



2024:DHC:8399



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Judgment pronounced on: 29.10.2024*+ **O.M.P. (COMM) 432/2024 & I.A. 41653/2024****ADANI ENTERPRISES LIMITED**

.....Petitioner

Through: Mr. Gaurav Pachnanda, Sr. Adv.
alongwith Ms. Ruby Singh Ahuja,
Mr. Vishal, Ms. Threcy Joby, Mr.
Piyush Sharma and Ms. Uzma
Sheikh, Advocates.

versus

SHRI SOMNATH FABRICS PRIVATE LIMITED.....Respondent

Through:

CORAM:**HON'BLE MR. JUSTICE SACHIN DATTA****JUDGMENT****I.A. 41654/2024 (Exemption) & I.A. 41655/2024(Exemption)**

1. Allowed, subject to all just exceptions.
2. Applications stand disposed of.

O.M.P. (COMM) 432/2024

3. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') is directed against an Arbitral Award dated 29.04.2024 (hereinafter '*the Award*'). The arbitration proceedings were held pursuant to an order dated 21.10.2021 in ARB. P No.: 790/2021 whereby a Sole Arbitrator was appointed to adjudicate the disputes between the parties.

4. The dispute between the parties have arisen in the context of a Coal Sale and Purchase Agreement dated 08.09.2020 (hereinafter '*CSP Agreement*'). The respondent/claimant signed the CSP Agreement on



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11.09.2020 for purchasing 10,000 MT coal from the petitioner. The supply of coal was to be in terms of the CSP Agreement. As per Clause 5 of the CSP Agreement, the base price of the coal was fixed at INR 2,997 Per MT. Therefore, the contract price was $\text{Rs.}2,997 \times 10,000$ (Base Price x Contracted Quantity) = Rs.2,99,70,000/- (Rupees Two Crores Ninety-Nine Lakhs Seventy Thousand Only) + Taxes and Duties.

5. As per Clause 7.1 of the CSP Agreement, EMD amounting to Rs.3,00,00,000/- (Rupees Three Crores only) was to be paid by the respondent/claimant to the petitioner at the time of signing of the CSP Agreement, as non-refundable interest free Earnest Money Deposit (hereinafter '*EMD*'). The amount of EMD was, in fact, paid in instalments between 11.09.2020 to 23.10.2020.

6. It was the case of the respondent/claimant that the petitioner took an inordinately long time to sign the CSP Agreement, despite several requests being made by the respondent/claimant to the petitioner to return a signed copy of the CSP Agreement.

7. It was further the case of the respondent/claimant that at no time, either between 11.09.2020 to 23.10.2020 or even thereafter, the petitioner or its officers had ever conveyed that the claimant was in breach of the CSP Agreement and the amount paid as EMD by the respondent/claimant would be forfeited.

8. Moreover, the petitioner never objected to the claimant's payment of EMD on different occasions. After full payment of EMD, the respondent/claimant called upon the petitioner to issue Delivery Order (hereinafter referred as '*DO*') for supply of coal, but the petitioner neither communicated or confirmed as to forfeiture of the EMD or cancellation of



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the contract, nor fulfilled the obligation as per the CSP Agreement to supply the promised quantity of coal to the respondent/claimant.

9. Consequently, the respondent/claimant issued a legal notice dated 22.03.2021 to the petitioner calling upon the petitioner to either supply the contracted quantity of coal or refund the amount of Rs.3,00,00,000/-, failing which the respondent/claimant would be constrained to invoke the dispute resolution mechanism in terms of Clause 18 of the CSP Agreement. Thereafter, the requisite steps were taken by the respondent/claimant to seek constitution of the Arbitral Tribunal to adjudicate the disputes that had arisen between the parties.

10. The petitioner replied to respondent/claimant's legal notices dated 22.03.2021 and 20.04.2021 *vide* letter dated 12.05.2021, wherein they took a stand that the respondent/claimant had breached the CSP Agreement inasmuch as the EMD was to be paid at the time of signing of the CSP Agreement, whereas, it was paid in instalments over a protracted period of time, which amounted to breach of Clause 7.1 of the CSP Agreement.

