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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 29th May, 2023

+ O.M.P.(COMM) 200/2023

UNION OF INDIA

..... Petitioner

Through: Mr. Manish Mohan, CGSC with
Mr. Jatin Teotia, Advocate for
UOI.

versus

RCCIVL-LITL (JOINT VENTURE)

..... Respondent

Through: Ms. Amrita Panda & Ms.
Chandrika Sharma, Advocates.
[M:-9873547805]

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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I.A. 10559/2023(exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

I.A. 10561/2023(condonation of delay)

This is an application for condonation of delay of 18 days in re-filing the petition.

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Ms. Amrita Panda, learned counsel, enters appearance for the respondent and accepts notice. She has no objection to this application being allowed.

For the reasons stated in the application and with the consent of learned counsel for the parties, the application is allowed and the delay is condoned.

O.M.P. (COMM) 200/2023 & I.A. 10560/2023 [seeking stay of the award]

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter, “the Act”], the petitioner- Union of India [hereinafter, “Union”] seeks to assail an award dated 07.11.2022, rendered by the learned sole arbitrator in arbitration proceedings between the parties arising out of a contract for construction of residential quarters for the Directorate General Married Accommodation Project [hereinafter, “the Contract”].

2. The respondent herein [hereinafter, “the claimant”] was the claimant in the arbitration proceedings. Its claims arose out of non-payment of its final bill submitted on 04.10.2018. The claimant also sought adjudication of claim Nos. 2(A) to 2(U) on account of disputed elements of the final bill, interest and costs thereupon. The Union made counter claims for recovery on account of “*minus amount of Final Bill*”, amounting to approximately ₹6.47 crores, and for recovery on account of defective work allegedly carried out by the claimant.

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3. The learned arbitrator, by the impugned award, awarded the claims of the claimant partially. As far as the amount claimed in the final bill is concerned, the learned arbitrator awarded a sum of ₹4,51,13,888/-, as against a claim of 5,31,23,148/-, with interest @ 8% per annum from 26.08.2019 to 07.11.2022. The disputed items in the final bill have been awarded fully or partially as far as 13 of the 21 sub-claims are concerned.¹ The rest of the disputed items of the final bill have been held to have been correctly disallowed by the Union. On the sums awarded to the claimant, past interest has been awarded where considered appropriate, while deciding the individual claims. *Pendente lite* and future interest have been awarded at 18% per annum, in addition to costs of ₹20 lakhs. The counter claims of the Union have all been rejected. In sum, therefore, the award is for the sum of ₹8,26,97,491/-, alongwith interest as noted above.

4. It is first submitted by Mr. Manish Mohan, learned Central Government Standing Counsel, that the contract underwent 11 extensions which were all granted by the Union. In these circumstances, he submits that the learned arbitrator ought not to have held the Union responsible for delay in implementation of the Contract and ought not to have awarded the entire amount of the final bill in favour of the claimant.

5. Upon perusal of the impugned award, I do not find that the claims have been awarded on account of delay. Mr. Mohan is unable to point towards any part of the award in this regard. In fact, the

¹ Claim Nos. 2(A), 2(C), 2(E), 2(F), 2(G), 2(H), 2(K), 2(L), 2(N), 2(O), 2(R), 2(S), and 2(T).



claims have arisen on account of the final bill submitted by the claimant for the work done, which was admittedly completed within the finally extended period granted by the Union [ie. 30.11.2017]. The case is, therefore, not one in which the learned arbitrator was called upon to inquire into the question of delay, but was instead required to adjudicate whether the claimant was entitled to payment under the final bill raised for the work done.

6. The issues framed by the learned arbitrator, set out below, also make this position clear:-

“48. Having regard to the pleadings filed by the Parties, the following Issues/Points for Determination were framed by the Tribunal in its Order No.5 dated 18th December 2019:

i. Whether the Claimant is entitled to Rs.5,31,23,148/- towards Final Bill? (OPC)

ii. Whether the Claimant is entitled to interest on delayed payment of Final Bill and towards expenses incurred on extension of the Bank Guarantees and Retention Money. If yes, at what rate and for what period? (OPC)

iii. Whether the Claimant is entitled to the claims raised? (OPC)

iv. Whether the Counterclaimant is entitled to the claims raised? (OPR/CC)

v. Whether the parties are entitled to pre-reference, pendente-lite interest on the claims raised. If yes, at what rate and for what period? (On Parties)

VI. Whether the Parties are entitled to the cost of arbitration? (On Parties)

vii. Reliefs.”

