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

+ **OMP (ENF.) (COMM.) 184/2023, EX.APPL.(OS) 1736/2023**

M/S NHPC LTD

..... Decree Holder

Through: **Mr Gauhar Mirza, Ms Hiral Gupta
and Ms Sukanya Singh, Adv.**

versus

M/S JAIPRAKASH ASSOCIATES LTD Judgement Debtor

Through: **Mr Lovkesh Sawhney, Sr. Adv. with
Mr Rohit Kumar, Adv.**

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

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14.02.2024

OMP (ENF.) (COMM.) 184/2023

1. This is a petition seeking execution of the Arbitral Award dated 07.10.2019, corrected on 18.12.2019. The operative portion of the Award dated 07.10.2019 reads as under:

“ **FINAL AWARD**

In accordance with the majority opinion of Justice B.P. Jeevan Reddy, Presiding Arbitrator and Sri K.K. Madan, Co-Arbitrator, the following is the final award.

1) (a) The Claimant's claim for additional costs on account of overstay at the site of the project is estimated/ascertained at Rs.60.00 Crores (Rupees sixty crores only) as set out in the body of this Award.



(b) The Counter Claims preferred by the Respondent have been allowed in the manner set out herein above in the body of the Award. The total amount allowed by way of Counter Claims to the Respondent against the Claimant is ascertained/determined at Rs.14,05,03,428/- (Rupees fourteen crores five lakhs three thousand four hundred and twenty eight only).

(c) The amount allowed by way of Counter Claims in favour of the Respondent and against the Claimant is set off/deducted the sum of Rupees Sixty Crores awarded to the Claimant against the Respondent towards additional costs for overstay at the site of the project, which means that the Claimant will be entitled to a sum of Rs.45,94,96,572/- (Rupees forty five crores ninety four lakhs ninety six thousand five hundred and seventy two only).

(2) As mentioned in Cl.(1) of this final award, the Claimant is awarded a sum of Rs.45,94,96,572/- (Rupees forty five crores ninety four lakhs ninety six thousand five hundred and seventy two only) against the Respondent. The Respondent shall pay the said amount of Rs.45,94,96,572/- (Rupees forty five crores ninety four lakhs ninety six thousand five hundred and seventy two only) within three months from the date of this Award. In case, the Respondent does not so pay the aforesaid amount of Rs.45,94,96,572/- (Rupees forty five crores ninety four lakhs ninety six thousand five hundred and seventy two only), the said amount of Rs.45,94,96,572/- (Rupees forty five crores ninety



four lakhs ninety six thousand five hundred and seventy two only), shall carry simple interest @ 9 (nine) percent p.a. from the date of expiry of the said three months upto the date of realization.

(3) In the circumstances of this case, the parties are directed to bear their respective costs in these proceedings.”

2. The Award was subsequently modified on 18.12.2019 and the relevant portion reads as under:

“16, 17 & 18. The figure Rs. 90,03,802/- is corrected as Rs. 9,03,802/-. Consequently, Sr. Nos. 17 and 18 are also allowed. The amount mentioned in the Award at page 80 (12th line from top) i.e., Rs. 14,05,03,428/- is corrected as Rs. 13,24,03,428/-.

Similarly, the figures in the last line at page 80 “Rs. 45,94,96,572/-“ is corrected as Rs. 46,75,96,572/-“.

19. For the reasons mentioned under serial numbers 16, 17, and 18, the figure Rs. 45,94,96,572/-, wherever occurs in the final Award, is corrected as Rs. 46,75,96,572/-.”

3. The decree-holder is seeking a recovery of Rs. 13,24,03,428/-. The decree-holder challenged the Award under Section 34 by filing O.M.P. (COMM) 482/2020 wherein the petition was allowed by this Court and the amount of Rs. 60 crores awarded in favour of the judgment-debtor was set aside. The operative portion of the judgment dated 26.05.2023 reads as under:

“65. The impugned Award does not set forth the reasons for the grant of award of additional costs of Rs. 60 Crores in favour of the respondent and against the petitioner. At the first instance, there



was no material on record to substantiate the quantum of the additional costs claimed and at the second stage, it was not within the scope of the Arbitral Tribunal to grant an award on the basis of estimates made on equity.

