly, since PN's claim for refund of the security deposit and performance money (Claim Nos.5 and 6) were also rejected once again without there being a finding as to whether PN was responsible for the delay.

(x) To buttress the submission that PN was not responsible for the delay, reference was made to the fact that TCIL had made representations to the Authority to extend the time for execution of 15 roads work.

21.1 In support of his submissions, Mr. Sethi relied upon the following judgments:

- (a) *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes*, AIR 2003 SC 2629; and
- (b) *Oil & Natural Gas Corporation Ltd. vs. Western Geco International Ltd.*, AIR 2015 SC 363.

22. On the other hand, Mr. Shivram relied largely upon the impugned award in support of TCIL's case. Furthermore, learned counsel submitted that in the exercise of its jurisdiction under Section 34 of the 1996 Act, this court was not required to reappreciate the evidence placed before the learned arbitrator. According to the learned counsel, the learned arbitrator had rendered the impugned award after apprising the material placed before him and backed his conclusions with the necessary reasoning.

22.1 In particular, insofar as Claim Nos.1 and 2 were concerned, learned counsel contended that despite several opportunities being given to PN to furnish proof in support of the 26th and 18th RA Bills, PN had failed to furnish proof qua them which led to the dismissal of Claim Nos.1 and 2.

23. In support of the amount awarded against Counterclaim No.3, learned counsel drew my attention to the entries made in the ledger to demonstrate the robustness of the findings returned by the learned arbitrator.

23.1 In particular, learned counsel submitted that PN's counsel had attempted to mislead the court by referring to pages 106 and 107 of the documents filed which facially projected that deductions or adjustments were made in PN's account maintained in the books of TCIL after the dates of termination of the agreements.

23.2 Mr. Shivram contended that PN had cleverly deleted the top portion of the page which would show the sub-ledger postings. It was stated that the period for which entries were made was given on the right-hand top corner

of each page. It was contended that once the agreements were terminated, advances were given to other agencies to complete the work at PN's risk and costs.

23.3 Furthermore, it was submitted that wherever advances were received from the Authority, credit was given to PN and insofar as the balance amounts were concerned, it formed the subject-matter of Counterclaim No.3. Mr. Shivram submitted that since Counterclaim No.5 comprised interest to be charged on advances mentioned in Counterclaim No. 3, it was claimed, once Counterclaim No.3 had been allowed.

24. In a nutshell, according to Mr. Shivram, the sum of Rs.1.56 crores (approximately) awarded by the learned arbitrator in respect of TCIL's claims was more than reasonable given the fact that the counterclaims lodged were for more than Rs.10 crores.

25. As regards liquidated damages Mr. Shivaram submitted that it was the subject-matter of Counterclaim No.1 and that it had been awarded by the learned arbitrator keeping in mind the deductions made by the principal employer qua TCIL's claim and the provisions of Clause 14 of the tender conditions.

26. Thus, according to Mr. Shivram, no interference was called for in respect of the impugned award.

Analysis and Reasons:

27. I have heard the counsel for the parties and perused the record. What has emerged from the above is as follows:

(i) TCIL had won the contract from the Authority for construction and maintenance of 15 rural roads works in Vidisha in the State of Madhya Pradesh.

