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

\+ ARB. A. (COMM.) 1/2024, I.A. 941/2024, I.A. 942/2024, I.A. 943/2024, I.A. 944/2024

UNION OF INDIA ..... Petitioner

Through: Mr. Shashank Garg, CGSC with Ms. Aradhya Chaturvedi, Advs.

versus

M/S RAMJI DAS DHAL CONSTRUCTION PVT. LTD ..... Respondent

Through: Ms. Risha Mittal, Ms. Simran Mehrotra, Mr. Snehl Shukla, Advs.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

O R D E R

% **15.01.2024**

1. The present petition has been filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (herein referred to as "*the A&C Act*") read with Section 13(1A) of the Commercial Courts Act against the order dated 20.10.2023 passed by learned Sole Arbitrator in the arbitration proceedings between the parties whereby the learned Arbitrator while exercising the power under Section 17 of *the A&C Act* has ordered for the release of one performance bank guarantee bearing No. 30550IGL0001616 from Union Bank of India, Agra, for a value of Rs.l,66,80,000/- and two retention money guarantees bearing No. 30550IGL0000119 from Union Bank of India, Agra, for a value of Rs.40,00,000/- and retention money guarantee bearing No.

30550IGL0001419 from Union Bank of India, Agra, for a value of Rs.5,00,000/- in favour of the respondent.

2. Mr. Shashank Garg, learned counsel for the petitioner has submitted that the order of the learned Sole Arbitrator is completely erroneous and against the terms of the contract. Learned counsel has submitted that the impugned order is also liable to be set aside on the simple ground that the learned Arbitrator has granted the relief under Section 17 of the *A&C Act* which was in fact the main relief prayed for by the respondent in statement of claim.

3. Learned counsel submitted that in Para-142 of the impugned award, the main reason for passing an order was the principle of equity, justice, and fairness which does not rest with the arbitrator as the Arbitration and Conciliation Act is a commercial act.

4. Learned counsel has invited the attention of the court to Section 28 (2) of the Arbitration and Conciliation Act, 1996 which provides as under:

> *"28 (2): The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so."*

5. Learned counsel has also submitted that the order of the learned Arbitrator is contrary to the terms of the contract. It has further been submitted that in fact as per the instruction communicated vide communication dated 05.01.2024 the final bill of the respondent has been technically checked and the tentative amount of the final bill is Rs. –345.76 lacs (Subject to check by Controller of Defence Accounts).

6. Mr. Shashank Garg, learned counsel for the petitioner submitted that in-fact the counterclaim has already been filed before the learned Sole

Arbitrator. Learned counsel submits that therefore the counterclaim of the appellant is more than the bank guarantees offered by the respondent and therefore to safeguard the interest of Union of India, the bank guarantees i.e., performance guarantees and the retention guarantees may not be released and the order of the learned Sole Arbitrator may be quashed.

7. Issue notice.

8. Ms. Risha Mitta, learned counsel for the respondent has appeared on advance notice.

9. Learned counsel submitted that the appeal of the petitioner is liable to be dismissed out rightly. Learned counsel submitted that admittedly the completion certificate has already been issued by the petitioner. It has further been submitted that as per clause 58, the period of liability and defect has already been over.

10. Learned counsel for the respondent further submitted that as per her instructions, the counterclaim has yet not been filed. Learned counsel submitted that in fact, the Union of India has only filed an application under Section 23(B) of *the A&C Act* for amendment of their statement of defence. Learned counsel submits that the Union of India has filed an amendment application whereby the petitioner has raised three counterclaims that are firstly on account of the minus bill, secondly, the cost of arbitration, and thirdly, interest.

11. Learned counsel submits that in-fact these were also the grounds which the respondent had raised and therefore the learned Arbitrator had looked into the final bill during the proceedings.

12. Learned counsel has further submitted that the final bill was submitted

by the respondent/claimant in the year 2022 and the respondent took unreasonably long time in settling the bill.

13. Section 37 of *the A&C Act* provides a forum of appeal to this court if the arbitral tribunal has granted or refused to grant any interim measure under Section 17 of the Arbitration and Conciliation Act.

