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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**IN ITS COMMERCIAL APPELLATE DIVISION**

**COMMERCIAL APPEAL NO. 548 OF 2019**
**IN**
**COMMERCIAL ARBITRATION PETITION NO. 589 OF 2019**

Indian Oil Corporation Ltd ...Appellant
*Versus*
Quality Fabricators & Erectors ...Respondents

**WITH**
**INTERIM APPLICATION NO. 868 OF 2019**
**IN**
**COMMERCIAL APPEAL NO. 548 OF 2019**

Indian Oil Corporation Ltd ...Applicant
***In the mater between***
Indian Oil Corporation Ltd ...Appellant
*Versus*
Quality Fabricators & Erectors ...Respondents

**Mr Chirag Mody***, with Yogesh Bhoge, i/b Jurisperitus for the Appellant.*
**None** for the Respondent

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| **CORAM** | **G.S. Patel &** **Gauri Godse, JJ.** |
| **DATED:** | **27th July 2022** |

**PC:-**

**1.** The Appeal, under Section 37 of the Arbitration and Conciliation Act 1996, challenges the order dated 19th September 2019 by RD Dhanuka J dismissing the Appellant's Section 34

Petition. That Petition challenged an arbitral Award dated 24th January 2019. The Appellant, Indian Oil Corporation Ltd ("**IOCL**") was the original claimant in Arbitration. It challenged the rejection in the arbitral Award of a part of its claim for supervision charges as also rejection of its claim for what is called a price discount.

**2.** IOCL awarded to the Respondent, Quality Fabricators and Erectors ("**QFE**") the work of fabricating additional floating roof tanks at Jawaharlal Nehru Port Trust. The contract value was not large by common standards, only about Rs. 1,94,52,022/-. IOCL issued necessary work orders, three in number. According to IOCL, there was a delay and work left incomplete. It terminated the contract on 18th January 2011 at the risk and expense of QFE in regard to the unfinished work under Work Order No. 3. This led to disputes between the parties. These were referred to arbitration under clause 9.0.1.1 of the General Conditions of Contract ("**GCC**"). IOCL was the claimant. QFE resisted the arbitral claim. It filed a counter-claim.

**3.** The Arbitrator framed 12 points for determination and decided them in his Award dated 24th January 2019. He made an Award in favour of IOCL for Rs. 11,33,000/- on account of the risk and expenses but without interest. He also held that IOCL was entitled to claim of 15% supervision charges on this amount of Rs. 11,33,000/-. In addition, IOCL was awarded Rs. 2,18,219.11 towards other recoveries but without interest. IOCL's claim for Rs. 72,50,409.72 towards a price discount stood rejected. In regard to the claims made by QFE, the Arbitrator held that it was entitled to a refund of amounts withheld, Rs. 12,81,534.97 under the first work order, Rs. 3,74,525.70 under Work Order No. 2 and Rs. 53,19,305.04 under Work Order No. 3. The Arbitrator also held that QFE was entitled to recover the amount of Rs. 21,39,189.41 towards security deposit under Work Order No. 2 and Rs. 15,81,699.57 towards security deposit under Work Order No. 3. QFE was held to be entitled to 9% per annum interest on the difference between total amount recoverable by IOCL and amount refundable to QFE for the period from the successful completion of the defect liability period by third party contractor namely Vishal that IOCL engaged to complete the work, until the date of Award or payment or realization. Arbitrator rejected QFE's counter-claims.

**4.** The question of supervision charges turns on an interpretation of clause 7.0.9.0 of the General Conditions of Contract. It is reproduced below.

> "Upon termination of the Contract, the OWNER shall be entitled at the risk and expense of the CONTRACTOR by itself or through any independent CONTRACTOR(s) to complete and/or get completed to its entirety the work as contemplated in the scope of work and to recover from the CONTRACTOR in addition to any discounts, compensations or damages that the OWNER may in terms hereof or otherwise be entitled (including price discount within the provisions of Clause 4.4.0.0 and liquidated damages under Clause 7.0.7.0 hereof) to the difference between the amounts as would have been payable to the CONTRACTOR in respect of the work(s) (calculated as provided for in Clause 6.21.0 hereof read with the associated provisions thereunder and Clause 6.31.0 hereof)

> and the amount actually expended by the OWNER for completion of the entire work(s) as aforesaid **together with 15% (fifteen percent) of the said amount expended by the OWNER for completion of the entire work(s) to cover OWNER's supervision charges,** and in the event of latter being in the excess of the former, the OWNER shall be entitled (without prejudice to any other mode of recovery available to the OWNER) to recover the excess from the Security Deposit or any monies due or becoming due to the CONTRACTOR."

