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

\+ **O.M.P. (COMM) 172/2017**

KSS PETRON PRIVATE LTD. & ANR. ..... Petitioners

Through: Mr A.S. Chandhiok, Mr Sanjeev Puri, Senior Advocates with Mr Sidharth Sethi, Ms Aruveena and Mr Anupam, Advocates.

versus

HPCL -MITTAL ENERGY LIMITED & ANR. ..... Respondents

Through: Mr Sandeep Sethi, Senior Advocate with Mr Kartik Nayar, Mr Rishab Kumar, Mr Prakhar Deep, Ms Sonali Mehta, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 10.04.2017

VIBHU BAKHRU, J

IA No. 4157/2017

1. Allowed, subject to all just exceptions.

2. The application is disposed of.

IA No. 4158/2017

3. This is an application seeking condonation of delay in re-filing.

4. For the reasons stated in the application, the same is allowed.

O.M.P. (COMM) 172/2017

5. Issue notice.

6. The learned counsel for the respondents accepts notice.

7. With the consent of the parties, the petition is taken up for final hearing.

8. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning an arbitral award dated 23.11.2016 (hereafter 'the impugned award') passed by the arbitral tribunal constituted by Justice Dr. Mukundakam Sharma (Retired), Presiding Arbitrator, Justice Mukul Mudgal (Retired) and Mr K.K. Singal. The impugned award was delivered by majority with Mr K.K. Singal dissenting.

9. The disputes involved between the parties essentially related to the question whether the settlement between the parties as recorded in the settlement agreement dated 24.08.2012 (hereafter 'the Settlement Agreement') stood rescinded on account of alleged failure on the part of the respondents to pay the Settlement Amount as agreed under the Settlement Agreement. The petitioners claim that the respondents had committed a breach of clause 7.1 of the Settlement Agreement by failing to make payment of the Settlement Amount and, therefore, their claims which were settled pursuant to the Settlement Agreement stood revived. The arbitral tribunal (by majority) has rejected the aforesaid claim. The petitioners seek to challenge the impugned award principally on the ground that the impugned award is contrary to the express terms of the Settlement Agreement.

10. Briefly stated the relevant facts necessary to address the controversy

are as under:-

10.1 Petitioner no.1, KSS Petron Pvt. Ltd. (hereafter 'KPPL') is a company engaged in Engineering, Procurement and Construction (EPC) contracts in Oil & Gas, Infrastructure and Industrial Sectors. Petitioner no.2, Petron Engineering Construction Ltd. (hereafter 'PECL') is stated to be a leading engineering and construction company. Petron Civil Engineering Pvt. Ltd. (hereafter 'PCEPL') was also one of the contracting parties and has since merged with KPPL. KPPL, PCEPL and PECL are hereinafter collectively referred to as 'the contractors'. Respondent no.1, HPCL-Mittal Energy Limited (hereafter 'HMEL') is a joint venture company between Hindustan Petroleum Corporation Ltd., a Government of India enterprise and Mittal Energy Investments Pte. Ltd. Respondent No.2, HPCL-Mittal Pipelines Limited (hereafter 'HMPL') is a wholly owned subsidiary of HMEL. HMEL/HMPL entered into various contracts with respect to a project relating to setting up a refinery at Bathinda, Punjab. There were nine contracts in all, out of which seven were entered into between HMEL on one part and KPPL or PCEPL and PECL on the other part. Two contracts were entered into between HMPL on one part and KPPL on the other part.

10.2 Certain disputes arose between the contractors and the respondents in respect of the nine contracts. Consequently, PCEPL (now merged with KPPL) commenced arbitration proceedings against HMEL in respect of three contracts. In respect of one of the contracts, arbitral tribunal was constituted. However, in respect of the two other contracts, PCEPL objected to the appointment of the sole arbitrator and initiated proceedings under Section 14 of the Act.

10.3 While the said proceedings were pending, the said parties (contractors and the respondents) entered into the Settlement Agreement dated 24.08.2012. In terms of the Settlement Agreement, the contractors settled their claims for an aggregate consideration of ₹1,42,45,59,195/- (the Settlement Amount). The break-up of the Settlement Amount under each contract was listed in 'Schedule E' of the Settlement Agreement.