66. It is also noted that the respondent has raised objections to findings in the Award qua the quantum of the additional costs granted in the favour of the respondent and has accordingly filed OMP (COMM) 505/2020 under Section 34 of the Act. Hence, it is evident that the respondent is also aggrieved of the findings given by the Tribunal.

67. Therefore, considering the entirety of the matter and the analysis made in the foregoing paragraphs, this Court is inclined to set aside the Award qua additional costs of Rs. 60 Crores granted in favour of the respondent herein, i.e., Jaiprakash Associates Limited.

68. Accordingly, the instant petition is allowed to the extent that the findings in the impugned Award dated 7th October 2019, corrected on 18th December 2019, qua additional costs of Rs. 60 Crores granted in favour of the respondent herein, i.e., Jaiprakash Associates Limited, is set aside.”

4. The judgment-debtor also challenged the Arbitral Award by filing its separate Section 34 petition being OMP(COMM) 505/2020 wherein the judgment-debtor sought setting aside of the majority Award on the ground that the judgment-debtor was entitled to an increased amount other than Rs. 60 crores. The operative portion of the judgment dated 26.05.2023 reads as under:



“56. During the course of the arguments, the learned counsel for the parties limited their arguments to the issue of additional costs so decided by the Arbitral Tribunal, both Minority and Majority. Therefore, limiting itself to the questions and objections raised to the grant of additional costs, this Court has only adjudicated upon the issue pressed. Moreover, the law is settled regarding a Minority Award being a mere supporting Award and it has no sanction and is not binding in nature. Hence, the said impugned Award passed by the Minority Tribunal is not entered into to complicate the proceedings, the law regarding which stands absolutely settled.

57. Keeping in view the aforesaid facts, circumstances, contentions raised on behalf of the parties, arguments advanced, law reiterated and analysis made, this Court is of the considered view that findings of the Tribunal pertaining to the grant of additional cost must not survive.

58. The impugned Award does not set forth the reasons for the grant of award of additional costs of Rs. 60 Crores in favour of the petitioner and against the respondent. At the first instance, there was no material on record to substantiate the quantum of the additional costs claimed and at the second stage, it was not within the scope of the Arbitral Tribunal to grant an award on the basis of estimates made on equity.

59. It is also noted that the respondent has raised objections to finding qua the grant of additional costs granted in the favour of the petitioner and has accordingly filed OMP (COMM) No. 482/2020 under Section 34 of the Act. Hence, it is evident that the petitioner



is also is also aggrieved of the findings given by the Tribunal to this effect.

60. Therefore, considering the entirety of the matter and the analysis made in the foregoing paragraphs, this Court is inclined to set aside the Award qua additional costs of Rs. 60 Crores granted in favour of the petitioner herein.

61. Accordingly, the instant petition is allowed to the extent that the findings in impugned Award dated 7th October 2019, corrected on 18th December 2019, qua additional costs of Rs. 60 Crores granted in favour of the petitioner herein, i.e., Jaiprakash Associates Limited, is set aside.

62. The petition is allowed in the terms as aforesaid and pending applications, if any, stand disposed of.”

5. None of the parties challenged the above said judgments and hence, the judgments have attained finality.

6. Mr Mirza, learned counsel for the decree-holder states that the amount of counter-claim awarded in favour of the decree-holder of Rs. 13,24,03,428/- is a decree enforceable in law and therefore, the present execution lies.

7. Mr Sawhney, learned senior counsel for the judgment-debtor states that the Award is only for a sum of Rs. 46,75,96,572/- (as corrected on 18.12.2019). He states that the entitlement of the decree-holder of Rs. 13.24 crores is only an entitlement and not the Award. The Award is only in favour of the judgment-debtor and once the same is set aside, the parties have to invoke the mechanism of arbitration again and for that reason the judgment-debtor has already filed the Section 11 petition being Arb. P.



1061/2023. He further relies on provisions of Order VIII Rule 6F and Order XX Rule 19 to state that the set-off portion is neither an Award nor a decree, and only the balance portion is a decree.

8. Mr Sawhney, learned senior counsel for the judgment-debtor states that the modification/partial setting aside can only be done by the Court hearing the Section 34 petition and not the executing Court.