7. On the question of the claimant's claim for payment of final bill and the counter claim for recovery of the “*minus amount of the final bill*”, the learned arbitrator recorded that the Union disputed even the

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undisputed portion of the final bill submitted by the claimant.² He rejected the demand of the Union for furnishing the bill in two portions – “disputed” and “undisputed” – on the ground that such a format was not postulated in Clause 55 of the Contract. The learned arbitrator noticed the contractual provisions and the testimony of the witnesses to come to the conclusion that the Union’s insistence on the submission of the final bill in two parts was *de hors* the Contract and he held that the Union was obligated to release payments relating to undisputed items within 180 days and to elucidate its objections to what the Union considers to be disputed.³

8. The Union, on its part, submitted a final bill before the tribunal on 12.04.2021, wherein it claimed that the final bill has been prepared by it and has worked out in the negative, to the tune of ₹6.47 crores. This was the subject matter of counter claim No. 1. The learned arbitrator noted that the Union did not avail of the opportunity to lead further evidence to prove the additional document placed by it by way of an amendment of the statement of defence and counter claims, including the revised final bill and certain deviation orders. The learned arbitrator, therefore, held as follows:-

“65. The Claimant has disputed the veracity of the contents of the Final Bill and the Deviation Order(s) taken on record pursuant to the Order dated 29th October 2021; nevertheless, the Respondent consciously chose not to lead any additional evidence to prove the aforesaid two documents which not only form the basis of its Counterclaim but also form its defence to the claims instituted by the Claimant. In light of this, the Tribunal holds that the Respondent

² Paragraph 61 of the award.

³ Paragraph 62 of the award.

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has failed to prove the Final Bill and the Deviation Order(s) placed on record of the Tribunal pursuant to Order dated 29th October 2021. The Tribunal is mindful that arbitration proceedings are not subject to the rigours of the Evidence Act. However, it is also a settled law that the principles of evidence apply to arbitrations as the provision of Section 19 of the A&C Act are words of amplitude and not of restriction [see *SREI Infrastructure Finance Limited v Tuff Drilling Private Limited* 2018 (11) sec 470]. It is a general principle of law that disputed documents require to be proved by the proponent/protagonist party. Hence, it was incumbent on the Respondent to lead appropriate evidence to prove the contents of the Final Bill and the Deviation Orders. **I must also note that Final Bill had been prepared by the Respondent only in November 2020 and was submitted to the Tribunal in April 2021. In the face of the denial by the Claimant and the fact that the Respondent consciously chose not to lead any evidence in this context, these documents do not commend any credibility. Even otherwise, a bare perusal of the Final Bill shows that it contains handwritten/manual adjustments/alterations.** Accordingly, the plea of the Respondent seeking rejection of Claim No.1 on the ground that the Final Bill, as prepared and submitted by the Respondent has worked out in the negative, lacks credibility and is rejected.”

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71. The Respondent has not led any independent evidence to dispute the stand taken by the Claimant. In fact, the Respondent's own witness has admitted that the Claimant had been paid the monies towards escalation and earthwork in May 2018. **It is also worthwhile to note that in the purported Final Bill filed by the Respondent, a sum of Rs. 1,75,17,665/- has been shown as outstanding towards the Claimant. However, in the very same document, sundry manual changes have been carried out. The Respondent has failed to produce the author of the Bill and the person who made those manual changes in the purported Final Bill filed by it. The Final Bill submitted by the Respondent after almost two years of the commencement of these proceedings does not commend any credibility.**”⁴

9. In view of the aforesaid findings, the learned arbitrator awarded the amount of ₹4,51,13,888/- to the claimant on this account and rejected counter claim No. 1. The difference in the amount claimed

⁴ Emphasis supplied.

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and the amount awarded by the learned arbitrator arises on account of a discrepancy between the claimed amount and the summary filed by the claimant in Appendix-A. On this point, the Union's submissions have been accepted.

