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

**Date of Decision: 16<sup>th</sup> December, 2021**

+ **ARB. A. (COMM.) 70/2021 & I.As. 15248-250/2021**

**M/S SOMA ENTERPRISES LTD. .... Appellant**

Through: Mr. Arvind Nigam and Mr. Arunabh Chowdhary, Senior Advocates with Mr. Abhishek Roy, Mr. Vaibhav Tomar, Ms. Barnali Chowdhury and Mr. Anirudh Mahadev Sethi, Advocates.

versus

**M/S ROTEC INDUSTRIES INC. .... Respondent**

Through: Mr. Ashish Bhagat, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**[VIA HYBRID MODE]**

**SANJEEV NARULA, J. (Oral):**

1. On account of disputes arising between the parties, an Arbitral Tribunal has been constituted, parties have filed their respective claims and counter-claims, and the proceedings are in progress. At this juncture, the Appellant is aggrieved with an interim order under Section 17 of the Arbitration and Conciliation Act, 1996 [*hereinafter, "the Act"*] *inter alia* directing it to pay USD 500,000/- per year (from 1<sup>st</sup> January, 2014 till 31<sup>st</sup> December, 2021) as an *ad hoc* arrangement for retention and use of

equipment supplied by the Respondent, which is deployed at the project for construction of a dam by the Appellant.

### **THE FACTS**

2. Before adverting to the contentions urged by the parties, it would be apposite to briefly take note of the factual background, which is as follows:

- 2.1. The Appellant - M/s. Soma Enterprises Limited [*hereinafter*, “**Soma**”] is the Indian partner of a Joint Venture [*viz.* BGS-SGS-SOMA JV]. Soma entered into an ‘Agreement for ROTEC Services’ on 19<sup>th</sup> April, 2005 [*hereinafter*, “**Agreement**”] with the Respondent - M/s. Rotec Industries Inc. [*hereinafter*, “**Rotec**”] for executing services including the supply, erection, commissioning, running and maintenance for placement of about 2.2 million cubic meters of concrete on 133m high and 271m long Subansiri Concrete Gravity Dam and Appurtenances – a segment of the Subansiri Hydroelectric Project of 2000 MW (8 x 250 MW) [*hereinafter*, “**Project**”].
- 2.2. Rotec was to supply and deploy the equipment, spares, and a team of requisite specialists to lead Soma’s crew for the operation and maintenance of the system.
- 2.3. The total contract value was agreed to be USD 16,500,000 – wherein the machinery/ equipment(s) cost was agreed as USD 4,950,000. Clause 4 of the Agreement provided a schedule of payments that were to be made at different stages, as follows:

*“4.1.(i) US\$ 3,242,250 (US Dollars Three Million two hundred forty-two thousand two hundred fifty only) through Letter of Credit (LC) payable to*

*ROTEC in January 2005 against ROTEK importing equipment and spares required for the execution of the said work.*

*(ii) US\$ 1,707,750 (US Dollars One Million seven hundred seven thousand seven hundred fifty only) through Letter of Credit payable to ROTEK on 31.03.2006 against ROTEK completing the importing of the entire equipment and spares required for the execution of the said work. While partial shipments will be allowed, the amount shall become payable only on 31.03.2006 against presentation of documents.*

*(iii) US\$ 3,300,000 (US Dollars Three Million three hundred thousand only) by giving foreign bank guarantee payable to ROTEK on 1.12.2010.*

*(iv) US\$ 8,250,000 (US Dollars Eight Million two hundred fifty thousand only) on completion of entire dam concreting work payable on 31.12.2011, in keeping with assessment of situation as mentioned in Cl. 12.1, 12.2 and 12.3 herein below. The final payment will be reconciled and regulated in accordance with Cls. 3.2 and 4.2 and actual quantity of concrete placed in the dam and appurtenances, and other clauses applicable as per this agreement. The said reconciled amount, though become payable on 31.12.2011 will have been earned by ROTEK on actual quantity of concrete placed on month-to-month basis."*

