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

% *Date of Decision: 04.04.2024*

+ **FAO (COMM) 149/2023 and CM APPL. 36770/2023**

M/S. SAMRAT CONSTRUCTIONS
COMPANY

..... Appellant

Through: Mr Nitin Mangla, Advocate.

versus

UNION OF INDIA

..... Respondent

Through: Mr Naginder Benipal with Mr
Ankit Siwach and Ms Anjali
Pandey, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J. (Oral)

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 06.05.2023 (hereafter *the impugned judgment*) passed by the learned Commercial Court in OMP (Comm) No. 15/2021 captioned *M/s Samrat Constructions Company v. Union of India*.

2. The appellant had filed the afore-mentioned petition [OMP(COMM) 15/2021] impugning an arbitral award dated 11.03.2020 (hereafter *the impugned award*) passed by an Arbitral Tribunal comprising of three members (hereafter *the Arbitral Tribunal*).



The appellant was aggrieved as the Arbitral Tribunal had rejected its claims and had awarded a sum of ₹10,60,439/- against the counter claims raised by the respondent. In addition, the Arbitral Tribunal had also awarded future interest at the rate of 12% per annum.

3. The learned Commercial Court rejected the appellant's application on the ground that it was filed beyond the period of limitation as prescribed under Section 34(3) of the A&C Act. The learned Commercial Court further held that the delay in filing the application was beyond the period of thirty days, which could be condoned in terms of the proviso to Section 34(3) of the A&C Act. Notwithstanding the aforesaid finding, the learned Commercial Court also examined the impugned award and found that the same was well reasoned and warranted no interference in proceedings under Section 34 of the A&C Act.

4. It is the appellant's case that although the impugned award is dated 11.03.2020, a copy of the same was not forwarded to the appellant immediately. The appellant claims that it made repeated requests to the Arbitral Tribunal for a copy of the same and, finally, a photocopy of the award was furnished to the appellant on 02.09.2020. The appellant filed its petition to set aside the impugned award on 18.02.2021 under Section 34 of the A&C Act.

5. The learned Commercial Court concluded that the petition was filed after a delay of 77 days after the expiry of three months from the receipt of the impugned award. Thus, exceeding the period of delay that



could be condoned, by 47 days. The learned Commercial Court referred to the decision of the Supreme Court in *Union of India v. Popular Construction Co.: AIR 2001 SC 4010* and held that since the Court did not have the power to condone the delay beyond thirty days, the appellant's petition to set aside the impugned award could not be entertained.

6. Although, the learned Commercial Court referred to the orders passed by the Supreme Court in *Suo Motu Writ Petition No. 3/2020; In Re: Cognizance for Extension of Limitation*, it is apparent that the learned Commercial Court failed to appreciate the import of the said orders. By an order dated 10.01.2022 passed in the said writ petition, the Supreme Court expressly directed that in cases where the period of limitation for filing any suit, appeal, application or proceedings expired during the period between 15.03.2020 to 28.02.2022, the same would be extended till ninety days from 01.03.2022. Undisputedly, in the present case, the period of limitation for filing a petition to set aside the impugned award expired during the aforesaid period. Thus, by virtue of the order dated 10.01.2022 passed by the Supreme Court in *Suo Motu Writ Petition 3/2020 (supra)*, a period of ninety days with effect from 01.03.2022 was available to the appellant to file a petition under Section 34 of the A&C Act to set aside the impugned award. The appellant had filed a petition within the aforesaid period and therefore, the finding that the appellant's petition could not be entertained as barred by limitation is *ex facie* erroneous and thus, liable to be set aside.

7. In view of the aforesaid conclusion, the appellant's application to



set aside the impugned award is required to be heard on merits.

8. The learned Commercial Court had also held that the impugned award warranted no interference as it was well reasoned. This finding is stoutly contested. Before proceeding to address the aforesaid controversy, it would be apposite to briefly outline the factual context in which the controversy arises.

8.1. The appellant is a firm engaged as a government contractor with the Indian Railways. Northern Railways had invited tenders for executing the work of “Construction of RCC/MCC substructure on open foundation along with miscellaneous protection work with contractor's own cement and steel and erection of steel plate girders of 12.2 mtr. span for major Bridge No. 137 over river Bein (15 X 12.20 mtr.) in between Hira Nagar Ghagwal Stations of Firozpur Division in connection with doubling of JUCPTKJAT Section” (hereafter *the Works*).

8.2. The appellant submitted its bid for executing the said Works. By a Letter of Acceptance dated 15.02.2005 (hereafter *the Letter of Acceptance*) issued by the respondent, the contract (hereafter *the Contract*) for executing the afore-mentioned work was awarded to the appellant. The same was to be completed within a period of eleven months from the date of the Letter of Acceptance. The value of the Works was estimated at ₹2,20,67,158.88/-. The appellant had also deposited an amount of ₹50,000/- with the respondent as earnest money.