11. Paragraph 17.39 of the Award notices that the price of the grade coal which was to be supplied by the petitioner to the respondent/claimant, increased after 18.09.2020. Thus, in the arbitral proceedings besides seeking the refund of the EMD, the respondent/claimant also raised a claim for losses suffered on account of increase of the price of coal.

12. In the statement of defence, the petitioner relied upon Clause 7.1 and 7.2 of the CSP Agreement to contend that the EMD was non-refundable. It is further the case of the petitioner that the respondent/claimant had breached the CSP Agreement by failing to pay the EMD amount at the time of signing of the CSP Agreement and that the petitioner had lodged several



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verbal objections in this regard.

13. The petitioner's case before the learned Sole Arbitrator was that since there was a breach on the part of the respondent/claimant in not adhering to the mode and the timeline of EMD payment and that the request/s of the respondent/claimant for evacuating the coal, after the expiry of the free period i.e. of 15 days from the date of CSP Agreement, is not only beyond the contractual understanding of the parties, but also does not bind the petitioner. Counter-claims were sought to be raised by the petitioner under the following heads :

- "20. (1) Claim for the value of the coal under Clause 8.2 of the CSP Agreement.*
- (2) Claim for loss of profit for non-payment of Contract Price.*
- (3) Claim towards the distress sale of the coal under Clause 13.1(c) of the GCC, and*
- (4) Claim for the plot rent under Clause 5.3 and 5.4 of the CSP Agreement."*

THE AWARD:

14. The learned Sole Arbitrator framed the following issues:

- "1. Whether the Claimant proves that the Respondent has breached the Coal Sale & Purchase Agreement read with General Conditions of Contract both dated 08/09/2020 and executed between parties?"*
- 2. Whether the amount of Rs.3,00,00,000/- (Rupees Three Crores Only) paid by the Claimant is Earnest Money Deposit for the supply of goods by the respondent OR it is towards price of coal to be supplied by the respondent?"*
- 3. Whether the Claimant proves that the Respondent is liable to repay, and that claimant is entitled to recover the amount of Rs.3,00,00,000/- (Rupees Three Crores Only) paid by it to the respondent with interest @18% per annum from November 2020 until date of payment, under the Agreement as claimed in the Statement of Claim?"*
- 4. Whether the Claimant proves that the Respondent is liable to pay and thus Claimant is entitled to recover. from the Respondent Rs.93,34,300/- (Rupees Ninety- Three Lakh, Thirty-Four Thousand and Three Hundred Only) as damages for loss of profit of as on 26/03/2021 with interest of 18%, per annum until date of payment, under the Agreement as claimed in the Statement of Claim?"*



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5. *Whether the Respondent proves that the Claimant has breached the Coal Sale & Purchase Agreement read with General Conditions of Contract both dated 08/09/2020 and executed between parties?*
 6. *Whether the Respondent is entitled to receive, from the Claimant an amount of Rs.3,58,23,185/- (Rupees Three Crores Fifty-Eight Lakhs Twenty-Three Thousand One Hundred and Eighty-Five Only) as entire contract price, along with interest at 18% per annum until the date of payment, under the Agreement?*
 7. *Whether the Respondent proves that the Respondent is entitled to damages as claimed by it in its Counter Claim?*
 8. *Whether the Respondent is entitled to receive, from the Claimant, an amount of Rs.3,61,82,656/- (Rupees Three Crores Sixty-One Lakhs Eighty-Two Thousand Six Hundred and Fifty-Six Only) being damages for the loss of profit along with interest at 18% per annum commencing after 15 days from the Agreement until the date of payment, under the Agreement?*
 9. *Whether the Respondent is entitled to receive, from the Claimant, an amount of Rs.24,70,000/- (Rupees Twenty-Four Lakh Seventy Thousand Only) being the difference between the agreed contracted price of the coal with the Claimant and the net price received by the Respondent due to the sale to the third party. along with interest at 18% per annum until the date of payment, under the Agreement?*
 10. *Whether the Respondent is entitled to receive, from the Claimant, an amount of Rs.37,28,800/- (Rupees Thirty-Seven Lakh, Twenty-Eight Thousand, and Eight Hundred Only) towards the plot rent along with interest at 18% per annum until the date of payment. under the Agreement?*
 11. *Whether the claims of the respective parties are barred by limitation?*
 12. *Whether either of the party is entitled to receive any other or further relief(s) including additional interest as deemed fit and appropriate by the Hon'ble Tribunal from other side?*
 13. *Whether interest is payable on the amount awarded to either party? If yes at what rate?*
 14. *What order as to costs? i.e., who has to bear the cost of this proceedings and to what extent?*
 15. *What award and order?"*
15. Extensive evidence was evidently adduced before the learned Sole Arbitrator which is taken note of in Paragraph 23 to 27 and the subsequent



