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

Date of Decision: 19th February, 2019

+ **O.M.P. 103/2009**

M/S SAI CONSTRUCTIONS

..... Petitioner

Through: Mr. Kartik Nayar, Mr. Sarthak
Malhotra and Mr. Naman Joshi,
Advocates. (M:9958966570 &
9810057280)

versus

M/S TEHRI HYDRO DEVELOPMENT CORPORATION

LTD. & ANR.

..... Respondents

Through: Mr. Puneet Taneja and Ms. Laxmi
Kumari, Advocates. (M:9810208494)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter the 'Act'*) has been preferred challenging the award dated 10th October, 2008 passed by the Ld. Sole Arbitrator. The Petitioner - M/s Sai Constructions (*hereinafter the 'Contractor'*) was engaged by Respondent No.1- M/s Tehri Hydro Development Corporation Ltd. (*hereinafter 'THDC'*) for executing works of construction of Pratap Inter College at New Tehri Town. The said college was meant to serve the residents of the Tehri colony, who were oustees of the Tehri Hydro Dam Project area. The contract was awarded on 21st October, 1991 and was to be completed by July, 1992. Various extensions were sought by the Contractor who blamed THDC for delay in furnishing of drawings, making the site available etc. The said requests for extension were made on five occasions and were granted by THDC. Finally, however, the contract was not completed and the Contractor had left the project sometime around May-

August, 1996. After the final bill was paid, the Contractor raised various claims against THDC.

2. The basic contention of the Contractor was that as against the scheduled completion period of nine months for the project, approximately 50 months lapsed and despite that, it was not allowed to complete the project due to the breaches by THDC.

3. On the other hand, the stand of THDC was that the Contractor failed to mobilise the required manpower and resources and since the project involved the construction of a college, extensions were granted by THDC.

4. Under these circumstances, the arbitration clause was invoked. Ld. Sole Arbitrator considered each of the claims of the Contractor. Finally, the Ld. Arbitrator granted the following sums in favour of the Contractor and rejected all the counter claims of THDC. The operative portion of the award reads as under:

“The respondent THDC has filed counter claims against the contractor Mis. Sai Constructions for the losses and damages suffered by them owing to the gross delay and the tardy work done by contractor in the construction of Pratap Inter College (PIC). They are four in number - Interest on blocked/unused funds from the schedule date of completion to the date of abandonment of the site by contractor, Interest on blocked funds after abandoning of the site by contractor, Loss due to non-shifting of Pratap Inter College from Old Tehri Town and loss of goodwill. The amounts claimed in the counter claims have been worked out on adhoc and lumpsum basis. These are theoretical and based upon several assumptions. No satisfactory and convincing evidence have been given to substantiate losses as claimed. These counter claims were not made earlier by respondent THDC. No letter/notice demanding their payments was ever served by respondent and refused by contractor. These have

been made for the first time much after 3 years limitation period on 25th September 2006 after filing of reply to claimants statement of claims. In view of above findings the counter claims as made out are premature, non-maintainable and unjustified. They are rejected.

8. To sum-up the respondents THDC are required to pay the claimants M/s Sai Constructions following amounts:-

<i>I. Final Bill</i>	<i>Rs.1,58,749.00</i>
<i>2 Claims sub-item 14 & 16 of Item 1, Claim 1</i>	<i>Rs.1,42,988.00</i>
<i>Total</i>	<i>Rs.3,01,737.00</i>

In addition they are also required to pay interest @ 10% per annum with effect from 03.08.1997

II Bank Guarantee(s) *Rs.23.3 lacs*

In addition they are also required to pay interest @ 10% per annum with effect from 10.06.1998

In both cases interest shall be payable till the date of payment or the date of decree whichever is earlier. The post decretal interest being within the jurisdiction of the Court."

5. Insofar as the Section 34 petition is concerned, the challenge was made towards all the claims decided by the Ld. Arbitrator. However, the claims which have been pressed are claim no.4 relating to escalation, claim no. 5 relating to idling of tools and machinery and claim no.6 in respect of overheads.

6. The submission of Mr. Kartik Nayar, Ld. counsel appearing for the Petitioner/Contractor is that the award suffers from a fundamental error i.e. the Ld. Arbitrator has failed to give a finding as to who was responsible for the delay in the project. The Ld. Arbitrator without arriving at a finding on

this issue, has rejected the claims for escalation and idling of tools and machinery as also overheads. This approach of the Ld. Arbitrator is faulted by the Ld. counsel for the Contractor on the ground that the time taken by the Contractor being almost 5 to 6 times more than the prescribed period for completion of the project, it was necessary for the Ld. Arbitrator to arrive at a conclusion on delay and then decide the claims for escalation, idling of tools/machinery and overheads.

7. Ld. counsel submits that it is a matter of fact that till May-August, 1996, the Contractor was at the site and whenever the Contractor has mobilised the site, there were several in-built expenses, which were incurred including for labour, equipment, machinery etc. and thus rejection of these claims is liable to be set aside.