10. The aforesaid findings are based upon an interpretation of the Contract and an appreciation of the evidence led before the learned arbitrator. To this extent, they are liable to interference under Section 34 of the Act only if they display perversity, or such irrationality as may lead the Court to the conclusion that no reasonable person could have arrived at these conclusions. Reference may be made in this regard to the judgments of the Supreme Court *inter alia* in *Associate Builders vs. Delhi Development Authority*,⁵ *Ssangyong Engineering and Construction Company Ltd. vs. NHAI*⁶ and *Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Ltd.*⁷ This is an extremely high burden, which the Union has been unable to discharge in the present case. Mr. Mohan has been unable to point to any of the findings in the impugned award which can be characterised as implausible or irrational.

11. As far as the various claims for disputed heads of the bill are concerned [Claim Nos. 2(A) to 2(U)], Mr. Mohan does not press the challenge on these findings, as they are based on an appreciation of evidence alone.

⁵ (2015) 3 SCC 49.

⁶ (2019) 15 SCC 131.

⁷ (2022) 1 SCC 131.

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12. The counter claims have also been rejected as they are, to a large extent, a converse of the claims made by the claimant. Those claims having been allowed on the aforesaid findings, as stated above, there was no occasion for any award on counter claim No. 1. As far as counter claim No. 2 (on account of defective work carried out by the claimant) is concerned, the learned arbitrator has found that no details of the rectification required to be carried out by the Union have been placed on record, although it was stated in the statement of defence that the details would be provided later. Counter claim No. 2 has, therefore, been dismissed in the absence of any evidence in support thereof. As far as counter claim No. 3 is concerned, the learned arbitrator has again found that no independent evidence was adduced in support of the counter claim. Mr. Mohan has not drawn my attention to any evidence placed on record in the arbitration, which was ignored by the learned arbitrator while returning these findings. There findings are also, therefore, unimpeachable.

13. Mr. Mohan made two further arguments with regard to the procedure employed by the learned arbitrator, based upon grounds G and H of the petition, which read as follows:-

*“G. BECAUSE the Ld. Arbitral Tribunal has **neither** allowed competent technical officers of Petitioner to explain & argue the case during hearings despite Petitioner request through mail dt 03 Feb 2022 **nor** the Ld. Arbitral Tribunal has appreciated the facts & Contract Provisions, thus misconducted the arbitral proceedings by adjudicating the Claim without proper understanding and without giving full & proper*

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opportunity to the Petitioner. Furthermore, the fundamental principles of natural justice have been breached and therefore the award needs to be set aside.

H. BECAUSE the Ld. Arbitral Tribunal has failed to appreciate that present case was not a Criminal Case wherein statements of eyewitness(es) and evidence led through them are of utmost importance. That it would be pertinent to mention herein that subject case was for adjudication of disputes arisen out of a construction contract wherein Deviation Orders, documents/facts presented before the Ld. Arbitral Tribunal by both parties were required to be given cognizance to decide the issues on merit.”

14. Although the communication dated 03.02.2022, referred to in ground G, has not been placed on record, it is clear from paragraph 26 of the award that the evidence of witnesses had been concluded on 06.07.2021. Paragraph 27 of the award records that the Union herein addressed arguments on counter claims on 27.10.2021 and 04.02.2022 and on claims on 30.09.2021 and 01.10.2021. The Union was represented by counsel throughout the arbitral proceedings. Mr. Mohan states that the aforesaid request dated 03.02.2022 was made to permit an engineer to explain the technical aspects of the matter before the learned arbitral tribunal. I do not find any procedural irregularity warranting the interference of the Court in this regard. Matters of procedure of the arbitral tribunal are within its own domain, subject to compliance of the rules of natural justice as reflected *inter alia* in Chapter V of the Act. No breach of any of those provisions has been occasioned even if the learned arbitrator did not permit an engineer to

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address arguments in place of counsel. It is always open to counsel to take the assistance of the engineer in preparing his/her arguments.

15. The objection raised in ground H also does not commend to me. Where oral evidence has been led, it is not just open to the learned arbitrator but, in fact, incumbent upon the learned arbitrator to take such evidence into account. The averment in ground H betrays a misconception on part of the Union that oral evidence is relevant only to criminal trials, and not to adjudication of civil disputes. Of course, there may be civil disputes which can be decided on documents alone, and the procedure in this regard is for the learned arbitrator to determine, after hearing the submission of the parties. However, the parties having agreed to a procedure which required oral evidence to be led, no grievance can be raised that the learned arbitrator relied upon such evidence to reach his conclusions.

16. For the aforesaid reasons, I do not find any merit in the present petition.

17. The petition, alongwith pending application, is dismissed.

PRATEEK JALAN, J

MAY 29, 2023

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