IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL {L} NO.31 OF 2016
IN
ARBITRATION PETITION NO.408 OF 2005

Indian Oil Corporation Ltd.,
A Company Incorporated under the
provisions of the Companies Act, 1956
having office at Gujarat Refinery,
P.O. Javaharnagar, Vadodra-391320. .... Appellant

- Versus -

Artson Engineering Ltd.,
Plot No.426, M.L. Agarwal Building,
1st Floor, Waman Tukaram Patil
Marg, Opp: Satabdi Hospital,
Chembur, Mumbai-400 071. .... Respondent

Mr. Manish Bhatt, Senior Advocate i/by Mr. Kalpesh
Joshi Associates for the Appellant.
Mr. Sharan Jagtiani with Mr. Mutahhar Khan i/by
M/s. Mulla & Mulla & CB & Caroe for the Respondent.

CORAM: ANOOP V. MOHTA AND
S.C. GUPTE, JJ.

DATED: MARCH 14, 2016

ORAL JUDGMENT (Per ANOOP V. MOHTA, J):

1. Admit. The parties have filed short synopsis and

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written notes of submissions. The appeal is taken up for final hearing, by consent.

2. The appellant/original respondent has preferred this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") against Judgment and Order pronounced by a learned single Judge of this Court on 30-10-2015, whereby the Arbitration Petition under Section 34 of the Act is partly allowed and maintained the other claims in the following words:

> *"133. I, therefore, pass the following order:-*
>
> *(a) The impugned award dated 30th June, 2005 is set aside insofar as claim nos.(d) and (g) are concerned.*
>
> *(b) Interest awarded on the security deposit is set aside.*
>
> *(c) Interest at the rate of 18% per annum awarded by the learned arbitrator is reduced to 12% per annum which shall be payable for the period as awarded by the learned arbitrator.*
>
> *(d) Interest awarded on claim nos.(d) and (g) is set aside.*
>
> *(e) Rest of the award is upheld."*

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3. The basic events are as under:-

The contract between the appellant-Indian Oil Corporation Limited (IOCL) and the respondent-Artson Engineering Limited was executed on 11-4-1998 after accepting the bid submitted for Crude Distribution System Project. The contract was governed by the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC). Time was the essence of the contract. Various meetings took place between the parties as the work was constantly changing for want of complete information to the respondent/claimant/contractor. Monthly progress reports were submitted. There were delays in providing various information as well as instructions. Delay was also caused even while approving various drawings. The respondent/claimant requested for release of payments from time to time. Request was also made for extension of time to complete the contract for the reasons attributable to the IOCL and M/s. Daelim. No timely payments were made, including towards increased quantities in the electrical, civil and structural works. The respondent/claimant even addressed letters

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recording non-availability of various items and materials which were necessary to complete the work. The IOCL conveyed about the change in the scheme and installation of the work to be done in respect of the pipelines. The revised details were provided to the respondent/claimant on 9-7-1999. The respondent/claimant completed the work under the two Crude Distribution Systems on 6-9-2000. The IOCL issued its completion certificate accordingly. On 3-10-2000 the respondent/claimant submitted the final bill. The Bank Guarantee was extended accordingly from time to time. As the final bill payment was not received, the respondent/claimant made representations again and again, apart from holding regular meetings. Request was also made by IOCL to Artson to depute an officer for negotiations and finalisation of the final bill on 12-11-2001. The respondent/claimant refused to accept the lowest rate, as suggested.

4. A petition under Section 9 was filed on 10-1-2002 by the respondent/claimant for preventing encashment of the Bank Guarantee by IOCL. Ultimately, on 1-4-2002 Artson and IOCL

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filed Consent Terms to resolve the disputes within eight months and accordingly an Arbitrator was appointed. The matter proceeded before the Arbitral Tribunal. Extension was also sought to complete the arbitration. Another Arbitrator was appointed on 7-7-2003. Ultimately, the learned Arbitrator passed the Award on 30-6-2005, allowing the claims under heads "A" to "D" and "G". The Arbitrator rejected the claim under heads "E" and "F", and also rejected the counter-claims.