- 2.4. Undisputedly, payments under sub-clauses (i), (ii) and (iii) of Clause 4.1 of the Agreement stand paid to Rotec. As regards the remaining amount, the parties are at variance. Soma alleges that its has made excess payments to Rotec, for which it has a counterclaim against Rotec. It emphasises that the total concreting work done by Rotec till 31<sup>st</sup> December, 2012 was only 4,29,083 cubic meters, and on that basis, Rotec was entitled to only USD 3,041,593; whereas, Rotec has received a total payment of USD 11,312,077 as of 31<sup>st</sup> December, 2012.
- 2.5. Soma further alleges that Rotec did not fulfil its obligations: Rotec unilaterally stopped the concreting activity midway in November, 2011 and abandoned the work in breach of its commitments under the Agreement. As a result, Soma had to take over the plant and machinery/ equipment(s).

- 2.6. On the other hand, Rotec contends that Soma failed to discharge its payment obligations, despite numerous requests, constraining it to withdraw from the Project.
- 2.7. It must also be noted that when Rotec left, it removed computer chips from the towerbelts, to ensure that there is no ability to compromise its personnel. In such circumstances, Soma approached the High Court at Gauhati for interim measures under Section 9 of the Act – where an order dated 9<sup>th</sup> December, 2011 was passed, restraining Rotec from creating any third-party right(s) over the plant and machinery mentioned in Schedule I to the Hypothecation Deed dated 13<sup>th</sup> May, 2005.<sup>1</sup> Rotec was further directed not to interfere with or create any hindrance(s) in the working of Soma in executing the work allocated by National Hydroelectric Power Corporation (NHPC) with the help of the plant and machinery/ equipment(s) supplied by Rotec. Rotec was also restrained from withdrawing the personnel deployed for making the plant and machinery operational.
- 2.8. At the same time, Rotec also filed a petition under Section 9 of the Act, before this Court, which was, however, dismissed *vide* Order dated 26<sup>th</sup> October, 2016.<sup>2</sup>
- 2.9. Soma, thus, armed with interim protection in its favour, continued to carry out the concreting work by utilising the machinery supplied by Rotec from 2011 onwards. More than a decade later, the construction of dam is still ‘work under progress’ – with 24.5% of the work yet to be completed.

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<sup>1</sup> In CRP 424/2011.

<sup>2</sup> *Being* O.M.P. (COMM) 924/2011.

**APPLICATIONS UNDER SECTION 17 OF THE ACT**

3. Both parties filed applications under Section 17 of the Act seeking interim measures. Soma prayed for the following reliefs:

- (i) Restraining Rotec from creating any third-party interest(s) or from interfering in utilisation of the plant and machinery/ equipment(s) supplied by it;
- (ii) Directing Rotec to ensure that officers/ staff deployed at the work site for running the plant continue to render their services and are not withdrawn;
- (iii) Continuation of the interim order dated 9<sup>th</sup> December, 2011 passed by the High Court of Gauhati.

4. Rotec, on the other hand, prayed for:

- (i) Restraining Soma and its associates from parting with the possession or creating third party rights over the machinery/ equipment(s) deployed at the project side.
- (ii) Restitution and immediate return of the machinery/ equipment(s).
- (iii) Securing an amount of USD 13,300,000 *i.e.*, the amount towards rent for the period from 1<sup>st</sup> January, 2012 to 15<sup>th</sup> July, 2017.
- (iv) Seeking payment towards rent at the rate of USD 200,000 per month, for usage of machinery/ equipment(s) from 16<sup>th</sup> July, 2017 till actual delivery of the equipment.
- (v) Damages for illegal retention of the machinery/ equipment(s) worth USD 27,900,000.

