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

\+ O.M.P. (COMM) 593/2020 & I.A. 12328/2020

TANTIA CONSTRUCTION LIMITED ..... Petitioner
Through Mr. Sanjay Bhaumik, Adv.

versus

IRCON INTERNATIONAL LTD ..... Respondent
Through Mr. Manoj Kumar Das, Ms. Geeta Das and Mr. Deepak Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% 13.04.2021
(Video-Conferencing)

1. This petition, under Section 34 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), is directed against a supplementary award dated 20th August, 2020, passed by the learned arbitrator. By the supplementary award, the amounts awarded in favour of the petitioner in the original award dated 23rd January, 2020, against Claims No. 6 and 12, were reduced. The amount of ₹ 1,90,86,595/-, awarded in respect of claim no. 6, was reduced to ₹ 97,85,184/- and the amount of ₹ 58,08,475/ -, awarded in respect of claim no. 12, was reduced to ₹ 54,01,882/ -. Side by side, the learned arbitrator also modified the reasons for awarding the aforesaid amounts. The changes effected by the impugned supplementary award stand captured, in the impugned award itself, in a tabular form, thus:

"Claim no. 6 Claim for	**Amount claimed (Rs.**	**Amount awarded in**	**Award modified**

illegal encashment of performance bank guarantee		**Original award (Rs.)**	**(Rs.)**
	1,90,86,595	1,90,86,595	97,85,184
Original reasons of award		**Modified reasons of award**	
As deliberated in above paras, the termination of the contract was wrongful, illegal and arbitrary due to the occurrence of earthquake in Nepal which also led to declaration of National Emergency, severely affected the citizens. Tender categorically stipulates that in the event of occurrence of a force majeure event, neither party shall be entitled to terminate contract in respect of non-performance or delay in performance. Hence claim amount of Rs. 1,90,86,595/-, is reasonable and payable.		As deliberated in above paras, the termination of the contract was wrongful, illegal and arbitrary due to the occurrence of earthquake in Nepal which also led to declaration of National Emergency, severely affected the citizens. Tender categorically stipulates that in the event of occurrence of a force majeure event, neither party shall be entitled to terminate contract in respect of non-performance or delay in performance. As against claim amount of Rs.1,90,86,595/-,respondent has mentioned they have adjusted the recoveries other than mobilization advance in the final bill for Rs.93,01,410 in the encashed amount of PBB. Hence balance PBG amount of Rs.97,85,184 is reasonable and payable.	
"Claim no.12 Claim for unbilled quantity of	**Amount claimed (Rs.**	**Amount awarded in Original award (Rs.)**	**Award modified (Rs.)**

blanketing materials layed			
	66,90,000	58,08,475	54,01,882
Original reasons of award		**Modified reasons of award**	
As per 17th & final bill total quantity paid up to 16th running bill was 47485.880 cum of granular blanketing material but in the aforesaid 17th & final bill it has been reduced to 39411.264 cum. Since the 47485.880 cum is a measured and paid quantity, payment of balance quantity 8074.616 cum recovered from the final bill for amounting to amounting to Rs.58,08,475.00 to be refunded to claimant.		As per 17th & final bill total quantity paid up to 16th running bill was 47485.880 cum of granular blanketing material but in the aforesaid 17th & final bill it has been reduced to 39411.264 cum. Since the 47485.880 cum is a measured and paid quantity, payment of balance quantity 8074.616 cum recovered from the final bill for amounting to amounting to Rs.54,01,882.00, after adjusting the rate quoted by the claimant, to be refunded to claimant.	
Original concluding paras		**Modified concluding paras**	
In conclusion, the respondent, IRCON INTERNATIONAL LIMITED shall pay to claimant, M/s Tantia Construction Limited. DD-30, 7th floor, Sector-1, Salt lake city Kolkata a sum of Rs.4,80,37,967.00 (Rs. four crores eighty lacs thirty seven thousand nine-hundred sixty seven only) in full and final settlement of all the claims/counter claims of both the parties arising out of dispute as referred vide IRCON International Limited, Saket's letter No. IRON/CO/ARBN/Tantai Con/JOG-		In conclusion, the respondent, IRCON INTERNATIONAL LIMITED shall pay to claimant, M/s Tantia Construction Limited. DD-30, 7th floor, Sector-1, Salt lake city Kolkata a sum of Rs. 3,83,29,963.00 (Rs. Three crores eighty three lacs twenty nine thousand nine-hundred sixty three only) in full and final settlement of all the claims/counter of both the parties arising out of dispute as referred vide IRCON International Limited, Saket's letter No.	