14. There is a limited power to intervene in appeals against orders rendered by arbitrators in response to applications filed under Section 17 of the A&C Act. However, the Court may, in appropriate circumstances, exercise its jurisdiction under Section 37 of the A&C Act to safeguard the appellant's legitimate interests, which may involve modifying the learned Arbitral Tribunal's order. It is worth noting that the jurisdiction of this Court, as defined in Section 37 of the A&C Act, is significantly distinct from that specified in Section 34 of the A&C Act. The latter provision does not grant the Court the authority to modify the award rendered by the Arbitral

15. In the case of ***Edelweiss Asset Reconstruction Company Ltd. Vs. GTL Infrastructure Ltd. and Anr.***, 2020 SCC Online Del 2081, a coordinate Bench of this Court inter-alia held as under:

> *"136. Once the legislature has consciously conferred appellate powers, to the High Court, against orders of Arbitral Tribunals, rendered under Section 17 of the 1996 Act, I see no reason, absent any statutory or precedential proscription to the contrary, for not allowing such appellate jurisdiction its full play and effect. No doubt, while exercising jurisdiction, even as an appellate court under Section 37, the High Court would be required to maintain the discipline of the 1996 Act, which requires minimal interference with the decision of the learned Arbitral Tribunal. Where, however, the directions contained in the*

impugned Order of the learned Arbitral Tribunal are found to be unsustainable on account of the prior rights of the appellant before this Court, to which the attention of the learned Arbitral Tribunal was never invited, interference, in order to protect <u>the legitimate interests of the appellant</u>, is justified. Once a case for interference is found to exist, the appellate jurisdiction of the Court, under Section 37 would, in my view, also extend to modifying the order of the learned Arbitral Tribunal, in view of the inalienable indicia of appellate jurisdiction, as identified and delineated in Tirupati Balaji Developers (P) Ltd., (2004) 5 SCC 1."

16. The scope of jurisdiction or the restrictions on the court while exercising its discretion an appeal are solely determined by the A&C Act, 1996 that grants the right to appeal. If the laws does not impose any limitations or restrictions on the breadth and extent of the appeal, it is interpreted that the appeal allows for a reconsideration of both the legal and factual aspects. It is common law that the appellate jurisdiction of an authority can be limited or regulated by the legislature and its extent has to be decided with reference to the wording employed by the statute establishing the appellate jurisdiction. The intention behind enacting the Arbitration and Conciliation Act by the legislature and as has been upheld by the constitutional courts in catena of the decisions that the courts should be very slow and minimal in interfering with the arbitration proceedings. The interim order can be modified only if the same is unsustainable or rights of the appellant is required to be protected.

17. In the present case, clause-58 of the General Conditions of Contract provides as under:

"<u>58. 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' to these conditions."

18. The bare perusal of clause-58 makes it clear that the performance bank guarantees or retention bank guarantees can be retained till the expiration of the defect liability period. However, the proviso is that the contractor shall first have been paid the final bill and have rendered a No Demand Certificate.

19. In the present case it is not disputed that the completion certificate has already been issued by the applicant. It is also not disputed that the period of liability and defect is complete. It is also not disputed that the respondent has submitted the final bill. However, as per the submissions of learned counsel for the appellant, the counterclaim has been filed before the learned Arbitrator. Therefore, though, the final bill was submitted a long time back but the respondent took their own time in settling the same and found that the tentative amount of the final bill is Rs. –345.76 lacs. This was even subject to the check by the Audit authorities.

20. I consider that the learned Arbitrator has gone through the terms of the award in the contract in detail and there is nothing on the record to suggest that order is not sustainable.

21. This court would also respectfully disagree with the submissions of the learned counsel for the appellant that the principles of equity, justice,

and fairness are not available to the Arbitrator. They are the basic notions of justice and the learned Arbitrator while discharging its function as an arbitrator has to take into account these principles which are the golden thread running into any judicial or quasi-judicial proceedings.

22. I do not find any ambiguity, perversity, or infirmity in the order of the learned Arbitrator. Hence the present petition stands dismissed.

DINESH KUMAR SHARMA, J

JANUARY 15, 2024/AR..