### **THE ARBITRAL ORDER**

5. The learned Arbitrator, after considering the submissions advanced by the parties, directed as under:
- 5.1. As an *ad hoc* arrangement, Soma to pay USD 500,000 per year as interim rent/ compensation to Rotec w.e.f. 1<sup>st</sup> January, 2014 till 31<sup>st</sup> December, 2021.
- 5.2. In case the project is not completed by 31<sup>st</sup> December, 2021, the rent/ compensation could be modified w.e.f. 1<sup>st</sup> January, 2022 after hearing both the parties.
- 5.3. Soma to not create any third-party interest(s) in the machinery/ equipment(s) and to take due care and maintain the same during pendency of the proceedings.
- 5.4. Restrained Rotec from taking possession of the machinery/ equipment(s), provided, payment of compensation is made by Soma regularly.
- 5.5. In case of any default(s) in making payment, Rotec is permitted take possession of the machinery/ equipment(s) within two weeks from the date of non-payment of the amount payable by Soma.
6. Aggrieved with the aforesaid order, Soma has filed the present appeal under Section 37(2)(b) of the Act.

### **CONTENTIONS OF THE PARTIES**

#### **ON BEHALF OF SOMA**

7. Mr. Arvind Nigam, Senior Counsel for Soma, makes the following submissions:

- 7.1. The learned Arbitrator has erroneously directed Soma to pay rent/ compensation by invoking Clause 4.3 of the Agreement, without rendering any finding attributable to Soma for prolongation of the contract beyond 31<sup>st</sup> December, 2011. In such circumstances, no direction for payment of rent/ compensation could have been passed. The learned Arbitrator at paragraph 39 of the impugned order has categorically observed that “*in absence of any evidence, it is difficult to come to a conclusion with regard to fault of any of the parties at the stage, in the matter of breach of the Agreement*”. In light of this observation, direction to pay compensation/ rent is untenable, bad in law and contrary to Clause 4.3 of the Agreement.
- 7.2. On account of Rotec’s various defaults, including their unilateral stoppage and abandoning of work in 27<sup>th</sup> October, 2011 after doing only 19.5% of work, Soma had suffered loss – for which it has submitted its counterclaim, and one such claim is as per Clause 4.3 of the Agreement. Therefore, direction to pay compensation/ rent to Rotec is not only untenable but also self-defeating.
- 7.3. The learned Arbitrator has ignored Clause 19 of the Agreement and Clause 4 of the Hypothecation Deed – which made it clear that in the event Rotec abandons the project, Soma would be entitled to take over Rotec’s plant and machinery/ equipment(s) in order to complete the project work; and the ownership thereof would stand transferred to Soma.
- 7.4. Rotec failed to ship all the machinery/ equipment(s) and spares before 1<sup>st</sup> March, 2006 in terms of Clause 4.1(ii) and 15.2 of the Agreement; the supply of shipment continued till 1<sup>st</sup> October, 2010 and still

remains incomplete. Thus, Rotec is guilty of delay in commissioning plant and machinery/ equipment(s) and shipping defective, irreparable, concrete carriers. In these circumstances, Rotec cannot be entitled to any order of compensation at an interim stage under Section 17 of the Act.

- 7.5. Rotec deliberately removed the computer chips from the machines, thereby, making the plant and machinery/ equipment(s) non-operational – which amounted to sabotaging the work. This clearly demonstrates that Rotec had unilaterally abandoned the work site and Soma was thereafter constrained to approach this Court to seek interim measures. In light of this conduct, as well as the fact that the learned Arbitrator still has to make a finding as to which of the parties is responsible for the breach and delay in the execution of the project, he could not have awarded rent/ compensation to Rotec.
- 7.6. Soma has, in fact, made an excess payment of USD 13,121,768 as on 31<sup>st</sup> December, 2011 and has made a counter claim of USD 110,094,013 as on 31<sup>st</sup> July, 2017 against Rotec. In these circumstances, when the disputes are yet to be adjudicated, rent/ compensation could not be awarded in the absence of any contractual stipulation to that effect, notwithstanding the determination of fault liability.
- 7.7. Rotec approached the Court under Section 9 of the Act but failed to obtain any interim order(s) for 10 years. On the contrary, Soma was protected by order dated 9<sup>th</sup> December, 2011 of the High Court at Guahati – which was also continued by an Order dated 9<sup>th</sup> December,

2013 of the District Judge, Dhemaji, Assam. There was thus no justification for the Tribunal to pass orders at such a belated stage.