5. Heard learned counsel appearing for the parties. The learned Arbitrator has passed the Award after taking note of rival contentions as well as the documents so placed on record and after appreciating the submissions made by the counsel for the parties and recorded as under:-

> "*150. Respondent will has to pay to the claimant in respect of various claims set out in the claim statements below with interest at 18% per annum from the dates mentioned against in the respective heads.*
>
> *Claim A – Rs.82,19,114/- with effect from 01.11.2000*
> *Claim B – Rs.1,40,00,000/- with effect from 01.11.2000*
> *Claim C – Rs.16,58,574/- with effect from 01.11.2000*
> *Claim D – Rs.13,96,756/- with effect from 01.12.2000*
> *Claim E – Nil as claim is rejected*

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Claim F – Nil as claim is rejected
Claim G – Rs.61,00,000/- with effect from 01.11.2000

On the claims A, B, C, D, and G, to the extent of claim awarded respondent will have to pay interest at 18% per annum with effect from 1.11.2000 till the date of award and at the same rate of 18% per annum till realization of award at the same rate of 18% per annum and from the date of award on the principle amount of Rs.13,96,756/-. The respondent will also pay cost of Rs.10 lacs to the claimant and bear the entire costs as incurred for the arbitration proceedings. Hence the final award. No interest is awarded on costs of Rs.10,00,000/- (Rupees ten lacs).

AWARD

The Respondent do pay Rs.3,12,74,444/- (Rupees Three Crores Twelve Lacs Seventy Four Thousand Four Hundred Forty Four Only) with interest to the claimant. The respondent do pay simple interest @ 18% per annum on Rs.2,99,77,688/- (Rupees Two Crores Ninety Nine Lacs Seventy Seven Thousand Six Hundred Eighty Eight only) with effect from 1.11.2000 till realization. Respondent do pay simple interest @ 18% per annum on Rs.13,96,756/- (Rupees Thirteen Lacs Ninety Six Thousand Seven Hundred Fifty Six only) with effect from 1st February 2002 till realization.

Respondent do pay Rs.10,00,000/- (Rupees ten lacs only) as arbitration costs to the claimant and bear its own costs as incurred."

6. The appellant filed an arbitration petition under Section 34 of the Act for setting aside the said Award on 9-11-2006. The said petition was allowed by the High Court and the entire Award was set aside. The appellant, therefore,

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preferred an appeal. On 9-1-2015 the appeal came to be allowed on the ground that the Award was severable and need not be set aside in toto and Claim "D" was arbitrable.

7. Ultimately, the learned single Judge on 7-9-2015 allowed Claims "A", "B" and "C", as recorded above, and awarded interest at the rate of 12% per annum, and Rs.10,00,000/- towards the arbitration costs.

8. Claims "A" to "D" and "G", allowed by the learned Arbitrator are reproduced below:-

> "*(A) Claim on account of ** items in SOR amount to Rs.82,19,114/- with interest of 18% per annum with effect from 3-10-2000.*
>
> *(B) Claim for Rs.1.40 crore withheld on account of liquidated damages with interest at 18% per annum with effect from 3-10-2000.*
>
> *(C) Claim on account of amounts appropriated on the ground of other recoveries amounting to Rs.16,58,574/- with interest at 18% per annum from 3-10-2000.*
>
> *(D) Claim of Rs.26,97,759/- being the cost incurred in keeping the Bank Guarantees in force beyond the period required in contract with interest at 18% per annum till the date of payment.*

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(G) Claim of Rs.61,00,000/- on account of extra work with interest thereon."

9. The appellant is basically aggrieved by the order passed by the learned Judge referring to Claims "A", "B" and "C" and also by rejection of the counter-claims (Claims "E" and "F"). The respondent has not raised challenge insofar as rejection of Claims "D" and "G" are concerned.

10. Heard the learned counsel appearing for the parties and also gone through the written submissions as well as the documents so referred and relied upon with regard to the respective claims, specifically Claims A, B and C and the interest so awarded.

