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

% ***Date of Judgment: 22nd May, 2019***

\+ FAO(OS) (COMM) 117/2019

UNION OF INDIA ..... Appellant
Through: Mr. Ashok Singh, Advocate

versus

M/S SIKKA ENGINEERING COMPANY ..... Respondent
Through: None

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. ***(ORAL)***

CM APPLs.24703-04/2019 (Exemption)

Allowed, subject to all just exceptions.

CM.APPL.24705/2019 (delay)

There is delay of 21 days in filing the accompanying appeal.

Heard.

The application is allowed and the delay of 21 days in filing the appeal is condoned

The application stands disposed of.

CM.APPL.24706/2019 (delay)

There is delay of 06 days in re-filing the accompanying appeal.

Heard.

The application is allowed and the delay of 06 days in re-filing the appeal is condoned

The application stands disposed of.

FAO(OS) (COMM) 117/2019

1. Present appeal under Section 37 of *the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act')* arises out of two orders passed by the learned Single Judge of this Court while deciding the objections to the Award filed by the appellant herein dated 6th December, 2018 and 19th December, 2018. While the first order decides the objections pertaining to Claim No.1 and the matter was adjourned to enable the appellant to seek instructions in the matter with respect to lifting of surplus material from the Udhampur Depot in according with Clause 1.2.53 of the Contract read with Clause 32 of *the General Conditions of Contract*, the second order, which is in continuation of the first order, decides Claims No.8, 10 and 21.

2. Mr. Ashok Singh, learned counsel appearing for the appellant, very fairly submits that he has instructions not to press the Claims No.8, 10 and 21. The Claim No.1 in this case comprises of six bills submitted by the respondent and a final bill in the total sum of Rs.1,54,25,671/-. Mr. Singh submits that the learned Arbitrator as also the learned Single Judge has failed to take into account the sample check report in respect to the measurement of actual weight of steel; the joint checks of steel structure dated 29th September, 2016 and the joint inspection report dated 6th April, 2017 as also

the communication addressed by the respondent to the appellant dated 25th November, 2016. It is the case of the appellant here that payment of six bills could not have been allowed by the Arbitrator for the reason that the steel supplied by the vendor was underweight and accordingly, the respondent could not have been given benefit for the material which was substandard and not in accordance with the specifications.

3. Mr. Singh has placed strong reliance on a communication dated 25th November, 2016 to buttress his submission that the respondent had unconditionally admitted the fact that the material was underweight and had also agreed to replace the same with fresh material. However, we find that the appellant has not argued and pressed this point before the learned Single Judge. Hence, it is not open for the appellant to press this issue before us at this stage.

4. The learned Single Judge has declined the prayer of the appellant herein in view of the fact that as per the terms of the Contract, M/s. Jain Steel Industries was one of the approved vendors of the appellant itself. The learned Single Judge has noticed that as per one of the conditions of the Contract, the respondent was to procure material from one of the approved vendors of appellant. Moreover, it was mandatory for the respondent to obtain certification with respect to the quality of the material from RITES, an agency nominated by the appellant itself. Another factor, which has prevailed upon the learned Single Judge, is the fact that the appellant did not complain with regard to the defective material during the currency of the work or even thereafter. We may also note that the nature of the work required supply of different types of fabricated and galvanized items, which

were to be used by the respondent and accordingly, the names of the vendors were provided by the appellant.

5. In addition to the three factors, which we have noticed in the paragraph No.4 aforegoing, being (i) that M/s. Jain Steel Industries was one of the approved vendors; (ii) the material was certified from RITES and (iii) both the agencies were nominated by the appellant itself, we cannot ignore that during the currency of the work, no protest was made by the appellant herein. We find no reason to take a different view than the view taken by the learned Single Judge for the reasons foregoing.

6. Mr. Singh submits that he is also aggrieved by the finding returned by the learned Single Judge pertaining to Claim No.7. However, reading of the order of the learned Single Judge would show that the said Claim was not pressed and thus, there is no finding on the same by the learned Single Judge.

7. No other claim is pressed.

8. Moreover, the law stands crystallized that the scope of interference in an appeal under Section 37 of the Arbitration and Conciliation Act is narrower. The Division bench of this Court in the case of ***MTNL vs. Fujitshu India Private Limited*** reported at 2015 SCC OnLine Del 7437, held in para 19 as under:

> *"19. The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts*

and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34."

9. Furthermore, this court time and again in its earlier judgments titled as ***M/S. L.G. Electronics India Pvt. Ltd. Vs. Dinesh Kalra*** reported at *2018 SCC Online Del 8367*, FAO(OS)(COMM) 55/2018 titled as ***M L Lakhanpal vs. Darshan Lal & Anr.*** and ***ADTV Communication Pvt. Ltd Vs. Vibha Goel & Ors.***, reported at *2018 SCC Online Del 8843* reiterated the limited scope of intervention in an appeal under Section 37 of the Arbitration and Conciliation Act and held as under:-

"It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd, reported at 2014(144) DRJ 220(DB), in para 16 it has been held as under:

"16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India MANU/DE/1853/2011 and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the

OMP filed under Section 34 of the Act and was raised for the first time in the arguments."

In the case of Steel Authority of India v. Gupta Brothers Steel Tubes Limited, (2009) 10 SCC 63, the Supreme Court has laid down that an error relatable to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

The Apex Court in J.G. Engineers (P) Ltd. v. Union of India, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the aforesaid judgement relied upon the pronouncement of ONGC Ltd. Vs. Saw Pipes , in paragraph 19 , held as under:-

"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [MANU/SC/0314/2003 : (2003) 5 SCC 705] held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."''

10. Thus, in view of the law under Section 37 of the Act, we find no ground to entertain this appeal.

11. The appeal is accordingly dismissed.

CM APPL.24707/2019 (stay)

The application also stands dismissed in view of the order passed in the appeal.

G.S. SISTANI, J

JYOTI SINGH, J

MAY 22, 2019
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HIGH COURT OF DELHI
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