- 7.8. Clause 4 of the Hypothecation Deed is in the nature of a default clause, and therefore, there is no question of payment of rent or any minimum guaranteed amount to Rotec. Any direction to pay rent would be giving a premium for the default committed by Rotec – which is not visualized under the Agreement.
- 7.9. There is a settled law that the Arbitrator cannot rewrite the contract in the absence of any arrangement between the parties. Reliance is placed on *LIC v. S. Sindhu*,<sup>3</sup> *Ssangyong Engineering and Construction Co. Ltd. v. NHAI*,<sup>4</sup> and *PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Ors.*<sup>5</sup>

ON BEHALF OF ROTEC

8. *Per contra*, Mr. Ashish Bhagat, counsel for Rotec, makes the following submissions:

- 8.1. The unilateral invocation of Clause 19 of the Agreement and Clause 4 of the Hypothecation Deed, without resorting to the modalities as mentioned under Clause 19,<sup>6</sup> and thereby, taking over the machinery/equipment(s) worth USD 27,900,000 by Soma, is patently illegal.

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<sup>3</sup> (2006) 5 SCC 258.

<sup>4</sup> (2019) 15 SCC 131.

<sup>5</sup> 2021 SCC Online SC 508.

<sup>6</sup> Clause 19 of the Agreement has two modalities – (i) is relating to failure of discharge of obligations under the Agreement; and (ii) the parties will discuss and agree upon the future modalities in this regard.

- 8.2. The modalities mentioned in Clause 19 relate to finalisation of rent of the machinery/ equipment(s) – which Soma has illegally bypassed and caused wrongful losses and harm to Rotec. In any case, the work was not going on, nor did it start for many years after the illegal taking over of the machinery/ equipment(s), thereby causing irreparable harm to Rotec.
- 8.3. As per Clause 12.1 of the Agreement, the date of completion of concreting in dam and appurtenances was stipulated as 31<sup>st</sup> December, 2011. However, even after ten years the same is incomplete. Thus, there was urgency, given that Soma has illegally retained machinery/ equipment(s) belonging to Rotec for over 10 years, without remunerating for the same.
- 8.4. Further, the learned Arbitrator has reiterated throughout the impugned Order, that the matter is not being decided on merits at this stage, and that the rental amount directed to be paid by Soma is only on an *ad-hoc* basis.
- 8.5. There is neither a strong *prima facie* case nor does the balance of convenience lie in favour of Soma.
- 8.6. The scope of this Court's interference under Section 37(2)(b) of the Act is extremely limited.

### ANALYSIS

9. The learned Arbitrator, after a careful analysis of the terms of the Agreement observed that since the proceedings are at an interim stage and evidence is yet to be adduced, he would not like to venture into an in-depth analysis of the terms of the Agreement and *inter-se* claims, and would rather

only work out an *ad hoc* arrangement during the pendency of arbitral proceedings.

10. On the afore-noted premise, after noting the specialised nature of machinery/ equipment(s), which is critical for the construction of a dam of vital importance to the nation, the learned Arbitrator deemed it necessary and expedient that project work is not adversely affected. He formed an opinion that it would be impossible for Soma to complete the project without the machinery/ equipment(s) and thus declined Rotec's request for taking over its possession. As a result, Soma has been allowed to retain the possession and use the same for completion of the dam.

11. In the circumstances noted above, in order to strike a balance, an *ad hoc* arrangement has been worked out whereunder Soma has been directed to pay USD 500,000 per year to Rotec towards rent/ compensation for the period from 1<sup>st</sup> January 2014 (two years from the date of scheduled date of completion) to 31<sup>st</sup> December, 2021. This amount is subject to revision w.e.f. January, 2022 – which would be considered after hearing both the sides.

