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IN THE HIGH COURT OF DELHI AT NEW DELHI

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FAO(OS) (COMM) 273/2022 & CM APPL. 40939/2022

ARMTECH (INDIA) LIMITED

..... Appellant

Through: Mr. Rajesh Gupta with Mr. Harpreet Singh and Mr. Tarun Kumar Tiwari, Advocates.

versus

GAIL (INDIA) LIMITED

..... Respondent

Through: Mr. Vikas Mehta with Mr. Apoorv Khator, Advocates.

Reserved on: 19th July, 2023Date of Decision: 28th July, 2023

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CORAM:**HON'BLE MR. JUSTICE MANMOHAN****HON'BLE MS. JUSTICE MINI PUSHKARNA****J U D G M E N T****MINI PUSHKARNA, J:**

1. The present appeal has been filed under Section 37(1)(C) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as Arbitration Act), read with Section 13 Chapter IV of the Commercial Courts Act, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 against common judgment dated 04th July, 2022 passed by the learned Single Judge in *O.M.P. (COMM) No. 20/2020*.

2. Facts leading to filing of the present appeal are that, a contract agreement dated 01st May, 2012 was executed between the parties for “External Development and External Services for 100 type B and 20 type D houses at GAIL GAON, Dibiyapur, Auraiya, Uttar Pradesh.” The total contract value for the said work was Rs. 17,47,91,942.51/- and the contract



work was to be completed within fifteen months.

3. Admittedly, there was delay in execution of work. Extension of time was granted by respondent to appellant from 6th May, 2013 to 20th February, 2016, last extension being granted vide letter dated 19th February, 2015 upto 20th February, 2016.

4. Since there was delay in execution of the work, respondent issued Show Cause Notice dated 03rd March, 2016 to appellant directing the appellant to complete the work within 15 days. Appellant replied to the said Show Cause Notice by letter dated 04th March, 2016 indicating that work was in full progress and shall be completed in permitted time. Subsequently, appellant received final notice dated 27th April, 2016, pursuant to which appellant submitted its action plan for completing the remaining works. As appellant failed to execute the balance work within the stipulated period, respondent invoked the two Bank Guarantees submitted by appellant aggregating to a sum of Rs. 1,99,79,200/-. Thereafter, the contract of appellant was terminated by respondent on 21st October, 2016. Respondent subsequently got the balance work completed by third parties at risk and cost of appellant.

5. In view of the disputes between the parties, appellant invoked the arbitration agreement. Appellant raised ten claims before the learned arbitrator, while the respondent herein raised four counter-claims. By award dated 24th September, 2019, the Arbitral Tribunal allowed claim nos. 2, 3, 4 and 5 of the appellant. Aggrieved by rejection of its claim nos. 1 and 8 and award of interest from the date of submission of claim and not from the date of cause of action, appellant filed petition under Section 34 of the Arbitration Act, being *O.M.P. (COMM) No. 20/2022*. By the impugned



judgment dated 04th July, 2022, the learned Single Judge dismissed the petition filed on behalf of appellant herein, against which the present appeal has been filed.

6. As per the case put forth on behalf of appellant with respect to claim no.1, the last measured work executed by appellant was upto 36th Running Account (RA) Bill. Upto 36th RA Bill, about 85% work valued at Rs.14,71,04,580/- stood executed and paid. After submission of the 36th RA Bill, respondent removed the contractual architect/consultant, namely, *M/s KNY Projects Private Limited* without any replacement. Since there was no contractual architect/consultant post verification of 36th RA Bill, the works executed by the appellant post 36th RA Bill could not be measured and/or verified as per the contract conditions.

7. It is contended on behalf of appellant that it raised 37th RA Bill dated 01st October, 2016 for Rs.1,00,05,623.25/- towards work done for six months immediately after 36th RA Bill till 01st October, 2016. Submission of the said Bill was disputed by respondent, with further objection that no measurement of the work had been done. It is submitted that the appellant refused joint measurement of the work executed by it, as the appellant had no confidence on the respondent. It is the case of the appellant that the work valued at approximately Rs.1,76,87,362/- remained to be executed. Since respondent claims to have got the work valued at Rs.83,99,885/- executed through other agencies, the appellant is entitled to amount of Rs.1,00,05,633.25/- raised by 37th RA Bill, as that would be the value of the work executed by appellant after 36th RA Bill, that remained unmeasured. It is submitted that refusal of appellant to participate in joint measurement did not absolve the respondent to its obligation to get the left over work



measured. It is, thus, contended that the learned Single Judge was in absolute error in rejecting the challenge of the appellant against the aforesaid claim no.1. Had the learned Single Judge appreciated the pleas raised on behalf of appellant, he would have found that the learned Arbitrator had ignored the material available with him qua the said claim of the appellant.