10.4 The relevant clauses of the Settlement Agreement are set out below:-

> "**4. SETTLEMENT AMOUNT**:
>
> 4.1 HMEL and the Contractors have hereby settled HMEL's Claims and the Contractor's Claims in consideration of Rs. 1,42,45,59,195 (Rupees One Hundred Forty Two Crore Forty-five Lakh Fifty-nine Thousand One hundred Ninety five only) ("Settlement Amount"). The break-up of the Settlement Amount under each Contract is described in **Schedule E** hereto.
>
> 4.2 The Parties further agree that Settlement Amount constitutes a full and final settlement of the Contractors and HMEL Claims, whether or not the Claims are considered by the Contractors and HMEL to be in relation to works under or arising under the Contracts and/or not under or not arising under the Contracts and/or outside the scope of the Contracts and includes any claims of the Contractors and HMEL with respect to all the deductions carried out.
>
> 4.3 The Parties further agree that after giving effect to the HMEL's Release and the Contractors' Release, as set forth in Clauses 2.1 and 3.1 hereof, the Settlement Amount, subject to the deductions of TDS on account of WCT and other applicable taxes deductible at source, shall be payable by HMEL in accordance with Clause 7.

4.4 It is clarified that the Settlement Amount shall not in any event be payable in part to any Contractor and shall be payable only in entirety to the Contractors (acting jointly) on the completion of all of the Contractor's obligations under Clause 7.

4.5 For avoidance of doubt, it is clarified that Retained Amount under clause 6 and Reimbursements under clause 8 are not part of the Settlement Amount.

xxxx xxxx xxxx

7. PAYMENTS:

7.1 Subject to clause 4.1 and 7.2, Parties agree that the total amount payable by HMEL to the Contractors under this Clause is the Settlement Amount.

HMEL shall pay the Settlement Amount to the Contractors against ninety days irrevocable usance L/C, which shall be opened by HMEL, as per the format specified in **Schedule G**. The payment shall be made by HMEL within seven days of accomplishing of all the following by the Contractors:

(a) Parties forthwith withdrawing their Claims before the Arbitral Tribunal, the Delhi High Court and any other Court or Tribunal including Arbitral Tribunal having any pending litigations brought by the Parties in relation to the Contracts;

(b) Each Contractor submitting an indemnity Bond as per the format given in **Schedule H** hereto, under each Contract before HMEL making payment of the Settlement Amount.

7.2 The Parties agree that they shall submit withdrawal application, (if required the withdrawal application may be made jointly) as per the format given in Schedule-I, within seven days from the date of this Agreement before

the Arbitral Tribunal, the Delhi High Court and any other Court or Tribunal including Arbitral Tribunal having any pending litigations brought by the Parties in relation to the Contracts with respect to all their claims/counter claims and stay application/litigations.

7.3 In the event of failure of HMEL in making the payment of the Settlement Amount after completion of all the actions as stated in Clause 7.1 read with Clause 7.2, hereinabove, this Settlement Amount shall be treated as cancelled on expiry of seven days from the time period agreed in clause 7.1 above being the outer time limit, and all the rights of the Parties shall survive including revival of the Arbitral and Court proceedings. Further, in the joint application of the Parties, it shall be stated that in the event of non-payment of the Settlement Amount by HMEL in accordance with Clause 7.1 read with Clause 7.3, the Parties shall have the right to revive such arbitral and court proceedings.

7.4 Applicable discounting charges for usance period of L/C shall be shared between the Contractors and HMEL in the ratio of 40/60 respectively and reimbursed by HMEL within seven days after receipt of relevant supporting documentation from the Contractors in that regard. It is clarified that such reimbursement shall be additional to the Settlement Amount.

7.5 For avoidance of doubt it is clarified that Retained Amount under clause 6 and Reimbursement under clause 8 are not part of the Settlement Amount."

11. After the Settlement Agreement was entered into, the parties filed a joint application dated 24.08.2012 before the arbitral tribunal seeking to withdraw their claims and counter claims and the same were allowed. Similarly, upon applications filed before this Court, the petitions were disposed of in terms of the Settlement Agreement by an order dated

30.08.2012. It is not disputed that in terms of the Settlement Agreement, the Settlement Amount was to be paid on or before 07.09.2012.

12. Admittedly, a sum of ₹1,41,24,24,998/- was paid to the petitioners on 04.09.2012; that is, within the time frame as agreed under the Settlement Agreement.

13. On 19.09.2012, the parties entered into an Addendum to the Settlement Agreement. On 21.06.2013 - almost nine months after receiving the payment - KPPL sent a letter to HMEL claiming that in terms of clause 7.1 of the Settlement Agreement, the respondents were liable to pay an amount of ₹1,42,45,59,195/- but had only paid ₹1,39,67,89,756/- and hence, there was a shortfall in payment. The petitioners claimed that by virtue of clause 7.3 of the Settlement Agreement, failure to pay the full amount had resulted in cancellation of the Settlement Agreement and their respective rights and claims under the contracts stood revived. The petitioners also sought to revive the arbitral proceedings.

