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

% **Date of decision: 1<sup>st</sup> March, 2021.**

+ **FAO(OS) (COMM) 36/2021**

**C & C CONSTRUCTIONS LTD. .... Appellant**

Through: Mr. Navin Kumar, Adv.

Versus

**IRCON INTERNATIONAL LTD. .... Respondent**

Through: Mr. Sidhant Goel, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**HON'BLE MR. JUSTICE AMIT BANSAL**

**[VIA VIDEO CONFERENCING]**

**RAJIV SAHAI ENDLAW, J.**

**CM No.8193/2021 (for exemption)**

1. Allowed, subject to just exceptions and as per extant rules.
2. The application is disposed of.

**FAO(OS) (COMM) No.36/2021**

3. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 impugns the judgment/order dated 15<sup>th</sup> December, 2020 of the Commercial Division of this Court of dismissal of application of the appellant under Section 34 of the said Act.

4. The application under Section 34 of the Act, being OMP(COMM) No.566/2020, was filed with respect to arbitral award dated 21<sup>st</sup> December, 2019 (of three Arbitrators, with the appellant and the respondent having nominated one Arbitrator each and the third Arbitrator having been appointed by this Court) of dismissal, in exercise of powers under Section 16 of the Act, of all the claims of the appellant.

5. It is the contention of the counsel for the appellant that the Arbitral Tribunal, on an application under Section 16 of the Act having been preferred by the respondent, has summarily dismissed all the 15 monetary claims for recovery of compensation/damages, of the appellant against the respondent, with respect to the Contract for 'Construction of Road Over Bridges (ROBs) & its approaches as per Specifications, Drawing & Design, Maintaining all Quality Control Standards etc. complete under ROB Cluster Package in Lieu of various LCs at Jaipur' entered into by the respondent with the appellant.

6. The counsel for the appellant has drawn our attention to Clause 49.5 of the General Conditions of Contract, invoking which the application under Section 16 of the Act was filed by the respondent. As per the said clause, in the event of any failure or delay on the part of the respondent or the engineer in fulfilling their obligations under the contract, such failure or delay on the part of the respondent or the engineer was not to in any way affect or vitiate the contract or alter the character thereof or entitle the appellant to damages or compensation therefor except that the engineer shall grant such extension or extensions of time to complete the work as in his opinion was reasonable. It was the plea of the respondent in its application under Section 16 of the

Act, that all the 15 monetary claims of the appellant were barred and/or not maintainable under Clause 49.5 of the General Conditions of Contract.

7. The counsel for the appellant has contended that the Arbitral Tribunal ought to have granted the appellant an opportunity to prove that the claims of the appellant were not barred by Clause 49.5 of the General Conditions of Contract. Attention is drawn to Clause 49.4 of the General Conditions of Contract which deals with delays not due to employer/contractor but on the part of the third parties or on the part of the Court orders. The contention of the counsel for the appellant is that all the 15 claims of the petitioner fall under Clause 49.4. On further enquiry, as to under which clause of Section 34 of the Arbitration Act the appellant justifies setting aside of the award, it is contended that the claim of the appellant falls under Section 34(b)(ii), whereunder an arbitral award is liable to be set aside if it is in conflict with the public policy of India. It is argued that opportunity to lead evidence is the public policy of India and summary dismissal of claims under Section 16, as barred by Clause 49.5, is in denial of principles of natural justice.