12. The ground for payment to Rotec as 'rent/ compensation' has been founded on the ground that Soma is utilising machinery/ equipment(s) beyond the stipulated date of completion. The computation thereof has been arrived at by recognizing that the equipment(s) depreciate by 15-20% annually, and by relying upon Clause 4.3 of the Agreement which dealt with

a situation where the contract period is extended beyond 31<sup>st</sup> December, 2011, which is extracted hereinbelow:

*“4.3 In Case contract period is extended beyond December 31, 2011 without increase in quantities due to reasons out of control of ROTEC and attributable to SOMA, SOMA will pay ROTEC extension fee in total of US \$ 200,000 (US Dollars two hundred thousand only) per month extension period, or portion of it thereof on pro-rata basis, based on the equipment and number of ROTEC personnel employed during the extension period. In case the extension beyond December 31, 2011 is due to reasons attributable to ROTEC, SOMA shall deduct US \$ 200,000 (US Dollars two hundred thousand only) per month of extension period, or portion of it thereof on pro rata basis from the amounts due to ROTEC from SOMA.”*

13. Clause 4.3 of the Agreement, as extracted above, envisages a situation where the contract period is extended beyond 31<sup>st</sup> December, 2011, without increasing quantities. Thereunder, the extension fee of USD 200,000 per month is payable on a *pro rata* basis – based on the machinery/equipment(s) and number of personnel employed by Rotec during the extension period. The first part puts the liability on Soma if the extension is “*due to reasons out of control of Rotec and attributable to Soma*”. Likewise, the second part deals with a situation where extension is due to reasons attributable to Rotec, where Soma is entitled to deduct USD 200,000 per month of extension period or portion thereof on a *pro rata* basis from the amounts due to Rotec from Soma.

14. Now, the question arises is whether reliance could be placed on the afore-noted Clause 4.3, as extracted above. Here, the contractual period certainly stands extended way beyond the stipulated date of completion. But the question still remains whether such delay/extension has been due to reasons beyond the control of Rotec and attributable to Soma. On this

crucial aspect, parties are yet to lead evidence and the learned Arbitrator has certainly not taken a view. He unequivocally observes in various paras of the impugned Order, as follows –

- (a) In paragraph 29, that *“At this stage, let me not see whether stopping of the work by the claimant was justified or not”*;
- (b) In paragraph 31, that *“I do not want to examine legality or validity of the act of the claimant with regard to the stoppage of the work at this stage”*;
- (c) In paragraph 42, that *“it is also pertinent to note that still evidence has not been led and it is not known whether at the initial stage, there was any fault on the part of the claimant or the Respondent”*;
- (d) Then again in paragraph 47, that *“it is very difficult to find fault of anyone in absence of complete evidence”*;
- (e) And after taking note of the terms of the Hypothecation Deed, he formed a *prima facie* view that *“it cannot be said that Respondent has taken the possession of the equipment in an illegal manner”*.

15. In fact, even though a final determination for award of compensation has been deferred, yet, reliance on Clause 4.3 could have been made for the assessment thereof in order to secure Rotec, as the equipment has been allowed to be retained beyond the term of the contract without any payment.

16. Next, Soma has relied upon Clause 4 of the Hypothecation Deed to contend that the custody and deemed ownership of the plant and machinery/equipment(s) rests with it. The said clause reads as follows:

*“4. This Hypothecation Deed shall be read in harmony with the provisions of Agreement for Rotec Services. However, if Rotec abandons the said works or commits any such serious breach of conditions of the said "ARS", Soma shall be entitled to take over Rotec's plant and machinery detailed in Schedule-I hereto, to enable them to complete the execution of the said work, and the ownership of the said schedule plant and machinery shall be deemed to have been transferred to and vested with SORIA to the extent necessary to remedy said breach.”*

17. The afore-noted clause stipulates that if Rotec abandons work or severely breaches the conditions under the Agreement, Soma shall be entitled to take over Rotec's plant and machinery/ equipment(s), as detailed in Schedule I to the Hypothecation Deed – enabling it to complete the execution of the said work. In such an event, ownership of the plant and machinery/ equipment(s) shall be deemed to be transferred to and vested in Soma, to the extent as necessary.