- (ii) TCIL, in turn, sub-contracted the work pertaining to these 15 roads to PN. The sub-contract *de facto* obliged PN to not only supply material and equipment but to also carry out the construction of all 15 roads.
- (iii) PN appears to have relied upon the assurance given by TCIL that it had the necessary approval from the Authority to sub-contract the construction work to PN. In the SOD, TCIL takes the position that since it was not completely barred from sub-contracting the road works all that PN was required to do to obtain Authority's approval was to get itself registered with the Public Works Department(PWD). According to TCIL, despite the repeated oral and written request, PN failed to cooperate with TCIL in getting itself registered with PWD. Consequently, TCIL was unable to obtain formal written approvals from the Authority. In this connection, TCIL in its SOD relies upon the communications dated 2.2.2006 and 26.12.2006 which were written to obtain approval for sub-letting the road works to PN.
- (iv) Furthermore, TCIL asserted that since PN was unable to furnish the requisite information, it forwarded whatever information was available with it to the Project Implementation Unit (PIU) in December 2006 for obtaining approval for sub-letting the road works to PN. In this behalf, TCIL referred to Authority's letter dated 8.1.2007 whereby TCIL was asked to forward PN's registration certificate establishing its registration with the Government department to enable it to process TCIL's request to approve for sub-letting of the road works to PN.
- (v) Based on the aforesaid, TCIL takes the stand that because payments made to PN as a sub-contractor was not hidden from the Authority, PIU

neither interdicted the road works nor the payments that were required to be made to TCIL and, in turn, were utilized by TCIL to make payments.

(vi) The fact that the agreements executed between PN and TCIL were terminated and, that, as on 30.9.2008, PN had completed only 50% of the road work valued at approximately Rs.9 crores emerges upon a perusal of PN's pleadings filed before this Court as well.

(vii) The assertion, at this stage, is that the amount owed by TCIL to PN was the sum of Rs.3.40 crores and because this amount was withheld, it has caused financial loss to PN. The fact that the total value of the work entrusted to PN was a sum of Rs.18.03 crores, which included construction work and amounts to be paid towards the supply of material and equipment also comes through in the pleadings filed by PN before this Court.

26. Given these admitted facts, what is required to be examined is as to whether the learned arbitrator while rendering his decision qua claims and counterclaims had ignored the provisions of the contract and/or breached the mandate of the law.

27. In this behalf, to my mind, it would be convenient if I were to examine each of the claim and counterclaim raised on behalf of the parties.

Claim Nos.1 & 2:

28. Insofar as Claim Nos.1 and 2 are concerned, the same relate to the amounts claimed by PN with regard to the 26th and 18th RA Bills. Both these bills are dated 18.6.2008. The learned arbitrator has returned a finding of fact and qua which there is no dispute that PN has been paid monies in respect of Package No. MP4555 till 22nd RA Bill. Likewise, insofar as Package No. MP4516 is concerned, the learned arbitrator has returned a finding that PN has been made payments till the 14th RA Bill.

29. The learned arbitrator has observed and, to my mind, correctly that while PN seeks payment of monies against 26th RA Bill, which concerns Package No. MP4555, and in respect of 18th RA Bill which relates to Package No. MP4156, no claims have been lodged for the preceding RA bills i.e. RA Bill Nos. 23 to 25 pertaining to Package No. MP4555 and RA Bill Nos.15 to 17 concerning Package No. MP4156. The learned arbitrator makes an acute observation, which is, that the 26th RA Bill and 18th RA Bill, both of which are dated 18.6.2008, are those RA Bills which TCIL had raised on the Authority and that too after the agreements entered into between TCIL and PN were terminated.

30. As noted hereinabove, the termination of agreements entered into between PN and TCIL took place between 11.9.2007 and 24.5.2008. The aforesaid two RA Bills, as noted above, are dated 18.6.2008. As correctly observed and found by the learned arbitrator, these RA Bills could not have concerned the work executed by PN. The learned arbitrator has returned a finding that these RA Bills pertain to agencies other than PN.

31. Thus, what is quite evident is that PN, after taking full advantage of the fact that it has also been assigned the construction work apart from being given the contract to supply material and equipment and after receiving the benefit, has chosen to object to the same. The learned arbitrator has made the following observations in that behalf and rejected the same as being untenable. The relevant findings recorded by the learned arbitrator, in this behalf, are extracted hereafter:

“...The claimant was fully aware of the total scope of work to be carried out in this contract. Thus it is not correct to agree to the comment of the claimant that the contract is not made for

execution of construction activities. The claimant should not have carried out the service portion if the contract is only for supply. The claimant has also never raised any objection or given any indication for the work of service portion during execution with the claimant. It is only because the claimant was fully aware of the scope of the tender and hence continued work as per tender scope of services... ”

32. Thus, for the foregoing reasons, I find that the learned arbitrator has correctly rejected Claim Nos.1 and 2. I tend to agree with the findings returned by the learned arbitrator which are, as noted above by me, based on the material on record. PN cannot pretend that the entire work which was allocated to TCIL had not been sub-contracted to PN.

