



\$~28

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision:- 10th January, 2024.
+ **O.M.P. (COMM) 451/2016**
ALLIED-DYNAMIC JOINT VENTURE Petitioner
Through: Mr. Akash Kakade, Advocate.
versus

IRCON INTERNATIONAL LTD, DELHI Respondent
Through: Ms. Monisha Handa, Mr. Rajul
Shrivastav, Mr. Anubhav Sharma,
Advs. (M. 9736299505)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by the Petitioner- Allied-Dynamic Joint Venture under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'the 1996 Act'*) challenging the Arbitral Award (*hereinafter, 'the Award'*) dated 28th June, 2016 passed by the Id. Arbitral Tribunal, whereby the claims of the Petitioner have been rejected *in toto*. The brief background is that the Respondent-Ircon International Ltd. had awarded a contract to the Petitioner vide LOA No. IRCON/3014/RRVUN.RS/TENDER/P-way on 25th October, 2010 for the following works (*hereinafter, 'the project'*):

"Earthwork in formation and Permanent Way work inside Thermal Power Plant in connection with Railway siding work consisting of earthwork in formation, supply of blanketing material, P. Way linking commissioning and associated work"

3. Thereafter, the Agreement was signed on 1st December, 2010 by the



parties. The total value of the contract was Rs.21,97,61,199/-. The completion period was a period of 11 months commencing from 25th October, 2010 till 24th September, 2011. In terms of the General Conditions of Contract (*hereinafter*, 'GCC') Clause No. 8 of the Agreement, 2% of the value was furnished as performance security, and 5% was furnished as retention money by the Petitioner.

4. The Petitioner commenced work at the site. However, various issues arose which, according to the Petitioner, led to delays in the completion of the project. One of the main issues raised by the Petitioner was the delay in the handover of the site. Conversely, Respondent's stand was that though some portion of the site was handed over belatedly, the Petitioner failed to perform its part of the contract, even for works where the sites had been handed over.

5. The record shows that the parties agreed to extend the completion period of the project from time to time. Such agreement between the parties is evident from letter dated 30th October, 2014 issued by the Respondent, where the original completion date of 24th September, 2011 was extended till 31st March, 2014. The said letter also clearly records that the payment released up to the last bill dated 25th March, 2014 was to the amount of Rs.23,09,58,770/-.

6. The work, though delayed, was finally completed in March, 2014. However, the Petitioner had various claims against the Respondent. The primary claims were for incorrect deductions and for compensation for delay in handing over of the project site. All the claims were referred to the Id. Sole Arbitrator - Mr. Yogesh Kumar Mishra. The Id. Sole Arbitrator rendered the impugned Award rejecting all the claims of the Petitioner.



Hence the present petition.

7. Ld. Counsel for the Petitioner broadly raises the following three grounds in support of the challenge to the Award under Section 34 of the 1996 Act:

- i) that the Id. Arbitrator was an employee of the Respondent and the Award was rendered in a biased manner;
- ii) that the Id. Arbitrator does not award any compensation in respect of the delayed handing over of the project sites, though it is admitted by the Respondent that there was a delay;
- iii) The delay caused by the Respondent was also admitted, and hence the claims, particularly regarding illegal deductions and compensations, should have been allowed. Additionally, the evidence presented in this regard was not considered.

8. On behalf of the Respondent, the Id. Counsel submits as follows:

- i) that the findings of the Id. Arbitrator are that the delay was attributable to both the parties.
- ii) that no evidence was led to support the claims, and all the claims of compensation were based on hypothetical calculations. Thus, this was not a case where the Id. Arbitrator erred in rejecting the claims of the Petitioner.
- iv) On the issue of bias, it is submitted that arbitration proceedings were invoked in terms of Section 21 of the 1996 Act in this case on 6th May, 2014, which predates the amendments made to the 1996 Act vide Arbitration and Conciliation (Amendment) Act, 2015, which came into effect from 23rd October, 2015. Since, the request to refer the dispute to arbitration was made before the Arbitration and



Conciliation (Amendment) Act, 2015 came into effect, the unamended 1996 Act shall be applicable for appointment of arbitrator. She also relies upon the following decisions of the Supreme Court to argue that the mere fact that the Id. Arbitrator is an employee cannot be presumed as a factor that would lead to bias in adjudication:

- ***Aravali Power Company Private Limited v. Era Infra Engineering Limited, (2017) 15 SCC 32.***
- ***Indian Oil Corporation and others v. Raja Transport Private Limited, (2009) 8 SCC 520.***

9. The Court has heard the Id. Counsels for both the parties. The Court has put a specific question regarding the grounds invoked by the Petitioner under Section 34 of the 1996 Act. The only significant ground that seems to have been raised pertains to the alleged bias of the Id. Arbitrator, as the Id. Sole Arbitrator was an employee of the Respondent.