Biratnagar/129/2601/74 dated 12.11.2015.	IRON/CO/ARBN/Tantai Con/JOG-Biratnagar/129/2601/74 dated 12.11.2015.
That Respondent IRCON is directed to arrange the payment of award totalling as stated above within a period of 90 days from the date of publication of award failing which an interest of 9% shall be payable by the respondent to the claimant till the payment of this Arbitration Award.	That Respondent IRCON is directed to arrange the payment of award totalling as stated above within a period of 90 days from the date of publication of supplementary award failing which an interest of 9% shall be payable by the respondent to the claimant till the payment of this Arbitration Award."

2. The impugned supplementary award came to be passed on an application, dated 8th August, 2020, preferred by the respondent-IRCON International Ltd. under Section 33 of the 1996 Act. The application was preferred on 8th August, 2020, whereas the award, of which correction was sought had, as already noted hereinabove, been passed on 23rd January, 2020.

3. Section 33 of the 1996 Act reads as under:

> "33. **Correction and interpretation of award; additional award. –**
>
> > (1) *Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties –*
> >
> > > (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, *within thirty days from the date of the arbitral award.*

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section."

Clearly, therefore, the application, under Section 33, was preferred by the respondent much beyond the period of 30 days, stipulated in Section 33(1).

4. Para 11 of the aforesaid application under Section 33 of the 1996 Act sought condonation of delay in preferring the application and read thus:

> "11. That although the statutory period of limitation, in general terms, under Section 33 i.e. 30 days and under Section 34 i.e. 3 months + 30 days has come to an end from the date of receipt of the Award Dated 23.01.2020, but considering the specific refusal by the Claimant to give his consent to refer the issue to the Ld Sole Arbitrator U/s 33 vide letter Dated 20.07.2020 and various orders of the Hon'ble Supreme Court of India on the issue of limitation under 1996 Act in view of spread of nCovid-19, the Respondent has proceeded with filing of the present Application under Section 33 of the 1996 Act."

5. Today, Mr. Manoj Das, learned counsel for the respondent, candidly acknowledges that insofar as the right to challenge the impugned supplementary award dated 20th August, 2020 is concerned, he could not take advantage of the same. He, nevertheless, submits that the delay was occasioned owing to the intervention of the COVID pandemic and that, in any event, as the error, of which rectification was sought, related to double payment made to the petitioner, the delay was condonable.

6. Notice was issued, by the learned arbitrator, on the aforesaid Section 33 application filed by the respondent, and reply, thereto, was filed by the petitioner.

7. Mr. Das emphasised the fact that the reply was restricted to questioning the maintainability of Section 33 application, and did not

dispute the contentions in the application on merits.

8. Admittedly, without hearing the petitioner, the impugned supplementary award came to be passed by the learned arbitrator on 20th August, 2020.

9. On the aspect of delay, the learned arbitrator held thus:

> "The Respondent, IRCON International Limited has filed an application vide above referred letter and factual calculations as per tender conditions w.r.t. to Claim No.6 and Claim No. 12 brought into notice of Tribunal. Respondent also requested to condone the delay in filing the present application in view of spread of Covid-19 and refusal by claimant.
>
> Accordingly, in partial modification to Award published on 23.01.2020 in the subject Arbitration case, the delay is condoned..."

10. On the issue of the default, on the part of the arbitrator, in hearing the petitioner before the impugned order came to be passed, Mr. Das submitted that, as the petitioner, in its reply to the Section 33 application of the respondent, had not questioned the averments contained therein on merits, the learned arbitrator could not have been said to have fatally erred in law in passing the impugned supplementary award without hearing the petitioner.

11. In my considered opinion, the impugned supplementary award is necessary to be set aside as being violative of Section 33(1) of the 1996 Act as well as the *audi alteram parterm* principle.

12. Section 33(1) prescribes a specific period of 30 days, from the

receipt of the arbitral award, within which an application for correction or rectification thereof can be moved. Unlike Section 34, Section 33(1) does not contain any provision permitting condonation of the period of limitation stipulated therein.