Claim No.3:

33. Insofar as Claim No.3 is concerned, PN's grievance is that the learned arbitrator has misconstrued the nature of its claim. Under Claim No.3, PN, even in this Court, has stated as follows:

S. No.	Particulars	Amount in Rs.
3.	<i>Items executed but unbilled, certified by project manager recommended for 75% payment hence value = 56,34,907/0.75</i>	75,13,209

34. A bare perusal of the same would show that PN claimed that part of the money qua which work was executed but remained unbilled though certified by the Project Manager. The Project Manager had recommended, according to PN, payment of 75% of such work which PN had valued at Rs.75,13,209/-. The 75%, even according to PN, worked out to Rs.56,34,907.00/-. Since PN's counsel confirmed during the argument that

this amount had been received, the learned arbitrator, to my mind, correctly noted that Claim No.3 had been rendered infructuous.

35. The argument now sought to be touted that the balance sum amounting to Rs.18,78,302/- had to be paid, in my view, is fallacious as in the SOC no such assertion was made. The argument that this aspect finds mention in the written arguments filed before the learned arbitrator can be of no help as no foundation qua the same was laid in the SOC. Pertinently, I was not shown any certificate issued by the Project Manager for the balance sum of Rs.18,78,302/-. Therefore, Claim No.3 was, in my view, rightly dealt with by the learned arbitrator.

Claim No.4 & Counterclaim No.1:

36. Claim No.4 which relates to miscellaneous deposits including the refund of liquidated damages was rightly rejected by the learned arbitrator on account of contrary stands taken by PN. The learned arbitrator noticed that PN in respect of Claim Nos.1 to 3 had taken a stand that it was awarded work qua the road works which entailed not only carrying out construction but also obliged him to supply equipment and material. However, the stand taken *vis-à-vis* Claim No.4 was that the contract obtaining between him and TCIL was only for the supply of equipment and material. The argument advanced before the learned arbitrator was that since PN could not have been awarded construction work, the delay in its execution could not be attributed to him and, therefore, no deduction could be made. According to me, this argument was rightly rejected by the learned arbitrator. However, insofar as this court is concerned, the argument raised *vis-à-vis* liquidated damages was that the learned arbitrator had not returned finding in terms of the provisions of Clause 14 of the tender conditions.

37. According to learned counsel for PN, the learned arbitrator had to first determine as to whether or not the delay in execution of the road works was attributable to it and thereafter, ascertain as to whether liquidated damages imposed by TCIL were within the limits prescribed under Clause 14 of the tender conditions. It was thus emphasized that the learned arbitrator had erred in not framing an issue with regard to whether the delay was attributable to PN.

38. In my view, the submissions advanced in the context of Claim No.4 are unsustainable for the following reasons:

- (i). Though the learned arbitrator had not formally framed issues in the matter, a perusal of the impugned award shows that he had provided ample opportunities to the parties to contest the disputes which had erupted between them based on claims and counterclaims lodged before him. Framing of issues by an arbitrator is not mandatory, though crystallization or framing of issues does enable parties to lead evidence keeping in mind the issues framed in the matter.
- (ii). That being said, as long as the parties are aware as to what is the nature of lis between them an award cannot be set aside merely on the plea that no formal issues were framed. At the heart of the dispute obtaining between the parties was the issue concerning the alleged non-payment of monies by TCIL towards running bills raised in respect of the work executed which though unbilled were certified by the Project Manager. Notably, PN did not challenge the validity of the termination order(s).
- (iii). This was also the position which PN took even in its notice dated 23.10.2009 whereby arbitration agreement was triggered. It was PN's case that TCIL had stopped making payments as it was apprehensive that the alleged fraud perpetrated by it in sub-contracting the road

works to PN would get discovered by the Authority. The focus and/or thrust was that the agreements executed between PN and TCIL were beyond the authority of TCIL.