8. Though according to us there is no absolute component of the principles of natural justice, that an opportunity to lead evidence will be granted, if it is otherwise evident from the pleadings and the documents that the claim is barred, and the Arbitral Tribunal is not bound by the procedure prescribed in the Code of Civil Procedure, 1908 (CPC) or the Indian Evidence Act, 1872 but we have proceeded to hear the counsels. Reference in this regard may be made to *Municipal Corporation of Delhi vs Jagannath Ashok Kumar* (1987) 4 SCC 497, *Sohan Lal Gupta vs Asha Devi Gupta* (2003) 7 SCC 492, *Jagjeet Singh Lyallpuri vs Unitop*

***Apartments and Builders Ltd.*** (2020) 2 SCC 279 and ***Centrotrade Minerals and Metals Ink vs Hindustan Copper Ltd.*** MANU/SC/0464/2020. If it was the case of the appellant itself before the Arbitral Tribunal that the compensation/damages sought were caused to the appellant on account of delay of the respondent, there was no need for the Arbitral Tribunal to give an opportunity to lead evidence to the appellant, since the claim, on the own plea of the appellant, was barred by the contract between the parties.

9. We have enquired from the counsel for the petitioner, that even if it were to be believed that the claims of the petitioner fell under Clause 49.4 and not under Clause 49.5 of the General Conditions of Contract, how could the delay on the part of the third parties to the contract entitle the appellant to make monetary claims for delay against the respondent. Clause 49.4 appears to have been inserted, only to protect the contractor i.e. the appellant herein from claims of the respondent of delay, if such delay were to be on account of third parties.

10. The counsel for the appellant does not controvert the same and on the contrary now contends that Clause 49.5 was waived by the respondent and has in this regard drawn our attention to the letter of the appellant dated 19<sup>th</sup> June, 2013 at page 754 of the electronic file and the response of the respondent dated 14<sup>th</sup> October, 2013 at page 831 of the file thereto.

11. However a perusal of the said communication and response also does not demonstrate any plea of waiver of Clause 49.5, even if it was possible in such manner. The letter dated 19<sup>th</sup> June, 2013 of the appellant has the subject of “Requisition for extension of time”. The respondent, in its response thereto asked the appellant for its claim, only for the purposes of

deciding, whether to grant extension of time or not and it can by no stretch of imagination be said that from the said correspondence, Clause 49.5 stood waived. A contract arrived at in a formal manner cannot be novated in the manner suggested by the counsel for the appellant. The counsel for the respondent has also drawn our attention to Clause 54 of the General Conditions of Contract which provides the manner in which any part of the contract was to be novated.

12. The counsel for the appellant has also referred us to a judgment of a Single Judge of this Court in *Simplex Concrete Piles (India) Ltd. Vs. Union of India* MANU/DE/4538/2010, to contend that a clause as Clause 49.5 has been held to be barred by Section 28 of the Indian Contract Act, 1872.

13. The counsel for the respondent states that the appeal thereagainst is pending before the Division Bench. He has also drawn our attention to the dicta of the Supreme Court in *General Manager Northern Railways Vs. Sarvesh Chopra* (2002) 4 SCC 45, where a clause as Clause 49.5 has been held to be valid. Reference is also made to the dicta in *Oil and Natural Gas Corporation Vs. Wig Brothers Builders and Engineers Pvt. Ltd.* (2010) 13 SCC 377.

14. The counsel for the appellant has drawn our attention to *Asian Techs Ltd. Vs. Union of India* (2009) 10 SCC 354 to contend that therein a similar clause as Clause 49.5 was held to have been given a go-by.

15. However the same is not the case here.

16. Moreover, this Court, while exercising powers under Section 37 of the Arbitration Act has to remember that as held in *Deep Industries Ltd. vs*

*Oil and Natural Gas Corporation Ltd. 2019 SCC Online SC 1602, MMTC Ltd. vs Vedanta Ltd. (2019) 4 SCC 163*, the scope of interference with the Arbitral Award, under Section 37, is much narrower and more limited than even under Section 34 of the Act and this Court is not to hear and adjudicate as in second appeal under the CPC, to see whether any substantial question of law arises. The parties agreeing to arbitration have to remember that they are thereby binding themselves to the decision of the arbitrator/s on facts as well as law and cannot use arbitration as a first step in litigation.

17. No case for interference is made out.

18. Dismissed.

**RAJIV SAHAI ENDLAW, J.**

**AMIT BANSAL, J.**

**MARCH 1, 2021**

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