14. The respondents filed a petition before this Court (being OMP 826/2013) which was disposed of on 30.10.2013 by, *inter alia*, observing if a new tribunal is constituted, both parties would be free to agitate their respective points of view qua the Settlement Agreement dated 24.08.2012. Thereafter, on 14.11.2013, the petitioners invoked the arbitration clause under the Settlement Agreement and nominated their arbitrator. The respondents also nominated their arbitrator and both the arbitrators appointed Justice Dr. Mukundakam Sharma (Retired) as the third arbitrator and the arbitral tribunal was constituted.

15. The petitioners filed their claim before the arbitral tribunal, *inter alia*,

seeking a declaration that HMEL had breached clause 7.1 of the Settlement Agreement; the Settlement Agreement stood cancelled; and all the rights of the petitioners survived including arbitration proceedings instituted earlier.

16. The arbitral tribunal considered the rival contentions and after examining the evidence on record, passed the impugned award rejecting the petitioners' claim.

17. The arbitral tribunal held that the petitioners had accepted the Settlement Agreement as final and binding. The arbitral tribunal held that there was a deviation in the Settlement Amount with regard to the amount payable as well as in the mode of payment but the same was agreed and accepted to by the petitioners and, therefore, the obligation to pay the Settlement Amount stood discharged.

18. The petitioners being aggrieved by the impugned award have preferred the above petition.

Submissions

19. Mr Chandhiok, learned Senior Counsel appearing on behalf of the petitioners contended that the arbitral tribunal had grossly erred in returning the finding that the petitioners had agreed and accepted the short payment in discharge of the Settlement Amount. He further contended that there was no dispute that the payments made by the respondents were less than the Settlement Amount and thus, the impugned award was contrary to the express terms of the Settlement Agreement.

20. Next, he referred to emails dated 28.08.2012, 29.08.2012, 03.09.2012

and 04.09.2012 exchanged between the parties and submitted that the initial emails had correctly reflected the basic amount of ₹1,42,45,59,195/- which was unilaterally altered in the subsequent mails to ₹1,41,24,24,998/-. He submitted that the only issue that was being discussed was the deviation in method of making payment of the Settlement amount; whereas as per the Settlement Agreement, the payment was to be made by issuance of letter of credit, it was now proposed to be made by HMEL by taking credit from its bank as the financing charges (interest rate) was lower. The petitioners had agreed to bear their share of 40% of the interest charges. He stated that there is no other document on record which would indicate that the petitioners had agreed to accept a sum lower than the Settlement Amount.

21. Mr Sethi, learned Senior Counsel appearing for the respondents countered the aforesaid submissions and also referred to the emails exchanged on 04.09.2012. According to him, these mails clearly indicated that the petitioners had agreed to accept the amounts that were remitted by the respondents.

Reasoning and Conclusion

22. As noted above, there is no dispute that the Settlement Amount was to be paid within a period of seven days from the parties withdrawing their claims and each contractor (KPPL, PECL and PCEPL) submitting an indemnity bond in the format as provided in schedule H to the Settlement Agreement; that is, on or before 07.09.2012. In terms of clause 7.1, the Settlement Amount was to be paid against 90 days irrevocable usance L/C (as per format as specified in Schedule G of the Settlement Agreement). In

terms of clause 7.4, of the Settlement Agreement, the applicable discounting charges for usance period of L/C were to be shared between Contractors and HMEL in the ratio of 40:60. Admittedly the said terms were altered; however, there is a dispute as to whether only the method of payment was modified or whether the basic Settlement Amount was altered as well. In this regard, certain emails exchanged between the parties are important.

23. On 29.08.2012, Gourav Bhatia of HMEL sent an email seeking confirmation of the amount payable as indicated in the table quoted below:-

"Dear Sir,

Please find the revised tabulation sheet for your confirmation

Company	**Basic**	**Taxes**	**WHT**	**Net Payable**
Petron Engg	65,117,201	4,603,676	(3,248,341)	72,969,218
Petron Civil	625,482,354	24,967,488	13,408,616	637,041,226
KSS-(HMEL + HMPL)	733,959,640	133,335,785	56,198,893	811,096,532
	1,424,559,195	**162,906,949**	**66,359,167**	**1,521,106,977**

Regards

Gourav"

24. The aforesaid calculations were confirmed on behalf of the petitioners. It does appear that thereafter there were certain other discussions and on 04.09.2012, the following email was sent by Mr Abhinandan Lodha of HMEL to Mr Maheshwari of KPPL. The said mail reads as under:-

"Dear Mr. Maheshwari,

With reference to the discussion I would like the confirm the

company has got financing on its own line @10.50% p.a.
The above Interest rate is sustainably lower than LC backed financing hence as agreed by you we are now mobilized the funding on our own bank lines.
As per the agreed interest sharing mechanism below is the net payable amount to you.