11. Learned counsel appearing for the respondent, at the outset, submitted proposal dated 26-2-2016, the relevant portion whereof is reproduced hereunder:-

"As this acceptance to the final amount is based upon the above clear understanding, and on the basis that prompt payment being the very essence of this offer, we clarify

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> *that our offer is valid only in the amount of Rs.498 Lakhs (Rupees Four Hundred Ninety Eight Lakhs only) is paid & realized in the accounts by AEL within four weeks from today or latest by 31st March 2016 (which is more than a month from today), the time being of essence.*
>
> *If the payment is delayed beyond 31st March 2016, AEL would have all rights under the law for recourse to the next step and this offer shall lapse.*
>
> *For the above purpose we have no objection to the Award of the Ld. Sole Arbitrator as partly being upheld by the Hon'ble Single Judge, being modified to the above extent.*
>
> *We clarify and state that upon our receiving the above amount of Rs.498 Lakhs, we shall have no further claim against IOCL arising out of the above referred contract as also the subject Award and further proceedings thereto.*
>
> *We may however clarify that the above proposal is strictly without prejudice to any of our rights available in Law."*

12. So far as Claim "A" is concerned, the learned Arbitrator as well as the learned Judge rightly held that the present contract was item rate contract. The quantity was fixed by IOCL. The quantity, however, was fixed on estimate basis. Correspondence exchanged between the parties was referred by the learned Arbitrator while allowing the claim for increase in quantity. The payments were asked accordingly from time to time. The oral evidence of Mr. Chopde, witness of

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the claimant, was recorded to determine the extent of quantity. The learned Arbitrator rightly held that the respondent cannot complain regarding rates which have already been settled through several negotiations and specifically when the case is not one of escalation. The application of IOCL to pay the dues under the contract and failure to make the payment, is rightly held to be a breach of the terms of the contract. The learned Judge has also upheld the said finding by further noting that additional quantities executed by the respondent/claimant were to the extent of 400%, 500% and 12500%. There was no objection of any kind by the appellant during the progress of the work. The issue was never finalized. Reliance, therefore, on the internal note by the learned Arbitrator could not be faulted with. The supporting evidence of the claimant proves the quantity. The learned Arbitrator as well as the learned Judge considered the evidence and the material, including the correspondence exchanged between the parties and therefore awarded the claim with interest at 18% on items purchased in excess of the quantities described in the Work Order.

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13. So far as Claim "B" is concerned, the amount was wrongly withheld though IOCL failed to perform their part of reciprocal obligation in time. The claimant's contractual obligations were depending upon the fulfilment of the IOCL's obligations. They failed to provide the information or data in time, including the designs and drawings. The essential certificate was not issued in time in providing approval for drawings submitted by the claimant in time. Various issues relating to work front where the other contractor M/s. Daelim was operating were not resolved at the relevant time. They even failed to supply various material for the work. The IOCL substantially altered and changed the scope of the work, including the Electrical Heat Tracer (EHT).

14. There was no clarification issued, though asked for from time to time, including about the laying of cables. No progress schedule was approved and/or agreed upon at the relevant time. The learned Arbitrator and the learned Judge also took note of the various clauses of the GCC, whereby reciprocal

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obligations are provided, including timely performance and action by the IOCL, as time was the essence. Various documents, including meetings, discussions and exchange of correspondence between the parties for the above purposes were noted but which also shows inaction and/or delay on the part of the IOCL. The learned Arbitrator as well as the learned Judge after considering the above gave a clear finding with regard to the delay on the part of the IOCL. The learned Arbitrator, therefore, based upon the same including the conditions and clauses which were agreed upon by and between the parties concluded that IOCL was responsible for the various delays. The work also could not be proceeded by the respondent/claimant for want of knowledge of engineering from M/s. Daelim. The learned Arbitrator has also considered the delay on account of EHT, which is also a subject of Claim "G". The learned Arbitrator even considered the delay on account of non-supply of materials prior to and after the Contract Completion Date. The learned Arbitrator by recording reasons considered the above background and passed the Award. The learned single Judge

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also confirmed the said decision by a reasoned order and therefore the finding given for want of no specific clause of liquidated damage by the appellant/IOCL and as the delay is attributable to the appellant, there was no reason for the IOCL to deduct the said amount as price reduction. Therefore, the deduction so made after one year from the preparation of the final bill is recorded to be an after-thought and therefore was not accepted. We see no case is made out by the appellant in this regard and there is no perversity in the findings recorded by the learned Arbitrator as well as by the learned Judge.