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portions of the Award.

16. Issue no. 1 and 5 were decided by the learned Sole Arbitrator in the following terms:

“229.1. Issue No. 1: Claimant proves that respondent has committed breach of CSP agreement thus issue is answered in Affirmative.

229.2. Issue No. 5: respondent failed to prove that Claimant has committed breach of CSP agreement thus issue is answered in Negative.”

17. Issue no. 2 and 3 were decided in the following terms:

“249.1. Issue No. 2: The amount of Rs.3.00.00.000/- paid by the claimant to the respondent is though named as EMD, as per the contract the same is to be adjusted in final account and thus it is also towards advance payment of price of coal to be supplied by the respondent, thus issue is answered in Affirmative.

249.2. Issue No. 3: Claimant is entitled to get refund of the EMD with interest as per this award, thus issue is answered in Affirmative.”

18. Issue no. 4 and 9 were decided in the following terms:

“271.1. Issue No. 4: Claimant fails to prove loss of profit thus issue is answered in Negative.

271.2. Issue No. 9: Respondent fails to prove loss of profit thus issue is answered in Negative.”

19. The remaining issues were also decided against the petitioner and consequently the counter-claims of the petitioner were rejected.

20. The net result is that the respondent/claimant was granted refund of the EMD amount of Rs.3,00,00,000/- alongwith interest 6% p.a from 16.12.2020 till its realization. The other claims of the respondent/claimant were rejected.

21. Elaborate findings have been rendered in the Award to the effect that there was no breach on the part of the respondent/claimant and also to the effect that no actual loss was suffered by the petitioner in respect of the transaction which is the subject matter of the CSP Agreement.



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SUBMISSIONS ON BEHALF OF THE PETITIONER

22. In the present proceedings, only two contentions have been raised by the learned senior counsel for the petitioner to assail the impugned Arbitral Award. Firstly, it is contended that the findings/reasoning contended in paragraph nos. 200 to 204 of the impugned Award suffers from patent illegality inasmuch the CSP Agreement did not permit the payment of EMD in tranches/instalments and the learned Arbitrator has completely ignored the scope and import of Clause 19.3 of the CSP Agreement between the parties while coming to the conclusion that there was a waiver of the mandatory contractual stipulation as regards to the manner of payment of EMD. In this regard reliance has been placed on the judgments in *Thyssen Krupp Material AG Vs The Steel Authority of India*, 2017 SCC OnLine Del 7997 and *Joshi Technologies International Inc. Vs Union of India*, (2015) 7 SCC 728.

23. Secondly it is contended that the impugned Arbitral Award grievously erred in misconstruing the date on which the contract was made between the parties and also misconstrued the mandatory deadline/s envisaged under the CSP Agreement.