8.3. It is the respondent's case that the appellant did not furnish the



security amount and therefore, a formal agreement was not executed. On 25.02.2005, the respondent called upon the appellant to mobilize and set up a field laboratory and site office as well as give a mix design report for the grade of concrete. The respondent states that thereafter, on 11.03.2005, the appellant was instructed to mobilize all resources and commence work. It was also called upon to deposit the security amount of ₹2,50,000/-. Additionally, the respondent states that on 18.03.2005, the appellant was called upon to collect the drawings for the subject work, but the appellant delayed in collecting the same.

8.4. On 28.03.2005, the respondent issued a 7 days' notice to the appellant to improve the progress and commence the work failing, which the respondent would take steps to terminate the contract and get the same completed at the appellant's risk and cost. Thereafter, on 15.04.2005, the respondent sent a notice to the appellant in terms of Clause 62 of the General Conditions of Contract, 1999 (hereafter *GCC, 1999*) putting the appellant to notice that if remedial steps were not taken, the contract would be terminated after expiry of the period of 48 hours. Thereafter, the respondent terminated the contract by a letter dated 19.04.2005.

8.5. In the meanwhile, on 11.04.2005, the appellant invoked the arbitration clause and requested the respondent to take steps for constitution of the Arbitral Tribunal.

8.6. Thereafter, the contract for execution of the subject work was awarded to another contractor. The appellant was put to notice that the



works awarded were at its risk and cost.

8.7. In the meanwhile, the appellant also made representation requesting that the Contract not be cancelled. However, the said request was not accepted. The respondent claims that the difference in the cost at which the Contract for works were awarded to the appellant and to the new contractor (M/s Chaudhary Jagar Singh) was ₹10,39,100/- and the respondent claims that the same was liable to be recovered from the appellant.

8.8. The appellant also raised a claim of ₹11,00,000/- along with interest and sought reference of the said dispute to arbitration. However, no steps were taken by the respondent to refer the said dispute to arbitration.

8.9. Subsequently, on 05.07.2007, the concerned authority of the respondent referred the dispute relating to the appellant's claim for refund of ₹50,000/- paid as earnest money, as well as the respondent's counter claim for ₹24,39,100/- towards liquidated damages for adjudication by the Arbitral Tribunal.

8.10. The proceedings before the Arbitral Tribunal proceeded at a snail's pace. The appellant filed its Statement of Claim on 06.08.2007, however, no effective proceedings took place for more than a year thereafter. The Statement of Defense and counter claim was filed by the respondent sometime in the year 2008-2009. The appellant filed its rejoinder on 06.02.2010. The pleadings before the Arbitral Tribunal were completed, however, for a period of six years thereafter, no



hearing took place before the Arbitral Tribunal.

8.11. In the meantime, the constitution of the Arbitral Tribunal also changed more than once.

8.12. As noted above, the impugned award was rendered on 11.03.2020, but a photocopy of the same was furnished to the appellant on 02.09.2020.

9. It was the appellant's case that immediately on receipt of the Letter of Acceptance, the appellant had reported at the site and met the concerned officials. Thereafter, it proceeded to mobilize its resources. But there was a delay on account of unprecedented rains during that period, which was beyond the appellant's control. The impediment caused by rains (till end of March 2005) was discussed with the concerned officials. However, in the meanwhile, there was also delay on the part of the respondent to finalize the drawings of the bridge. The appellant claims that due to the delay in finalizing the drawings of the bridge, it could not take steps for finalizing the supply of steel. In the meanwhile, there was a significant increase in the price of steel, which rendered the competitive rates submitted by the appellant as unworkable. The appellant claims that it requested the respondent to issue steel from railway stores as was issued to other contractors but the said request was not accepted.

10. The appellant claims that the drawings were handed over on 30.03.2005. However, in the meanwhile on 28.03.2005, the respondent had already issued a notice alleging little or no progress. The appellant



claims that there is no possibility of mobilization within a period of 7 days as the drawings had been handed over at a much belated stage and the appellant required further time to make the necessary arrangements. The appellant claims that without considering the reasons for the delay, the respondent terminated the contract in question. The appellant claims that it had also made arrangements to execute certain works at site, which were not accounted for.

11. In the aforesaid circumstances, the appellant claimed a refund of its earnest money of ₹50,000/-. Additionally, the appellant also claimed a sum of ₹25,000/- as costs. As noted above, other claims made by the appellant were not referred to the Arbitral Tribunal.