- (iv). Therefore, the learned arbitrator was not required to, in my opinion, decide whether or not agreements were validly terminated, given the fact, as noticed above, the same was not challenged by PN. The learned arbitrator, though, (without framing a formal issue as to whether the delay was attributable to PN) did return a finding of fact that liquidated damages were deducted because of “non-performance” of PN. The learned arbitrator, in fact, also found that because of procrastination of PN in the execution of the work allocated to it, the Authority deducted liquidated damages from the invoices submitted by TCIL to it. The finding recorded to that effect by the learned arbitrator, as set out in the award, is extracted hereafter:

“...The LD was deducted because of non performance of the claimant which is as per the tender terms and condition. Because of the slow work of the claimant, the ultimate client i.e. MPRRDA has also deducted LD from the invoice of the Respondent which has been deducted from the invoice of the claimant as per the payment terms of the contract...”

(emphasis is mine)

39. Given these circumstances, the rejection of Claim No.4, to my mind, cannot be found fault with. For the same reasons, I am also inclined to agree with the learned arbitrator that Counterclaim No.1 could have been allowed only to the extent of Rs.10,05,504/-.

40. To be noted, the fact that the learned arbitrator had taken into account the provisions of Clause 14 of the tender conditions is evident from the following extract of the award:

“Clause 14 (Liquidated Damages) of terms and condition of POs mentions "Liquidated damages shall be payable for any delay due for the reasons attributable to the contractor at the rate of 2% per week or part thereof subject to the maximum of 10% of the contract value. However the LD recoverable from the contractors shall be limited to the LD imposed by PMGSY on TCIL".

The project could not be completed by the Claimant in time and there were many letters issued by the Respondent for speedy progress to complete the work as per agreed dated decided at different time. The Respondent ultimately terminated all the POs at the risk & cost of the claimant. The claimant has also not submitted any final bill to Respondent for payment for completion of work which indicates that the claimant had failed to complete the work. So as per PO terms as mentioned above liquidated damages shall be payable by the claimant.

The Respondent has put a counter claim to Rs. 1,76,83,396/- towards Liquidated damages (LD). It has also been indicated by the Respondent that an amount of Rs.68,75,891/- has already been recovered from the claimant and hence the balance amount of Rs.1,08,07,505/- is demanded by the Respondent.

From the available documents it is found that MPRRDA, for this project of PMGSY have deducted Rs.37,77,709/- towards LD for package 4516 and Rs. 41,03,686/- for package 4555 totaling Rs.78,81,395/-.

Though the Respondent has counter claimed LD for 10% of the total value of the project but as per the clause 14, as mentioned above, LD can be limited upto the amount imposed by PMGSY

on TCIL. Hence TCIL's claim for LD is justified only for Rs.78,81,395/-. TCIL had already recovered Rs.68,75,891/- and hence the claimant must pay the balance amount Rs.10,05,504/- to the respondent.

This counter claim is allowed to the extent of Rs.10,05,504/-."

Claim No.5 & 6:

41. These claims are pivoted on Clauses 3 and 4 of LOAs. Clauses 3 and 4 read as follows:

"3. Security Deposit will be deducted @ 5% out of the which, 25% will be released on completion of Project and balance 75% will be released after expiry of maintenance period of five years

4. Performance Guarantee @ 5% will be deducted from your running bills and 50% PBG shall be released on completion of project and balance 50% shall be released after one year of completion of project."