**5.** QFE did only part of the work. IOCL got the rest of the completed through another contractor, Vishal. Mr Mody submitted before Dhanuka J, as he submits before us now, that the Arbitrator was in error in allowing the claim for supervision charges only in respect of the amount that IOCL incurred for having the balance work completed by Vishal i.e. its expenditure on getting done that which QFE did not complete. Mr. Mody's submission is that the plain wording of clause 7.0.9.0 is that IOCL is entitled to 15% of the *entirety* of the cost of the work irrespective of whether it was done by QFE or by Vishal. In other words, QFE would be liable to pay 15% of the supervision charges for the work that it did as also for the work it did not do. This was also the contention before the Arbitrator. Mr Mody submits that no interpretation was possible contrary to the plain language of clause 7.0.9.0.

**6.** RD Dhanuka J came to the conclusion that the interpretation of the contract by the Arbitrator was one that commended itself. He noted that there is no other contractual provision to permit recovery of supervision charges. When the Arbitrator held that supervision charges claimed could only be for the balance work done post-termination, RD Dhanuka J concluded that this was the only correct interpretation. It could not be said to be perverse.

**7.** Other than reiterating the same submissions before us, there is nothing advanced to show how the interpretation by the Arbitrator or by RD Dhanuka J is incorrect. The clause speaks of 15% "the said amount expended" and then "for completion of the entire works". Mr Mody's reliance is on the expression "entire works" but overlooks the previous clauses namely "the said amount expended" and second expression "for completion".

**8.** It is eminently reasonable to hold that this clause's only possible interpretation is that IOCL would be entitled to recover from QFE 15% supervision charges for the amount that IOCL expended for completion of work left undone by QFE, i.e. the expenditure required to bring the project to completion.

**9.** Then Mr Mody made a submission in regard to the price discount of Rs. 72,50,409.72. The Arbitrator rejected this entirely. Here two additional clauses of the GCC are to be considered. They read thus:

> "4.4.1.0 The contractual price payable shall be subject to adjustment by way of discount as hereinafter specified, if the Unit(s) are mechanically completed or the contractual works are finally completed, subsequent to the date of Mechanical Completion/final completion specified in the Progress Schedule.

4.4.2.0 If Mechanical Completion of the Unit(s)/final completion of the works is not achieved by the last date of Mechanical Completion of the Unit(s)/final completion of the works specified in the Progress Schedule (hereinafter referred to as the "starting date for discount calculation"), the OWNER shall be entitled to adjustment by way of discount in the price of the works and services in a sum equivalent to the percent of the total contract value as specified below namely:

For Mechanical Completion of the Unit(s)/final completion of the works achieved, the starting date for discount calculation – ½ % per week of the total contract value."

**10.** Mr. Mody's submission is that these two clauses have to be read with clause 7.0.9.0 and since it was QFE that delayed the work, and since IOCL had the work completed through another contractor, IOCL was entitled to recover one-half percent of the total contract value. The word 'discount', he is submitted before Dhanuka J, was in the nature of liquidated damages.

**11.** Dhanuka J considered the clause and the findings returned by the Arbitrator. He concluded that the Arbitrator had correctly interpreted the clause to mean that since the contract was already terminated by IOCL, there was no question of QFE completing the work after the due date of conclusion or after the termination. Since the contract was terminated before the scheduled date of the completion, this clause would not apply and the claim could not be granted. There is a separate clause for discounts, compensation for damages but this was never invoked. Dhanuka J held that Arbitrator correctly rejected this claim.

**12.** There is no dispute in regard to question of interest. It was not pressed before Dhanuka J with any degree of seriousness and it is not pressed before us at all.

**13.** In our view, there is absolutely no infirmity with the impugned order. As recent decisions of the Supreme Court have shown the scope for interference in Section 34 Petition is exceedingly narrow. The scope for interference in a Section 37 Appeal is narrower still.

**14.** The Appeal is dismissed.

**15.** No costs.

**16.** In view of dismissal of Appeal, nothing survives in the Interim Application. It stands disposed of as infructuous.

**(Gauri Godse, J)** **(G. S. Patel, J)**

IRESH SIDDHARAM MASHAL
Digitally signed by IRESH SIDDHARAM MASHAL
Date: 2022.07.28 12:01:55 +0530