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

% *Date of Judgment: 12th March, 2021*

\+ **O.M.P. (COMM) 112/2021**

UNION OF INDIA REPRESENTED BY DG MAP ..... Petitioner

Through: Mr Rakesh Kumar, CGSC with Mr Raghav Nagar, Advocates.

versus

NCC LIMITED ..... Respondent

Through: Ms Priya Kumar, Mr Tejas Chhabra and Mr Kunal Dhawan, Advocates for NCC Ltd.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. *(ORAL)*

I.A. 3836/2021 & I.A. 3840/2021

1. For the reasons stated in the application, the delay in filing as well as re-filing is condoned.

2. The application is disposed of.

I.A. 3837/2021 & I.A. 3838/2021

3. Allowed, subject to all just exceptions.

O.M.P. (COMM) 112/2021 & I.A. 3839/2021

4. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), impugning the interim award (hereafter 'the impugned award') passed by the Arbitral Tribunal comprising of a Sole Arbitrator. By the impugned award, the Arbitral Tribunal had directed that the Performance Bank Guarantee (Bank Guarantee No. 130391 BG 0000505) for a sum of ₹15,06,31,160/-, furnished by the respondent (hereafter 'NCC') be returned to NCC, with the attendant direction to replace the same by a Bank Guarantee in the sum of ₹1.5 crores.

5. The petitioner contends that the impugned award is patently illegal as it effectively dilutes the security available with the petitioner, to recover its counter-claims. According to the petitioner, the performance of the contract was delayed inordinately and it is entitled to recover damages, which have been articulated as counter-claims. The petitioner contends that such an interim award, without adjudication of its counter claims, is patently illegal and is liable to be set aside.

6. The controversy in the present case arises in the following context:-

7. On 21.12.2009, the petitioner issued a Notice Inviting Tenders (NIT) for "*Construction of Dwelling Units including allied services for officers, Senior Sailors & Junior Sailors at Naval Station (Dolphin Hill, DGNP site), Bheemunipatnam (Navy), Vizag*". NCC submitted its bid pursuant to the said NIT.

8. On 05.03.2010, the petitioner issued the Letter of Award (LoA), awarding the contract for the construction of dwelling units including allied services for officers, senior sailors and junior sailors at three sites – Dolphin Hill, DGNP Site and Bheemunipatnam (Navy site) – at Vizag. In terms of the LoA, NCC was required to construct 1,369 Dwelling Units (hereafter DUs). The construction was planned in three Pockets and one hundred and seven blocks as under:

Srl No	Pockets	No of DUs	Blocks
1	Bheemunipatnam	70	14
2	Dolphin Hill	470	79
3	DGNP Site	829	14

9. The period of completion of the works was stipulated as twenty-five months. The construction was to be completed in five phases and separate dates for commencement and completion of construction for each phase were stipulated in the Work Order – Work Order No.1 was issued on 18.03.2010.

10. In terms of the contract between the parties, the original date for completion of the last phase of the contract (Phase-V) was stipulated as 17.04.2012. The work in respect of the other phases was to be completed earlier. However, the dates of completion in respect of the five phases were extended from time to time.

11. The work commenced as per Work Order-I on 18.03.2010 and was completed on 13.08.2015.

12. The contract between the parties stipulated the defect liability period as two years. This period expired on 12.08.2017.

13. The respondent submitted its Final Bill on 09.11.2016, which included an undisputed amount as well as the disputed amount. Though the undisputed portion of the Final Bill was for a sum of ₹1,31,02,606.50, however, a sum of ₹1,07,91,165/- was released to the respondent.

14. The disputes between the parties have been referred to arbitration. The same also includes NCC's claim regarding return of the Bank Gurantee (Bank Guarantee No. 130391 BG 0000505) for a sum of ₹15,06,31,160/-, which was furnished by NCC as a performance security.

15. The Arbitral Tribunal has decided NCC's claim regarding the return of the aforesaid Bank Guarantee, in terms of the impugned award.

16. It is NCC's case that its Final Bill was prepared and therefore, there was no ground for the petitioner to withhold the Performance Security and the same was liable to be refunded in terms of Condition 58 of the General Conditions of Contract (GCC). The said clause is set out below:-

> "**58 <u>Refund of Performance Security</u>**
>
> The Performance Security deposit mentioned in Condition 19 above may be refunded to the Contractor after the expiration of the defects liability period (vide condition 40) by the P.M. provided always that the

> contractor shall first have been paid the final bill and have rendered a No-Demand Certificate on the form at Annexure 'G' of these conditions."

17. The petitioner contested NCC's claim for refund of performance security, *inter alia*, on the ground that defects in certain DU's, which were required to be cured by NCC, had not been cured.

18. In the aforesaid context, a joint verification was conducted and it was found that there were no defects pending rectification in any of the DU's constructed at the two sites. However, there were defects in certain DUs constructed at the DGNP site (Naushakti Vihar). There were 829 DUs constructed at this site, out of which 665 DUs contained some defects. Admittedly, the defects in 652 DUs out of the aforesaid 665 DUs had been rectified and defects in only 13 DUs remained.

19. It is also material to note that although NCC had taken steps to cure the defects, it maintains that it was not obliged to do so as the defect liability period had expired. It is also noted that there is some controversy as there were two agencies handling the DUs at the material time.