					10.50% p.a. interest	
Company	**Basic**	**Taxes**	**WHT**	**Net Payable**	**60% Interest Cost for 90 days**	**Net payable to Company**
Petron Engg	65,117,201	4,603,676	(3,248,341)	72,969,218	(1,889,203)	71,080,015
Petron Civil	625,482,354	24,967,488	13,408,616	637,041,226	(16,493,259)	620,547,967
KSS-(HMEL + HMPL)	721,825,443	133,335,785	55,419,499	799,741,729	(20,705,642)	779,036,087
	1,412,424,998	**162,906,949**	**65,579,773**	**1,509,752,174**	**(39,088,104)**	**1,470,664,070**

You are kindly requested to confirm the above understanding, payable amount and send us the bank details to effect the payment."

25. Mr Maheshwari responded to the aforesaid mail by an email sent on the same day, which reads as under:-

> "Interest calculation appears to be 100%. Please allocate 40 % to KSS & remit the net payable to respective Bank accounts as already appearing in HMEL masters."

26. However, it appears that even prior to the receipt of the email sent by Mr Maheshwari, Mr Abhinav Lodha of HMEL re-sent a modified statement, calculating the interest cost payable at 40%. The said email reads as under:-

"Resending the calculation @ 40%

					10.50% interest	
Company	**Basic**	**Taxes**	**WHT**	**Net Payable**	**40% Interest Cost**	**Net payable to Company**
Petron Engg	65,117,201	4,603,676	(3,248,341)	72,969,218	(755,681)	72,213,537
Petron	625,482,354	24,967,488	13,408,616	637,041,226	(6,597,304)	630,443,923

Civil						
KSS-(HMEL + HMPL)	721,825,443	133,335,785	55,419,499	799,741,729	(8,282,257)	791,459,473
	1,412,424,998	**162,906,949**	**65,579,773**	**1,509,752,174**	**(15,635,242)**	**1,494,116,932**

27. It is apparent from the above that HMEL had sought confirmation regarding the computation of the amount payable to the petitioners and the same was confirmed by Mr Maheshwari by his email dated 04.09.2012.

28. It is also not disputed that HMEL made payments in terms of the statement as indicated in the above email (the basic payment being ₹1,41,24,24,998/-). Admittedly, no protest or reservation of any kind was lodged or expressed for any short payment at the material time.

29. During the course of the arbitral proceedings, Mr Harak Banthia, (Chief Finance Officer of the respondents) filed an affidavit *inter alia* affirming as under:-

> "10. I state that pursuant to the execution of the Settlement Agreement, the payment was to be made as per a Letter of Credit ("LC") and under the Settlement Agreement, the said LC discounting charges had to be shared between the parties in the ratio of 40:60 (being Claimant-40:Respondent-60). However, after the execution of the Settlement Agreement, Mr. Keswani approached me that since they were unable to obtain competitive rates from banks in discounting Letter of Credit, he requested me if we can approach the banks and get Letter of Credit discounted at rates which was going to be at better rates. As Chief Financial Officer, I was also keen to save the said costs since it was going to benefit both the Parties. Mr. Keswani confirmed to me that the Claimant's cost was going to be around 15% p.a. Mr. Keswani explained to me that banks were charging high amounts to them due to their poor credit rating. I agreed that

this rate was very high and I was keen to accept this proposal as we were also to share 60% of the said discounting costs. The proposal was going to benefit the Claimant's cost in terms of immediate payment and lower charges and would also save the Respondent from the exorbitant charges being offered to the Claimant's owing to their credit rating. After receiving the proposal from Mr. Keswani, I discussed the same with my treasury department and sought their views on their interest rates. I was informed by the treasury department that the said rates being offered to the Claimants were indeed exorbitant and that it would be prudent to make a direct payment to the Claimants as our own financing/borrowing costs were then substantially lower at around 10.50% p.a.