42. The learned arbitrator has declined to allow these claims for the reason that the project was not completed by PN. As noted hereinabove, there is no dispute concerning the same. A bare perusal of the aforesaid clauses would show that the completion of the project had to be the basis for sustaining Claim Nos.5 and 6. I find nothing wrong with the conclusion reached by the learned arbitrator qua these two claims.

Claim No.7:

43. Insofar as Claim No.7 is concerned, the learned arbitrator rejected the same as under this claim, PN had claimed Rs.48 lakhs on account of items executed which did not form part of the running bills. The learned arbitrator noticed that all payments had been made with regard to work at hand as per the record maintained in the measurement books. This is a finding of fact made by the learned arbitrator. Nothing has been shown which would have

me interdict this finding. The findings returned qua this claim, to my mind, do not require any interference.

Claim B:

44. This claim pertains to alleged wrongful encashment of bank guarantees by TCIL. Once again, no fault can be found with the decision of the learned arbitrator as, even according to PN, bank guarantees of a cumulative value of Rs.60 lakhs were furnished against the mobilization advanced. The learned arbitrator has returned a finding of fact that since mobilization advance could not be adjusted, the bank guarantees were encashed. This again is a finding of fact which cannot be interfered with by this Court under Section 34 of the 1996 Act.

Claims C to E:

45. As regards these claims, no arguments were advanced. Therefore, I need not delve into the same. I must, however, state that the reasoning given by the learned arbitrator for each of them is not correct.

Claim G:

46. Insofar as this claim is concerned, PN sought payment of Rs.30 lakhs towards non-utilization of plant and equipment solely purchased for the project under various sub-heads such as depreciation, idling, etcetera. This claim was rejected by the learned arbitrator and, to my mind, once again, rightly for the reason that the agreements obtaining between the parties were terminated by TCIL on account of poor performance by PN. There is nothing on record which would have me come to a contrary conclusion. As noted hereinabove by me, right from the commencement of the arbitration, PN's main thrust was to recover money against work said to have been executed by it. No break-up has been given by PN to show as to what

portion of the amount pertained to depreciation and idling charge. The claim could not be proved and hence was rightly rejected by the learned arbitrator.

Claim F:

47. As noted hereinabove, this claim has been allowed in favour of PN subject to TCIL receiving monies from the concerned insurance company.

Claim H:

48. As regards this claim, the learned arbitrator returned a finding of fact that no documentary evidence was placed before him concerning the alleged loss of profit to the tune Rs.1.50 crore. This again is a finding of fact, no interference is called for qua monies claimed under this claim.

Claim I:

49. A sum of Rs.1.50 crores is claimed towards loss of credit in the market, mental agony, etcetera. This claim has been rejected by the learned arbitrator on the ground that no clause is found in the contract for payment of this claim. Furthermore, the learned arbitrator also records that the claim is not justified. No evidence was put forth about the amounts claimed under this head. Nothing has been shown by PN which would have me rule otherwise and sustain the claim of PN. I am not inclined to interfere with the finding recorded by the learned arbitrator under this head.

Claim J:

50. Claim J pertains to interest on the amounts due. Since the learned arbitrator has rejected the principal claims, Claim J was correctly rejected.

Claim K:

51. Insofar as Claim K is concerned, the learned arbitrator has directed the parties to bear their respective costs. No grievance qua this was raised before me.

Counterclaims

52. This leads to me to the counterclaims which have been allowed by the learned arbitrator.

Counterclaim No.1:

53. As noticed above, under this claim, TCIL had claimed liquidated damages amounting to Rs.1,76,83,396/-. The Authority had recovered with regard to Package No. MP4516 and Package No. MP4555 a cumulative sum amounting to Rs.78,81,395/-. Against this, TCIL had already recovered a sum of Rs.68,75,891/- from PN. As correctly found by the learned arbitrator, in terms of Clause 14 of the tender conditions, TCIL could not recover more than that which the Authority had recovered from it. Therefore, the learned arbitrator had allowed this counterclaim, as noticed hereinabove by me, to the extent of Rs.10,05,504/-.