8. On the other hand, Mr. Taneja, Ld. counsel appearing for the Respondent No.1 – THDC, submits that the Contractor repeatedly sought extensions and the same were granted sometimes on the condition that levying of liquidated damages would be considered at a later occasion or without levying any liquidated damages. Every time THDC gave extensions to the Contractor, the clear understanding was that, no claims were to be entertained for compensation. He relies upon three 'No-claim' certificates, one of them dated 2nd August, 1996 and two, which are undated. It is submitted that the Contractor was liable for not mobilising the site and in fact, THDC ought to have been compensated by the Ld. Arbitrator, though he concedes that THDC has not challenged the impugned award.

9. The Court has heard Ld. counsels for the parties. Apart from the claims raised by the Contractor, THDC had also raised several counter claims. The total value claims raised by the Contractor were

approx.Rs.12.35 crores and the total value of counter claims raised by THDC were for a sum of Rs.50 crores including liquidated damages. Ld. Arbitrator has rejected the counter claims *in toto*. Insofar as the Contractor's claims were concerned, the value of the Bank Guarantee which was encashed i.e., a sum of Rs.23.3 lakhs along with interest @ 10% was awarded and some claims under sub items 14 and 16 of item no.1 of claim no.1 as also the final bill to the tune of Rs..... were allowed. Apart from these claims, the remaining claims of the Contractor were rejected.

10. In the present case, as in every construction contract, the Contractor blames the corporation and the corporation blames the Contractor. It is a matter of record that repeated extensions were sought by the Contractor and the same were granted by THDC. It appears that so long as the Contractor was at the site, though the correspondence reveals that the blame game continued in writing, both the parties were comfortable with each other and extensions were being granted. It is a matter of record also that no liquidated damages were, in fact, imposed, though the contractual provisions did permit the same. The Contractor from his side, does not deny the submission of three no claim certificates. These certificates read as under:

“No Claim Certificate 1 dated 2nd August 1996
Regarding Development and Construction of Partap
Inter College vide LCA No.THDC/RKSH/CD-
109/LCA-004 dated 21.10.91 upon granting of
extension in completion of the work as applied with
30.4.96, we undertake not to claim any compensation.

No Claim Certificate 2 (undated)
Certified that I shall not claim any compensation
whatsoever due to grant of this extension nor claim any
increase in contract (illegible) for the work done

in the extended period.

No Claim Certificate 3(undated)

Upon granting of extension in completion of the work as applied we undertake not to claim any compensation. This is without prejudice to our rights as per provisions in the contract and reasons explained in the application.

*For Sai Constructions,
Neeraj Partner”*

11. The first of these is dated 2nd August, 1996 and the remaining two are undated. The same have obviously been given by the Contractor at the time when extension was sought. From the said certificates, it is clear that the Contractor had given up its rights and agreed not to claim any compensation. Insofar as THDC is concerned, they have accepted the award and have also implemented the same. The bank guarantee amount and the other awarded amount with interest has been paid to the Contractor. A total sum of Rs.51,00,247/- has been paid by THDC to the Contractor on 5th January, 2009. This is clear from a perusal of the letter dated 5th January, 2009, which acknowledges the receipt of the above amount by the Contractor.

12. The reasoning of the Ld. Arbitrator is clear that the submission of the *No-claim* letters by the Contractor at the time of obtaining the extensions, led to the conclusion that the Contractor would not be entitled to any payments. The relevant portion of the award is set out herein below:

“.....At that time also works were left incomplete. So there is no justification in demand for loss of any goodwill of the contractor. In this work, time was the essence of the contract. The contractor at the time of seeking Extension of Time(s) had not made any demands for payment of additional overheads, loss of profit and goodwill etc. due to his

prolonged stay at the work site. He has also given 'No Claim Certificate' at the time of seeking Extension of time(s). As and when extension of time(s) were granted I find that claimants did not serve any notice to claim compensation in future by way of loss or damages due to prolongation of stipulated time/extended time for completion. During the period(s) extension of time was not sanctioned I find that contractor had continued to work and accepted running bill payments without any demur. The manner and conduct confirms that the contractor was willing to work without any additional demands. The claimants due to such action and conduct have waived off their right to claim any compensation at a later date for working beyond the stipulated date(s) of completion. Also no satisfactory evidence has been placed on record to substantiate claim of loss or damages suffered by them. In view of the above findings, the three claims as made out are not acceptable and they are rejected."

13. The above findings of the Ld. Arbitrator are factual in nature and the same cannot be reappreciated in objections under Section 34. The Contractor, having sought extensions and having waived its right to claim compensation, rejection of claim nos.4, 5 & 6 cannot be faulted with. Insofar as THDC is concerned, it has accepted the award. Under these circumstances, the OMP is liable to be rejected.

14. OMP is, accordingly, dismissed, however, with no orders as to costs.

**PRATHIBA M. SINGH
JUDGE**

FEBRUARY 19, 2019/dk