11. I state that after receiving of the said confirmation from the treasury department, I immediately contacted Mr. Keswani and offered that we can deduct their share of discount @ 10.50% p.a. and I also mentioned that the Respondent could even consider making a direct payment to the Claimants instead of the Claimant's suffering the pain of discounting the Letter of Credits etc. which as stated was uncertain and exorbitant rates of around 15% as quoted by the Claimant. I state that my proposal was immediately accepted and even appreciated by Mr. Keswani and Mr. Maheshwari. Several telephonic discussions in this regard took place between me, my team and the Claimant's representatives. Pursuant to our mutual agreement for the same, it was agreed between both parties that certain other deductions to be carried out from the Settlement Agreement in light of the reduced charges, being borne by the claimants, the direct payments being made to the Claimant instead of payment by Letter of Credit etc. The same was agreed by the Claimants and on the basis of our understanding with Mr. Keswani and Mr. Maheshwari, the revised amount so agreed was duly recorded in writing to Mr. Maheshwari by members of my accounts team being Mr. Abhinandan Lodha and Mr. Gourav Bhatia. I categorically state that following various discussion

> between me, my team on behalf of the Respondent and Mr. Maheshwari and Mr. Keswani on behalf of the Claimants, I specifically instructed my accounts team to send the figures to the Claimant's for their written approval and only after receiving the Claimant's written approval where final revised amounts were mentioned, I authorized the payments made on 4 September 2012."

30. Apparently, Mr Banthia was not cross-examined on the aspect of the discussions as affirmed by him.

31. It is also relevant to note that after receipt of the amounts as indicated above, the parties had entered into an Addendum to the Settlement Agreement on 19.09.2012. Admittedly, the said Adddendum also did not indicate that the Settlement Agreement had failed on account of any alleged short payment; on the contrary, the petitioners had re-affirmed the Settlement Agreement.

32. The arbitral tribunal considered the above evidence and material on record and passed the impugned award (by majority) rejecting the contention that the Settlement Agreement had to be treated as cancelled, for several reasons. First, the arbitral tribunal noted that the amount of ₹1,41,24,24,998/- (as against the originally settled amount of ₹1,42,45,59,195/-) was paid pursuant to the discussions and agreement between the parties as reflected in the emails and the shortfall of ₹1,21,34,197/- was a very small fraction of the amount paid.

33. Second, the arbitral tribunal noted that the records clearly indicate that there were discussions between the parties and the exchange of emails revealed that the petitioners had agreed and accepted deviation of the terms

of the Settlement Agreement not only in respect of the manner in which the payments were to be made (from being paid via letter of credit to direct payment) but also with regard to revision of the amounts payable under the Settlement Agreement. The arbitral tribunal observed that the petitioners had chosen not to cross-examine Mr Banthia with regard to his testimony and, accordingly, accepted the evidence tendered by Mr Banthia that there were discussions that had fructified into an understanding as affirmed by him.

34. Third, the arbitral tribunal also noted that the financing charges that were payable by the petitioners pursuant to the change in the method of payment were substantially lower than L/C backed financing and inferred that the petitioners had agreed to receive a lower amount for the aforesaid reason.

35. Fourth, the arbitral tribunal noted that there was no protest or reservation expressed by the petitioners at the material time and they had accepted the payments made; the allegation that there was a shortfall in the payment was made at a much belated stage.

36. Lastly, the arbitral tribunal noted that the parties had entered into an Addendum to the Settlement Agreement on 19.09.2012 which also indicated that the parties were treating the Settlement Agreement as subsisting and binding.

37. The findings of the arbitral tribunal cannot by any stretch be stated to be perverse or patently illegal. The contention that the impugned award runs contrary to the express terms of the Settlement Agreement is also unpersuasive considering the finding of the arbitral tribunal that the parties

had agreed to deviate from the terms of the Settlement Agreement to the extent of the manner and the amount payable. The arbitral tribunal found that the amount payable was confirmed on behalf of the contractors as is evident from the emails referred to above. These finding of facts by the arbitral tribunal are final and cannot be interfered with unless such findings are established to be perverse or patently illegal. This Court does not act as an appellate court to re-examine and re-appreciate the evidence considered by the arbitral tribunal and unless the finding/decision of the arbitral tribunal is found to be perverse or wholly unsustainable in law, no interference with the arbitral award is warranted.

38. It is also relevant to mention that Mr Chandhiok did not advance any arguments in support of the view expressed by Mr K.K. Singal in his dissenting note. He had stated at the outset that he was not defending the said view. Thus, it is not necessary for this Court to express any view on Mr Singal's dissenting note.

39. In view of the above, the present petition is dismissed. No order as to costs.

VIBHU BAKHRU, J

APRIL 10, 2017
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