9. I have heard learned counsel for the parties.

10. “Arbitral award” has been defined under Section 2(1)(c) of the Arbitration & Conciliation Act, 1996 (hereinafter “the Act”) to include an interim award. Section 31 of the Act indicates the form and contents of an arbitral award and reads as under:

“Section 31. Form and contents of arbitral award

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the



award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.- The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]

[(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.]

Explanation.—For the purpose of clause (a), “costs” means reasonable costs relating to—

- (i) the fees and expenses of the arbitrators and witnesses,*
- (ii) legal fees and expenses,*



(iii) any administration fees of the institution supervising the arbitration, and

(iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.”

11. In the present case, the Arbitral Tribunal had allowed the claimant's claim upto Rs. 60 crores and the respondent's counter claim of Rs. 13.24 crores. Hence, according to me, the Arbitral Tribunal awarded Rs. 60 crores in favour of the judgment-debtor and Rs. 13.24 crores in favour of the decree-holder. It is only subsequently that the Arbitral Tribunal, after adjusting the amount of Rs. 13.24 crores, awarded Rs. 46,75,96,572/- in favour of the judgment-debtor. Hence, to state that the Award was only for Rs. 45.75 crores would be a misnomer and in case that interpretation is to be taken, the award of counter claims in favour of the decree-holder will become a nullity. This Court in ***National Highways Authority of India v. Trichy Thanjavur Expressway Ltd.*** 2023 SCC OnLine Del 5183 has held as under:

“70. The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforesaid mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified.

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D. CONCLUSIONS



87. *The Court thus records its conclusions as follows:—*

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K. The expression “modify” would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT. However, when a Section 34 Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that must be borne in mind.

.....”

12. The same clearly shows that as long as the part of an Award which is proposed to be annulled is independent and stands unattached to the other part and can be validly incised, the partial setting aside would be valid and justified. The same also applies to execution proceedings. The part of the Award which can be validly incised must be enforced as a decree of Court. Section 36 of the Arbitration & Conciliation Act, 1996 describes the manner of enforcement. The provisions of CPC i.e. Order VIII Rule 6F and Order XX Rule 19 are relevant in this regard.

13. Order VIII Rule 6F reads as under:-

“6F. Relief to defendant where counter-claim succeeds.—Where in any suit a set-off or counterclaim is established as a defence against the plaintiff’s claim and any balance is found due to the plaintiff or the defendant, as the case may be. the Court may give judgment to the party entitled to such balance.”

14. Order XX Rule 19 reads as under:-



“19. Decree when set-off or counter-claim is allowed.—

(1) Where the defendant has been allowed a set-off [or counter-claim] against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Appeal from decree relating to set-off or counter-claim.—Any decree passed in a suit in which a set-off [or counter-claim] is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off [or counter-claim] had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.”

15. I have already held that in case the interpretation as sought by Mr Sawhney is to be accepted, the same would render the Award of counter claim in favour of a party as otiose. Hence, in my view, the decree holder is entitled for execution of recovery of Rs. 13,24,03,428.

16. Mr Sawhney in the present execution petition has filed an affidavit wherein there are claims exceeding Rs. 13.24 crores in favour of the judgment-debtor and are already under process under the *Vivad Se Vishwas Scheme II* of the decree-holder. The same seems to be correct in view of the affidavit-in-reply filed by the decree holder on 12.02.2024. *Prima facie*, the amounts claimed by the judgment-debtor in *Vivad Se Vishwas Scheme II* are higher than the amount which is to be paid under the present decree. The amount of Rs. 13.24 crores shall be adjusted from the amounts found due and payable to the judgment-debtor under the *Vivad Se Vishwas Scheme II*.



In case no amount is found due and payable under *Vivad Se Vishwas Scheme II* by the decree-holder, the decree-holder shall be entitled to revive of the execution proceedings after applications under *Vivad Se Vishwas Scheme II* have been processed by the decree-holder. The issue of interest is left open to be urged in appropriate proceedings.

17. With these observations, the execution petition is allowed. Pending applications, if any, are hereby disposed of.

18. The affidavit-in-reply of the decree-holder is taken on record.

JASMEET SINGH, J

FEBRUARY 14, 2024/sr