10. Firstly, the Court notes that the Agreement itself, as per clause 72.2.3 of the Agreement, provides a safeguard that if an employee is appointed, such a person must not be connected with the work in question. The said clause reads as under:

“72.2.3 Managing Director of the Employer may himself act as Sole Conciliator/Sole Arbitrator or may at his option appoint another person as Sole Conciliator or sole arbitrator, as the case may be. In case, Managing Director of the Employer decides to appoint a sole conciliator/ sole arbitrator, then a panel of at least three names will be sent to the contractor. Such persons may be working/retired employees of the employer who had not been connected with the work. The contractor shall suggest minimum two names out of this panel for appointment of sole Conciliator/Sole



Arbitrator, Managing Director of the Employer will appoint sole conciliator/sole arbitrator out of the names agreed by the contractor.”

11. The Id. Sole Arbitrator was appointed by the Respondent way back on 21st October, 2014. While the Petitioner claims to have written letters raising the issue of bias, at no point formal adjudication was sought on this aspect, nor any change of arbitrator was sought on the ground of bias. No remedy was also availed of in respect of the allegation of bias. Under such circumstances, it would be impermissible for the Petitioner to wait for the award to be rendered and thereafter approach the Court with the allegation of bias against the Id. Arbitrator.

12. Moreover, in terms of the decision of the Supreme Court in *M/s. Shree Vishnu Constructions v. The Engineer in Chief Military Engineering Service*, [2023 LiveLaw (SC) 417], the disqualification of an employee from being appointed as an Arbitrator in terms of Section 12(5) read with Seventh Schedule of the 1996 Act, which came into effect on 23rd October, 2015, would not be applicable to the present case. The invocation of the arbitral proceedings in this case is prior to the notification of the said amendments to the 1996 Act.

13. In any event, the Petitioner having participated in the proceedings fully and the Final Award in terms of Section 31 of the Act having been rendered, this Court is of the opinion that the allegation of bias cannot be agitated at this stage as such conduct could also constitute *waiver* under Section 4 of the 1996 Act.

14. Insofar as the delays and the compensation claims are concerned, the award has rendered the following findings:



“5.3.4 DECISION BY SOLE ARBITRATOR

i) *The Claimant's claim on this account mainly relies on their submission that the contract was abnormally delayed purely on account of the Respondent. Accordingly, as they had to extend the PG for the extended period of the contract, the cost incurred by them for the same should be reimbursed.*

ii) *The Claimant attribute the abnormal delay for execution of work mainly on account of site being not handed over at time and isolated locations and non-availability of approved yard plan from the Railway for execution of the work.*

iii) However, from the Respondent submission dtd. 17.10.2015 & 25.2.2016 indicate that the Claimant was equally responsible for the delay in the execution of work. The Claimant failed to carry out the work even in the land allotted to them and delayed the start of work even after the approved yard plan was provided to them.

iv) Therefore, the Claimant failed to establish the responsibility of the delay for completion of work entirely on account of the Respondent and share responsibility for the delay, therefore, NIL award is given against the claim.

xxx xxx xxx

5.6.4 DECISION BY SOLE ARBITRATOR

i) *In the verbal pleadings, no clause of the Contract Agreement was put forth on which the claim is based.*

ii) *No earlier notice or details of losses have been pleaded by the Claimants. Compensation claimed has to be supported by documents etc.*

iii) The claim is based on hypothetical calculations, without any basis or putting forth any details of contracts which could not be taken or bid for, by the Claimants, but was missed.

v) *In view of above, the claim is not tenable and NIL award is given.”*



15. The above findings show that delays have occurred due to the conduct of both the parties. From the letter dated 30th October, 2014, relied upon by the Petitioner itself, it is clear that the parties have agreed for extension of the date of completion.

16. According to the Respondent, for the period of 25th September, 2011 to 24th September, 2011, in terms of the Price Variation Clause ('PVC') under clause 17.1 of the Agreement, the Petitioner has been paid a sum of Rs. 1,08,32,013/-.

17. Under such circumstances, the claim of wrongful deductions being rejected with proper reasons, no grounds for interference are found by this Court. The Id. Arbitrator also records that the claims relating to damages and compensation were also hypothetical and no evidence was led. Further, it is well settled in terms of the decisions of the Supreme Court in *Haryana Urban Development Authority, Karnal v. M/s. Mehta Construction Company [2022 LiveLaw(SC) 348]* that under Section 34 of the 1996 Act, this Court cannot go into a fact-finding exercise, and an award cannot be set aside under Section 34(1) of the 1996 Act merely on the ground of misappreciation of evidence, which the present petition seeks to indirectly manifest.

18. In these circumstances, no ground under Section 34 of the 1996 Act has been made out by the Petitioner for challenging the Award dated 28th June, 2016. The petition is accordingly dismissed, however, with no orders as to costs. All pending applications disposed of.

PRATHIBA M. SINGH
JUDGE

JANURARY 10, 2024/Rahul/dn