20. However, the Arbitral Tribunal was of the view that it would not be necessary to examine this dispute at this stage since there were only thirteen units that required rectification. It is noted that the cost of each DU was only ₹18.74 lakhs. It is also estimated that not more than ₹2,50,000/- would be required for rectification of the defects in each DU and a maximum of ₹25,00,000/- would be required to cure the defects. In addition, a sum of ₹1,50,000/- would be required for the

Over Head Tanks as per NCC's estimate and therefore, NCC contended that a maximum of ₹25,50,000/- plus 18% GST would be required to cure the alleged defects. The petitioner did not dispute the aforesaid estimate.

21. In the aforesaid circumstances, the Arbitral Tribunal concluded that in terms of clause 58 of the GCC, the Performance Security was liable to be refunded and delivered the impugned award.

22. It is the petitioner's case that the impugned award passed by the Arbitral Tribunal is patently illegal, as it fails to take into account that there were counter claims raised by the petitioner. Mr Rakesh Kumar, the learned counsel for the petitioner referred to clause 58 of the GCC and submitted that the said clause required submission of a No-Demand Certificate in the form annexed as Annexure 'G'. He pointed out Part B of the said No Demand Certificate, which is set out below:-

"**PART 'B'**

> Certified that there are no demands outstanding against the contractor in respect of the Contract agreement No.............................. dated .... for ....
>
> AAO,PCDA/CDA Project Manager
>
> SAO,PCDA/CDA
>
> Receive from ....The sum of Rupees ....being the amount in refund of my security deposits in full which was deposited in the form of ....

Stamp for Sums

Exceeding ₹500/-

Signature

Dated.......................

NOTES

1. When only the official Appointment held by the paying officer is stated in the certificate, a short reference the fact of payment should be written on or across the certificate and signed by the disbursing officer (addition his rank) who refunds the security.

2. Here mention the full particulars of the security e.g. Post Office Cash Certificate No and date and the G.P. Notes No and date, Post Office Savings Bank Account No. Fixed Deposit Receipts etc."

23. He earnestly contended that since a No Demand Certificate in the said format had not been issued therefore, the question of refund of Bank Guarantee would not arise. He further submitted that the petitioner had pointed out various counter claims and the Performance Security could not be released before the said claims were decided.

24. Ms Priya Kumar, the learned counsel for the respondent has pointed out that, in fact, a No Demand Certificate in the format as required under Annexure 'G' was issued by the petitioner and the contention that the same was not issued, is erroneous. She also referred to the copy of the pleadings filed by the respondent, which is annexed along with the present petition. The same encloses the said No Demand Certificate as Annexure 'C/8'. The copy of the same has been handed

over by the learned counsel and the same is taken on record.

25. This Court had pointedly asked Shri Rakesh Kumar, whether there is any averment in the present petition that NCC had not submitted the No Demand Certificate, in the prescribed format (Part B of Annexure 'G'). He fairly states that there is no such averment. But there is an averment that a No Demand Certificate could not be issued without the counter claims being satisfied.

26. Since it is not disputed that in fact a No Demand Certificate has been issued; the requirements of Clause 58 of the Contract are fully satisfied. Thus, the finding of the Arbitral Award in this regard cannot be faulted.

27. Insofar as the petitioner's counter-claims are concerned, the Arbitral Tribunal had noted that the counter claims had not been raised at any stage prior to filing the same before the Arbitral Tribunal, that is, much after the claims had been filed. Keeping in view all the facts, the Arbitral Tribunal directed the petitioner to release the Bank Guarantee.

28. It is trite law that scope of interference in Arbitral Award is limited. This Court finds no flaw in the reasoning of the Arbitral Award in directing that the Performance Security be released. The contention that the Arbitral Tribunal had erred in noting that No Demand Certificate in the requisite format, which was a pre-condition to the release of the Performance Bank Guarantee, was furnished, is also unmerited. Notwithstanding the same, it is apparent from a plain reading of the Award that the Arbitral Tribunal had found that at the

material time, there were no demands pending against NCC. In other words, the petitioner was in any event, obliged to issue the No Demand Certificate. And, the fact that it had defaulted in doing so cannot be held to NCC's prejudice.

29. It is also important to note that prima facie, the counter claims raised by the petitioner appear to be time barred. The petitioner does not dispute the finding of the Arbitral Award that the counter claims had been raised only at the stage after NCC had filed its claims. It is also not in dispute that the petitioner had not issued any notice setting out its claims. As noticed above, the contract was completed on 13.08.2015. The defect liability period had also expired on 12.08.2017. Undisputedly, a portion of the Final Bill was released on 20.03.2019. The Statement of Claim was filed on 18.10.2019. The petitioner filed its counter claim on 14.01.2020. It is seen from the counter claims that the claim is in the nature of damages on account of delay on completion of works. The said claim has been made for the first time after the works were completed. The Supreme Court in the case of ***State of Goa. v. Praveen Enterprises: (2012) 12 SCC 581*** has held that the question whether the counter claim is filed within the period of limitation would be determined whether the date on which the counter claim is made is within the prescribed period. The only exception is cases where a notice under Section 21 of the A&C Act have been issued by the party prior to filing the counter claim. Admittedly, in this case, no notice under Section 21 of the A&C Act was issued by the petitioner.

30. This Court is refraining from making any final observations in

this regard as the matter is pending before the Arbitral Tribunal and the Arbitral Tribunal will obviously consider this aspect as well.

31. The petition is unmerited and is accordingly, dismissed with the aforesaid observations.

32. The pending applications are also disposed of.

VIBHU BAKHRU, J

MARCH 12, 2021
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