8. It is further contended that learned Single Judge erred in not allowing the objection raised against claim no. 8 that was wrongly rejected by the learned arbitrator. Claim no.8 for Rs.80,46,734/- was premised on balance confirmation by respondent/GAIL vide letter dated 09th April, 2016 admitting and confirming the said amount as being due and payable to appellant as on 31st March, 2016. The said amount was admittedly due, but not paid. It is submitted that the learned Single Judge as well as the learned arbitrator have faltered in rejecting the said claim.

9. Learned counsel appearing for appellant has further raised the plea that learned Single Judge failed to appreciate that learned arbitrator had wrongly awarded interest with effect from date of start of arbitration, as the interest ought to have been given from the date of accrual of the claims. It is further submitted that the learned Single Judge has failed to appreciate that the appellant had duly set up a case for grant of pre-reference interest from the date of accrual of claims awarded.

10. Per contra, learned counsel appearing for the respondent has justified the award passed by the learned Arbitrator as well as the impugned judgment passed by the learned Single Judge qua claim nos. 1 and 8 and the interest awarded to the appellant.

11. Having heard learned counsel for the parties, this Court is of the view that the appellant has failed to make out any ground for interference with the



judgment passed by the learned Single Judge.

12. With respect to objections raised on behalf of appellant qua claim no.1, learned Single Judge has noted in clear terms that respondent/GAIL had issued notice to appellant calling upon it to participate in joint measurements. However, appellant did not come forward for the joint measurement. During the course of arguments before this Court, learned counsel for appellant categorically admitted that appellant had refused to participate in the joint measurement. Thus, the fact remains that there was no evidence before the learned Arbitrator that the appellant had executed any work after 36th RA Bill. The appellant failed to establish before the learned Arbitrator that it had executed the works after passing of 36th RA Bill. In the absence of any evidence before the learned Arbitrator, the said claim was rightly rejected by the learned Arbitrator. Thus, this Court does not find any fault with the award passed by the learned Arbitrator and rejection of the objections by the learned Single Judge in this regard.

13. As regards claim no.8, the same was rejected by the learned Arbitrator after considering the explanation of the respondent with respect to letter dated 09th April, 2016 written by it, which was relied upon by appellant as the basis of the said claim. There was no other material before the learned Arbitrator with respect to claim no.8 on behalf of the appellant. Thus, this Court is of the opinion that the learned arbitrator rightly rejected the claim on the basis of the evidence before it. The Arbitral Tribunal being the final adjudicator of the quantity and quality of evidence before it, the objection in this regard was rightly rejected by the learned Single Judge.

14. Similarly, refusal by the learned Single Judge to interfere in the interest component also cannot be faulted with, as the arbitrator exercised its



discretion in awarding interest as per the material before it.

15. It is well settled that a court while hearing an appeal under Section 37 of the Arbitration Act cannot undertake an independent assessment of the merits of the award. Court does not sit as a court of appeal over the award of the Arbitral Tribunal at the time of consideration of the matter under Section 37 of the Arbitration Act. As held time and again in a catena of judgments, where there are concurrent findings of facts and law by the Arbitral Tribunal and confirmed by the court under Section 34 of the Arbitration Act, then a court hearing an appeal under Section 37 of the Arbitration Act must be very cautious and slow to disturb such concurrent findings.

16. Having perused the award dated 24th September, 2019 passed by the learned Arbitrator and judgment dated 04th July, 2022 passed by the learned Single Judge, it is apparent that the view taken by the learned Arbitrator is a plausible and possible view on the basis of the evidence on record. The findings given by learned Arbitrator, as upheld by learned Single Judge, do not appear to be erroneous.

17. No illegality is found in the judgment of learned Single Judge. Accordingly, the present appeal is dismissed.

MINI PUSHKARNA, J

MANMOHAN, J

JULY 28, 2023/au