12. The respondent filed the Statement of Defence as well as raised a counter claim for liquidated damages. The entire counter claim is articulated in one sentence. The same is set out below:

“1. The Risk & Cost of the work has been finalized and liquidate damage worked out to Rs. 10,60,439.00 (Rupees ten lacs sixty thousand four hundred thirty nine only) in under finance vetting and to be recovered from the claimant.”

13. The appellant filed its rejoinder to contest the counter claim. It claimed that the estimated cost in the fresh tender was changed. The invitation for tenders that was issued, did not indicate the current estimated cost. The same was corrected but, by that time the other contractors had purchased the tender documents. The appellant further claimed that it had also submitted its offer, but the same was not considered.



14. It was contended on behalf the appellant that there was a material variation in the quantities as carried out by the new contractor, who was awarded the contract for execution of the works at the risk and cost of the appellant. Therefore, the additional amount (an amount in excess of the contract value between the respondent and the appellant as paid to the new contractor) could not be recovered. In addition, it was submitted that whilst, the contract awarded to the appellant was terminated within a short period, alleging delay, the contract awarded to the new contractor was completed in 25 months as against the stipulated period of 11 months.

15. The Arbitral Tribunal did not accept the appellant's claim for the refund of earnest money. The Arbitral Tribunal held that in terms of Para 1270 of the Engineering Code, the Dy. Chief Engineer/Construction/Jammu Tawi was competent to terminate the Contract and to get the balance work executed at the risk and cost of the appellant. The Arbitral Tribunal held that the respondent has rescinded the Contract following due process. In view of this finding, the appellant's claim for refund of earnest money was rejected.

16. Insofar as the counter claim is concerned, the Arbitral Tribunal awarded an amount of ₹10,60,439/- as claimed by the respondent. The Arbitral Tribunal found that the liquidated damages of ₹10,60,439/- was correctly calculated.

17. Insofar as the refund of earnest money is concerned, the impugned award is intelligible. The Arbitral Tribunal had found that a



contract had been terminated by following due process and issuance of proper notices and therefore, the appellant's claim for refund of earnest money, was not sustainable.

18. We are unable to accept that the said conclusion of the Arbitral Tribunal is vitiated by patent illegality. Once it is held that the Contract was validly terminated in accordance with the terms of the Contract – as the Arbitral Tribunal has so held – it follows that the earnest money is not liable to be refunded.

19. Insofar as the counter claim is concerned, the impugned award is bereft of reasons. The respondent had referred a counter claim of ₹24,39,100/- for adjudication by the Arbitral Tribunal. However, in its Statement of Defence, the respondent had reduced the said counter claim to ₹10,60,439/-. As noticed above, the counter claim was set out in a single sentence and provided no details as to how, the said amount was computed or the basis for the same. It records that the difference of the cost between a fresh tender (issued at the risk and cost of the appellant) and the previous tender of ₹10,39,100/-. It is assumed that this amount is subsumed in the amount of ₹10,60,439/- awarded in favour of the respondent. The impugned award indicates that the appellant had contested this claim on two grounds. First, that there was variation in the quantities that were executed pursuant to the fresh contract entered into with the new contractor. Thus, the difference in the cost could not be recovered. The contention being that if the quantities executed by the new contractor are different from those that were awarded to the appellant, the appellant would not be liable to pay



the difference in the value of the Contract. The second contention raised by the appellant was that the Contract awarded to the appellant was for 11 months, but that executed by the new contractor spanned to 25 months. The Arbitral Tribunal has not made any observations regarding either of the two contentions or returned any finding in respect of either of these contentions advanced on behalf of the appellant, although the same were noted. The reasons and the conclusion of the Arbitral Tribunal for allowing the counter claim are set out in two sentences. The same are set out below:-

“9.....After going through the documents and arguments of both the parties, tribunal is of the view liquidated damages of Rs. 10,60,439/- have been correctly calculated by the respondent. Tribunal is of the view that as the contract has been terminated following due process by the Respondent, thus the liquidated damages for execution of work on risk and cost is payable, amounting to Rs. 10,60,439/-.”

20. We are unable to accept that the impugned award satisfies the requirements of a reasoned award as required in terms of Section 31 of the A&C Act.

21. The learned Commercial Court has also not considered the aforesaid controversy. The learned Commercial Court has merely referred to various decisions relating to the scope of examination under Section 34 of the A&C Act and has concluded that no interference with the impugned award is warranted.

22. The learned Commercial Court has held that the impugned award “*is an award which contains elaborate discussion and reasoning for the*



conclusions so arrived at by the Ld. Arbitral Tribunal". This conclusion is manifestly erroneous and unsustainable.

23. In view of the above, the impugned judgement is set aside. The impugned award insofar as it allows the counter claims of the respondent is also set aside. The pending application is disposed of.

24. The parties are left to bear their own costs.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

APRIL 04, 2024
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