24. I find no merit in the aforesaid contentions.

25. A perusal of the award, in totality, reveals that the following reasons are disclosed in the award for directing refund of the EMD amount for Rs.3,00,00,000/- to the respondent/claimant:

(i) The learned Sole Arbitrator noted (in Paragraphs 143-144) that any refund of earnest money is to be assessed in the light of the legal position under Section 73 and 74 of the Indian Contract Act, 1872. The



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implication is that forfeiture/ refund of EMD is inextricably linked with the issue of whether any actual loss was suffered by the Petitioner. This issue is answered in the negative in the later part of the award.

(ii) On the aspect of whether the Respondent is guilty of breach of the agreement by failing to make the EMD payment within the stipulated time, Paragraph 160 of the Award takes note that the time period taken by the petitioner for signing of the contract is to be excluded to reckon the timeline for payment of EMD. As such, it cannot be said that the respondent/claimant has not paid the EMD amount on time. The said paragraph reads as under: -

“160. Thus, overall factual details including documentary as well as oral evidence shows that though EMD is payable on signing of the contract and thereby though claimant has signed the contract between 08/09/2020 and 11/09/2020 and though it was forwarded to the respondent on 11/09/2020 the respondent has never signed the contract and taken a stand that signing of contract is mere formality whereas the contract provides that EMD is payable on signing of contract. Thus, time being taken by the respondent for signing of contract is to be excluded for payment of EMD and therefore it cannot be said that claimant has not paid EMD in time, more particularly when respondent has accepted it without any reservation or demure or objection or disclosure or notice regarding its decision to consider that there is breach of the Claimant by not paying full EMD on 08/09/2020 or 11/09/2020. Thus, there is no breach of contract by the claimant in form of non payment of EMD in time.”

(iii) The learned Sole Arbitrator further held that the petitioner had failed to disclose the relevant particulars as regards procurement/purchase of coal of the requisite quantity and quality that was to be supplied to the respondent/claimant in terms of the CSP Agreement. Nor was any other relevant information disclosed as regards custom clearances/transport particulars or any evidence as regards the stockyard where the coal was allegedly stored (Para 163 of the award). It was concluded in Paragraph 163 of the award as under :-

“163. When Respondent has failed to disclose not one but several facts and evidence, presumption has to be drawn that disclosure of any of such fact or evidence if produced, it would be unfavourable to the respondent. This is one



offact depending upon the whole state of fact to discard the claims by the Respondent and to consider that the breach if any committed, it is by the respondent. It cannot be ignored that in addition to defend the Claim, the respondent has come forward with the CC and thus step into the position / status of the Claimant, as CC are to be considered separately, but when claims by both parties are dealt with together the presumption of adverse inference would certainly help the claimant also. The non disclosed facts and evidence by the Respondent may be summarized as under:

- (1) Documentary evidence regarding procurement /purchase of coal of the quantity and quality as per the CSP Agreement Ex. 28 that is to be supplied to the Claimant within 15 days after 08/09/2020, thus capable to reach in Indian Port within that time period, viz; contract with Indonesian Company from which the coal is purchased by the Respondent,*
- (2) The document regarding transportation of such coal from Indonesia to India at Hazira Port in Gujarat,*
- (3) Custom Clearance Certificate to prove that coal had arrived on particular date at Hazira Port in Gujarat,*
- (4) Documentary evidence regarding unloading of coal container at Hazira Port in Gujarat,*
- (5) The evidence regarding the price on the date when coal, to be supplied to the Claimant, was purchased,*
- (6) The evidence and facts regarding intimation to the buyer to lift the coal,*
- (7) Confirmation regarding deterioration of coal which was meant for supply to the claimant but sold to Interocean.*
- (8) Evidence regarding actual holding of the stockyard for which rent is claimed, irrespective of its actual cost which is agreed upon between the parties, thus even if respondent has spent less amount than its entitlement, that may not be the issue, but it could have been proved by documentary evidence that the coal was in stockyard from 08/09/2020 till 16/12/2020, but unfortunately except a stand that contract stand terminated automatically on and from 08/09/2020 or 11/09/2020, the respondent has not bothered to disclose any evidence which can prove that they were ready and willing to supply the coal as per contract on 08/09/2020 as the same was readily available with them from 08/09/2020 till 23/09/2020 – the free period for the claimant to lift it.
.....”*

(iv) In Para 168.2 of the Award, it is reiterated that non-supply of signed



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CSP Agreement by the petitioner was a breach on the part of the petitioner and in the absence thereof, the time to pay EMD amount did not even start.