54. I have discussed Counterclaim No.1 in the context of Claim No.4. I find the basis and the reasoning to be in order. Since the learned arbitrator has returned a finding that PN did not complete the work within the agreed timeframe, which led to TCIL terminating the contract, the recovery made by TCIL and the further sum to be paid by PN, in my opinion, need not be interfered with.

Counterclaim No.2:

55. Under this head, TCIL sought an adjustment of consultancy charges to the extent of Rs.28,83,000/-. The argument raised on behalf of PN is that a sum of Rs.28,83,000/- was deducted from the invoices of PN for slow progress and non-completion of work by PN without provisions to that effect obtaining in the agreements between PN and TCIL. The learned arbitrator has recorded that a sum of Rs.28,83,000/- in respect of

consultancy charges have been deducted by the Authority from the invoices of TCIL on account of the project being delayed beyond the prescribed schedule. The learned arbitrator also found that since the sum of Rs.28,83,000/- had already been adjusted by TCIL, it could not seek payment of the sum once again as it would amount to TCIL benefitting twice over.

56. In respect of this, while I find merit in the submission of PN that with regard to recovery of consultancy charges for delay of work, there was no provision in the agreement obtaining between it and TCIL, I am, at this juncture, unable to grant any relief to PN as PN has not lodged any claim to that effect in SOC. The learned arbitrator under Counterclaim No.2 has refused to grant amounts claimed by TCIL based on the rationale that the said amount has already been adjusted by TCIL. The learned arbitrator was not required to proceed further as there was no claim lodged by PN concerning consultancy charges. The learned arbitrator noticed that PN in its counter-reply has accepted this deduction. Given what is noted hereinabove by me, in my opinion, if PN were to commence a proceeding to recover the said amount, it would be entitled to do so, *albeit*, in accordance with the law.

Counterclaim No.3:

57. As regards Counterclaim No.3, the claim made by TCIL is for a sum of Rs.1,22,43,398/- qua sums which had been paid as advances but could not have been adjusted. The argument advanced on behalf of PN that the amounts awarded under this head were based on a self-generated statement of account, in my view, is not sustainable for the reason that TCIL has rightly asserted that PN in his counter-reply has not impugned any specific

entry contained in the statement of account. While the account books of TCIL by itself may not provide a conclusive proof in support of its claim and that the accounts contained therein may have to be backed by corroborative evidence if a challenge was raised qua the same that may not be necessary in this case. In this case there is only a bare denial by PN without a specific challenge to the entries contained in the statement of account. Therefore, this argument cannot be sustained.

57.1 Besides this, on behalf of PN, reference is made to Clauses 9(d) and (e) of the tender conditions. It is important to note that Clause 9 generally relates to payment terms. Clause 9(d) and (e) have to be read with the material on record which in this case is the statement of account. This aspect, to my mind, is in the realm of appreciation of evidence and therefore, cannot be interfered with by me. The argument advanced on behalf of PN that it should have been paid double the amount claimed under this head by TCIL does not appeal to me. Consequently, the submissions made on behalf of PN qua Counterclaim No.3 are rejected.

Counterclaim No.5:

58. Insofar as counterclaim No.5 is concerned, the amounts awarded under this head to TCIL are consequential. Since counterclaim No.3, which pertains to advances, has been allowed, interest under this head was rightly awarded by the learned arbitrator.

Decision:

59. Thus, for the forgoing reasons, I am not inclined to interdict the impugned award save and except with regard to my observation qua Counterclaim No.2, which pertains to consultancy charges.

60. The captioned petition is disposed of in the aforementioned terms. However, parties shall bear their respective costs.

61. Consequently, the pending application shall also stand disposed of.

RAJIV SHAKDHER, J

AUGUST 05, 2019/pmc