13. It is not possible for this Court to read, into Section 33(1), a power of condonation of delay, where none exists. The fact that delay cannot be automatically condoned by the Arbitral Tribunal, in the case of application under Section 33(1), also stands underscored by the stipulation contained by the words "*unless another period of time has been agreed upon by the parties*" in Section 33(1). Clearly, the intent of the legislature is that, the period of 30 days, stipulation in Section 33(1), is relaxable only if, *ad idem*, the parties agree to another period for filing the application thereunder. *De hors* any such mutual agreement between the parties, therefore, the period of 30 days in Section 33(1) is sacrosanct and is not relaxable. Per corollary, delay in preferring the application under Section 33(1) would not be condonable, either. The learned arbitrator, therefore, materially erred in condoning the delay on the part of the respondent, in filing the application under Section 33.

14. Besides, even otherwise, the period of limitation for filing the aforesaid period expired somewhere in mid-February, 2020. The Covid-2019 pandemic hit the nation only in March, 2020, which is why amnesty, in respect of periods of limitation under various statues, was extended even by the Supreme Court only from 15th March, 2020. There is no reasonable explanation for the respondent not having

moved the arbitral tribunal within time.

15. There is yet a third reason why the decision, of the learned Arbitrator, to condone the delay in filing the Section 33(1) application cannot be sustained. The impugned supplementary award mechanically condones the delay, by the respondent, in moving the Section 33 application, without a word by way of reasoning. The expiry of statutorily prescribed period of limitation, results in crystallising of valuable rights in favour of the opposite party. Courts, tribunals and arbitrators cannot, therefore, mechanically condone statutorily sanctified periods of limitation, especially where the delay is inordinate, as in the present case. Cogent reasons, for doing so, must be apparent on the face of the order. There is clear non-application of mind, by the learned arbitrator, in his decision to condone the delay. Even on this ground, therefore, the decision of the learned arbitrator to condone the delay cannot sustain the scrutiny of law. This, of course, is without prejudice to the initial finding, hereinabove, that, on the expiry of 30 days from the receipt of arbitral award by the respondent, the arbitral tribunal was rendered *coram non judice* and could not, therefore, have entertained the Section 33 application filed by the respondent at all.

16. The impugned order is also starkly violative of the principles of natural justice. As far back as in ***Olga Tellis v. Bombay Municipal Corporation***[1], the Supreme Court held that the requirements of compliance with principles of natural justice could not be washed

[1] **(1985) 3 SCC 545**

away on the ground that the affected party would not have had any defence to put up. That apart, it is not as though the petitioner had, in its reply to the Section 33 application of the respondent, not contested the application. The application was contested both on the ground of maintainability as well as on limitation. Even otherwise, the mere fact that, in the reply, the petitioner may not have contested the Section 33 application on merits, did not *ipso facto* foreclose the right of the petitioner to do so, as and when an opportunity of hearing was extended to it.

17. *Audi alteram partem* is a salutary and sacred principle of natural justice. Ordinarily, it is not to be jettisoned. The learned arbitrator has not provided any justification, in the impugned supplementary award, for passing the award without hearing the petitioner.

18. Even otherwise, arbitral proceedings are *ad idem* proceedings between the parties to the arbitration, and it is of the essence that the arbitrator hears the parties before taking any decision prejudicial to one or the other. This requirement has stands sacrificed in the impugned order.

19. It cannot be disputed that the impugned order reduces the amounts originally awarded to the petitioner in the award dated 23rd January, 2020. Such reduction, without hearing the petitioner, could not, howsoever justified, have been effected.

20. For the aforesaid reasons, therefore, the impugned supplementary award, dated 20th August, 2020, as passed by the

learned arbitrator, cannot sustain in law.

21. Accordingly, the impugned supplementary award dated 20th August, 2020 stands set aside.

22. The petition stands allowed accordingly, with no order as to costs.

23. Needless to say, all observations contained in this judgment relate only to the sustainability of the impugned supplementary award, dated 20th August, 2020. This Court has not expressed any opinion one way or the other on the original award dated 23rd January, 2020.

C. HARI SHANKAR, J.

APRIL 13, 2021
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