(v) It was noticed that the petitioner did not take any steps to terminate the contract on account of alleged breach of the contract on the part of the respondent/claimant. Further, the petitioner “*accepted the amount of EMD till 23/10/2020 without any reservation or demure or objection or disclosure or notice regarding its decision to consider that there is breach of the Claimant by not paying full EMD on 08/09/2020 or 11/09/2020 and thus agreement stand cancelled*” (Paragraph 174 of the Award).

(vi) In Para 190.4 of the Award, the Arbitral Tribunal noticed the deposition of the witness/es on behalf of the respondent/claimant as under:-

“190.4 Thus, now it is clear and certain that payment of EMD is due only on signing of the contract by both the sides and that the respondent has not signed the contract though called for. Such fact is proved by the claimant by his statement on oath in his affidavit at Ex.38 that:

XXX

XXX

XXX

“7.I state that even though the EMD amount was to paid at the time of signing of the Agreement, the Claimant initiated the part payment of the EMD at the time it signed the Agreement relying upon the promise and representation of Mr. Sanjay Middha that the Respondent would sign the Agreement and share the same with the Claimant immediately. I state, that however, the Respondent, for reasons best known to itself, was taking a lot of time to sign the Coal Sale & Purchase Agreement and send it back to the Claimant. I state that I contacted Mr. Sanjay Middha several times requesting him to share the signed copy of the Agreement with the Claimant. However, the Claimant was repeatedly assured that the Respondent would soon share the Agreement with the Claimant and in the meanwhile, the Claimant may arrange and deposit the EMD amount. I state that at no time between 11.09.2020 to 20.10.2020 and even thereafter, did the Respondent or its officers state that the Claimant was in breach of the Agreement and that the EMO which was being deposited by the Claimant would be forfeited.”

XXX

XXX

XXX”

(vii) In Paragraph 190.5, it was noticed that the concerned witness of the claimant/respondent was not cross-examined with regard to the above statement.

(viii) In Paragraph 193, it was concluded that the signing of the contract by



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the petitioner was mandatory upon which the obligation to pay EMD would be triggered. Thus, it could be said that the respondent/claimant had paid EMD even prior to the date on which it was due, in the absence of a signed copy of the CSP Agreement being furnished by the petitioner.

(ix) In the above background and after rendering the above findings, the Award at Paragraph 200-204 proceeds to observe that there was a waiver on the part of the petitioner as regards the manner of payment of EMD inasmuch as the same was accepted in tranches/instalments.

(x) It is evident that the observations in paragraphs 200-204, on which much emphasis has been laid by learned counsel for the petitioner, have to be read with other relevant portions of the award. The said observations do not detract from the conclusion drawn in the award, based on an intricate factual analysis and interpretation of the relevant provisions of the CSP, that in the absence of the signed copy of the Agreement being furnished by the petitioner, the obligation to pay EMD amount did not even arise. The findings in the award are not wholly founded on the aspect of the waiver. The factual matrix of the judgments sought to be relied upon by learned counsel for the petitioner, is altogether different.

(xi) In Para 276, it was concluded as under: -

“276. Thus, in absence of evidence regarding purchase of coal by the respondent with report regarding quality of coal couple with its non-action as per the Terms of the contract, the respondent is not entitled to either of the claim as per Issue No. 6 and 8.”

26. Consequently, the learned Sole Arbitrator concluded that there was a breach on the part of the petitioner with the terms of the CSP Agreement and that the petitioner had failed to prove that the respondent/claimant had committed a breach thereof. The said finding rendered by the learned Sole



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Arbitrator is based on an elaborate consideration of the voluminous evidence placed on record by both the parties and based on interpretation of the relevant provisions of the contract. The view taken by the learned Sole Arbitrator is an eminently plausible view and cannot be interfered with the touchstone of settled parameters governing exercise of jurisdiction of Section 34 of the A&C Act.