15. So far as Claim "C" is concerned, after going through the submissions and the documents so placed on record, we also noted that for want of particulars and no evidence, the two deductions of 10% with 18% interest from 3-10-2000 were wrong. There was no justification for such recoveries. The IOCL failed to discharge its obligation by not leading even the evidence in support of its claim. The amount, therefore, so deducted wrongly was rightly deprecated by the learned Arbitrator as well as by the learned Judge. The finding given

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therefore by both the learned Arbitrator as well as by the learned Judge, in no way can be said to be perverse and/or bad in law.

16. The learned counsel appearing for the appellant has made submissions revolving around the rejection of their counter-claims with regard to the awarding of costs of Rs.10,00,000/-. Considering the reasons so recorded by the learned Arbitrator and the learned Judge and for the reasons so recorded, in our view, no case is made out for interference with the awarding of costs so fixed.

17. The Apex Court in the case of **M/s. Chebrolu Enterprises Vs. Andhra Pradesh Backward Class Cooperative Finance Corporation Ltd.**, reported in 2015 (12) Scale 207, recently reiterated and reinforced the principle that unless case of perversity and/or error on the face of the record and/or any issue of jurisdiction is raised which goes to the root of the matter and/or any Award and/or order is contrary to the agreed terms and conditions, no interference is called for by the learned Judge

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as well as the Appellate Court in the finding of facts. In para 20 of the Judgment, the Apex Court has observed thus:

> *"20. .... This Court or even the Appellate Court would not look into the finding of facts unless they are perverse."*

18. The rejection of the counter-claims on the ground of limitation and the counter-claims not being arbitrable as no claim was raised immediately after receipt, as it was never even quantified at appropriate time to make the claim of amount, calls for no interference. The learned Judge has also upheld the said Award. There was no counter-claim raised before the earlier Arbitrator. The correspondences in the case, cannot read to mean extension of limitation specifically when it was in the nature of damages. The work was completed on 6-9-2000. The counter-claims were filed on 6-11-2003. The arbitration clause invoked for the same was in time. The observations of the learned Judge in paragraphs 120 to 124 need no interference.

19. Insofar as the interest is concerned, the learned Arbitrator has awarded 18% per annum, as recorded above,

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from the respective dates so mentioned. The learned Judge considering the rival contentions has restricted the same to 12% per annum instead of 18% per annum and the same shall be payable for the period as awarded by the learned Arbitrator. The Award and the interest on Claims "D" and "G" are set aside. Rest of the Award is upheld. Therefore, for the reasons so recorded above, we see no case is made out by the appellant to interfere with the said reasons, the Award as well as the modified order passed by the learned single Judge, so also the awarding of costs.

20. However, even at the conclusion of the hearing, learned counsel for the respondent resubmitted that the proposal submitted by the respondent on 26-2-2016 should be treated as a with prejudice offer of the respondent so that if the amount of Rs.4,98,00,000/- is paid by the appellant, latest by 31-3-2016, such payment shall be treated as full and final settlement of the respondent's claim under the Award on the aforesaid modified terms. If the amount of Rs.4,98,00,000/- is not paid by 31-3-2016, the impugned Award as modified by the

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impugned order passed by the learned single Judge shall be executable. However, if the amount of Rs.4,98,00,000/- is paid by 31-3-2016, the Award shall stand modified and satisfied.

21. For the reasons so recorded above, we dismiss the the appeal accordingly. No costs.

(S.C. GUPTE, J.) (ANOOP V. MOHTA, J.)

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