18. Now, even if the possession of the machinery/ equipment(s) was lawful – on the assumption that Rotec had abandoned the work midway, as contended by Soma – resultantly causing further delay, it does not lead to the conclusion that the machinery/ equipment(s) can be retained endlessly without payment of any compensation whatsoever to Rotec. Further, Clause 4 of the Hypothecation Deed, only entitles it to take-over the plant and machinery/ equipment(s) *“to enable them to complete the execution of the said work”*. For this limited purpose, the ownership of the said plant and machinery/ equipment(s) is only *“deemed to have been transferred”* and vests with Soma to the extent necessary to remedy the breach. As we see here, the possession of the machinery/ equipment(s) has been retained by Soma now for more than a decade, which is far beyond the scheduled date of

completion. The work is, admittedly, far from completion. After taking over the equipment, further delay cannot *prima facie* be attributed to Rotec. Certainly, the deemed ownership by Soma does not vest in it an absolute right to use the same, free of cost, for as long as it may desire. Compensation for the same cannot be said to be a far-fetched direction. In the afore-noted circumstances, since the learned Arbitrator has allowed Soma to retain the machinery/ equipment(s), and considering the nature of work involved, Rotec indeed needs to be secured for the use of machinery/ equipment(s).

19. Soma's contention that the directions given by the Arbitrator are beyond the term of the contract, is misconceived as well, because the Arbitrator is only accessing the compensation.

20. The next question is – whether the directions given by the Arbitrator warrant any interference by this court. Admittedly, the payments envisaged under sub-clauses (i), (ii), (iii) of Clause 4.1 stand paid to Rotec. The cost of the machinery/ equipment(s) as per Clause 15.1 of the Agreement is USD 4,950,000, as against the total contractual value of USD 16,500,000. The compensation in terms of the impugned Order payable for the period from 1<sup>st</sup> January, 2014 to 31<sup>st</sup> December, 2021, calculated as 96 months x 500,000 per month, works out as USD 48,000,000. Thus, when we compare the cost of the machinery/ equipment(s) and the amount of rent awarded, the figures do not reconcile. In fact, the total contractual value as per the Agreement *i.e.*, USD 16,500,000 is inter-linked with the concreting work under Clause 4.2 of the Agreement; and payments thereof, are a composite amount for

utilising the machinery/ equipment(s), supply of spares required for the execution of the work, and towards the deployment of personnel. Thus, by relying upon Clause 4.3 of the Agreement, the learned Arbitrator's direction for payment of *ad hoc* amount is indeed an award of compensation for prolongation of contract, and not just 'rent' for retaining the machinery/ equipment(s).

21. In the afore-noted circumstances, in the opinion of this Court, directions issued at the interim stage should only be limited to securing Rotec's claim for compensation for use of the machinery/ equipment(s). At this stage, direction for making payment to Rotec would amount to final award of compensation. No doubt the Arbitral Tribunal has wide powers under Section 17 of the Act to pass interim measures and even direct payment(s), pending adjudication of disputes. However, since the defaulting party is yet to be identified and the contentious issue(s) require adjudication – as observed in paragraph 39 of the impugned Order – directions should not have been passed by the Arbitrator to Soma for making payments to Rotec. To that extent, the tribunal fell in error. Therefore, in the opinion of the court, the compensation amount directed to be paid by Rotec should instead be secured by way of deposit in the Court, subject to final outcome of the arbitral proceedings.

### **CONCLUSION**

22. In view of the above, the impugned Order needs to be interfered with to a limited extent– by directing that the payment(s) as described in paragraph 46 of the Order to be made by Soma – be deposited with the

Registry of this Court instead, till such time the Arbitral Tribunal takes a final view of the matter.

23. Further, it is clarified that in case the Arbitral Tribunal comes to the conclusion that the amount is required to be revised w.e.f. 1<sup>st</sup> January, 2022, the said compensation should also be deposited with this Court, subject to the final outcome of the arbitral proceedings.

24. With the afore-noted directions, the present appeal along with all pending applications is disposed of.

**DECEMBER 16, 2021**  
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**SANJEEV NARULA, J**