27. Crucially, apart from the findings in the award absolving the petitioner of any breach of the agreement, the Award goes on to render a factual finding to the effect that the petitioner had failed to prove that any coal was imported by it in pursuance of CSP Agreement and/or that any actual loss was suffered by it. In the absence of any actual loss, it would be impermissible to forfeit the EMD amount. In this regard, reference is made to the following portions of the Award:

“261.9. The evidence referred herein above makes it clear that the respondent is taking improper stand for its obligation as if it's obligation under the contract need not to be perform only because it considers that the contract stands terminated due to its breach by the claimant, and such termination is automatic, though there is no such clause in the contract which confirms that termination will be automatic. On the contrary the contract says that termination should be by notice in writing regarding termination. Now it is clear that till date there is no notice of termination by the Respondent, and in fact the witness said that termination is as per the contractual terms, meaning thereby it must be by termination notice in writing so also demand notice, but there is no such notice of termination or demand for any such amount till date of SoD. Thus, such demand is not as per the terms of the contract.

262. There is one more reason to refuse and reject the claim for damages towards difference in price of the coal, because there is specific evidence on record that the coal sold to the third-party InterOcean is of the same quality of coal which was to be supplied to the Claimant and that in fact the price of the coal has increased after the CSP Agreement, though Respondent's witness has tried to save their skin by adding that increase is marginal. Thus, even if increase in price was marginal, there is no reason to sell the coal at lower rate so as to claim compensation from the claimant.

263. The overall situation shows that practically there was no stock available with the Respondent for the goods as per the CSP Agreement with the claimant,



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as respondent has failed to prove on record by placing on record relevant documentary evidence to prove the import of such coal before or on or about 08/09/2020. Whereas on one hand as discussed herein above it is the case of the Respondent that they import coal only upon receipt of confirm order from its buyer and that more than a weeks' time is necessary to reach the coal at its end in India from Indonesia. Thus in this case in absence of specific evidence regarding availability of requisite coal on 08/09/2020 and at the same time absence of evidence to prove that such coal was deteriorated during storage, couple with evidence regarding increase in price of coal makes the respondent ineligible to claim such amount in absence of notice in writing before distress sale which may enable the claimant to object the action and to get the quality of coal checked for its valuation and demand note at the earliest after selling of the coal as such."

28. The relevant evidence on the basis of which the above conclusions have been drawn has been elaborated in paragraphs 264.1-264.6, and also in the subsequent paragraphs of the Award.

29. In the above conspectus, in the light of the findings rendered in the impugned award, both on the aspect of attribution of breach and as regards absence of any actual loss being suffered, this Court is unable to accept the contentions of learned senior counsel for the petitioner to the effect that the payment of EMD in tranches/instalments renders the same non-refundable.

30. Equally untenable is the contention on behalf of the petitioner that the learned Sole Arbitrator has misconstrued/misapplied the mandatory deadlines envisaged under the CSP Agreement. On the basis of the elaborate evidence adduced, and on interpretation of the terms of the CSP, it was concluded that the time taken by the respondent/claimant for signing the contract is to be excluded for the payment of EMD and therefore, it cannot be said that the claimant has not paid the EMD in time. The award also rightly takes note of the fact that the petitioner itself accepted the same without any reservation or objection as regards thereto. No exception can be taken to the award on this count.



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31. The submissions of the petitioner not only tantamount to seeking a merit based review of intricate factual findings rendered in the award, they are also in derogation of the settled legal position as set out in ***Kailash Nath Associates Vs. Delhi Development Authority & Anr***, 2015(4) SCC 136 and the subsequent line of cases.

32. For the aforesaid reasons, this Court finds no merit in the present petition and the same is accordingly dismissed.

33. The pending application also stands disposed of.

SACHIN DATTA, J

OCTOBER 29, 2024/at