* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
R-21 (***Not reportable***)
\+ **O.M.P. 431 of 2003**

IRCON INTERNATIONAL LTD ..... Petitioner
Through: Mr. K.R. Gupta with
Ms. Payal, Advocates.

Versus

BUDHRAJA MINING AND CONSTRUCITON
LTD. & ANR ..... Respondents
Through: Mr. Anil Seth with
Mr. M.K. Pathak, Advocates.

and

R-22
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CORAM: JUSTICE S.MURALIDHAR

O R D E R
% 08.11.2012

1. OMP No. 431 of 2003 under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by Ircon International Limited ('IRCON') challenges an Additional Award dated 11th August 2003 passed by the learned Arbitrator in the application under Section 33 of the

Act in the dispute between IRCON and Budhraja Mining and Constructions Limited ('BMCL') arising out of the execution of the earthwork for railway formation in Package II-B of NTPC (Dadri) railway siding project for which the sub-contract had been entered into between the parties.

2. OMP No. 432 of 2003 under Section 34 of the Act has been filed by IRCON against an additional Award dated 11th August 2003 passed by the learned sole Arbitrator in an application under Section 33 of the Act in the dispute between IRCON and BMCL arising out of the execution of the earthwork for railway formation in Package II-C of NTPC (Dadri) railway siding project.

3. The background to these petitions is that two separate Awards were passed by the learned sole Arbitrator on 23rd May 2002. In the Award in the disputes pertaining to Package II-B, while allowing Claim No. 1 the learned Arbitrator awarded a sum of Rs. 5,52,701 as against Rs.88,81,785 claimed as balance amount due as per the work executed under the contract. Apart from Claim No.1, the learned Arbitrator allowed Claim No. 9 in the sum of Rs. 52,106 as charges for carriage of Hume pipes. In all, IRCON was to pay to BMCL a sum of Rs. 6,04,807 together interest @ 12% per annum from the date of the Award till the date of payment.

4. In the separate Award dated 23rd May 2002 in respect of the disputes

pertaining to Package II-C, the learned Arbitrator held that BMCL was entitled to Rs. 6,17,278 under Claim No. 1 as against the claimed sum of Rs. 64,09,104. In arriving at this figure, the learned Arbitrator noted the fact that as per the final bill prepared by IRCON, Rs. 6,45,137 was payable, out of which Rs. 2 lakhs was already paid and therefore, the balance amount of Rs. 4,45,137 was payable. Further, the learned Arbitrator noted that in view of the discrepancy pointed out by BMCL in Exhibit C-56 and C-57 as regards the quantities of additional work the amount in the final bill stood enhanced 'on agreed rates to Rs. 1,72,141.' Since there was no clear response from IRCON on this point, the learned Arbitrator allowed Rs. 4,45,137 + Rs. 1,72,141 = Rs. 6,17,278. The learned Arbitrator also allowed Rs. 55,000 under Claim No. 2 for amount withheld from the running bills, Rs. 65,000 under Claim No. 3 for carriage, fixing and laying of Hume pipes, Rs. 62,030 under Claim No. 4 for refund of hire charges, Rs. 7,89,355 towards extra expenditure incurred in providing excess earth due to settlement in foundation under Claim No. 5. Claim Nos. 6 to 9 were rejected. In all, IRCON was asked to pay Rs. 15,88,663 together with interest on the said amount at 12% per annum.

5. Admittedly, the aforementioned awarded amounts were paid by IRCON to BMCL on 23rd July 2002. However, prior to the making of the said payment by IRCON to BMCL, applications were filed by BMCL on

18th June 2002 before the learned Arbitrator under Section 33 of the Act stating that there was a computation error in each of the Awards in respect of Claim No. 1. BMCL accordingly sought rectification. Since the applications under Section 33 of the Act were filed beyond a period of 30 days after the passing of the Awards, BMCL filed applications under Section 5 of the Limitation Act, 1963 ('LA') for condonation of delay. Consequently, while acknowledging payment of the awarded amount on 23rd July 2002, BMCL made an endorsement that it was "subject to the application dated 18th June 2002 awaiting disposal."

6. BMCL's applications under Section 33 of the Act were disposed of by two separate additional Awards dated 11th August 2003, both of which have been challenged by IRCON in the present petitions. In the additional Award pertaining to the dispute arising out of Package II-B, the learned Arbitrator directed that the amount payable under Claim No. 1 as set out in para 19 of the Award dated 23rd May 2002 should read as Rs. 5,48,093.07 in place of Rs. 29,448 and thus the amount awarded should be read as Rs. 11,52,900. In the additional Award dated 23rd May 2002 pertaining to the dispute arising out of Package II-C, the learned Arbitrator held that the amount payable in para 37 of the Award dated 23rd May 2002 should read as Rs. 11,72,141 in place of Rs. 1,72,141. Correspondingly in para 67 (i) of the Award the amount payable had to be read as Rs. 15,88,663 + Rs. 7,39,812 = Rs. 23,38,475. Consequently,

IRCON was directed to pay BMCL Rs. 5,67,672, in addition to the amount already awarded, within two months failing which IRCON would liable to pay interest @ 12% per annum from the date of the additional Award till payment.

7. The present petitions under Section 34 of the Act were filed by IRCON challenging both the original Awards dated 23rd May 2002 and the corresponding additional Awards dated 11th August 2003. Initially, by an order dated 24th September 2007 the learned Single Judge of this Court held that the delay in BMCL filing the applications under Section 33 of the Act could not have been condoned by the learned Arbitrator under Section 5 of LA. Consequently, the additional Awards dated 11th August 2003 were set aside. Liberty was granted to the parties to challenge the original Awards dated 23rd May 2002 if the law otherwise permitted them to do so.

8. Aggrieved by the above order, BMCL filed FAO (OS) Nos. 449 and 451 of 2007. The Division Bench allowed the appeals by a common order dated 3rd May 2012, the operative portion of which reads as under:

> "We thus set aside the impugned order of the learned Single Judge dated 24th September 2007. However, the matter cannot rest at this since, the merits of the plea of the Respondent under the application under Section 34 of the said Act has not been dealt with by the learned Single Judge. It is agreed by learned counsels for the parties that this would require the attention of the learned Single Judge and an adjudication on that aspect. Thus, the matter will have to be remitted to the learned Single Judge dealing with the matters

> to decide the objections of the Respondent on merits of the claim qua the issue of there being a clerical mistake in the Award, the findings of which is in favour of the Appellant."

9. Thereafter, IRCON filed written submissions in both petitions before this Court on 8th October 2012. Mr. K.R. Gupta, learned counsel appearing for IRCON assailed both the additional Awards dated 11th August 2003 on the ground that the learned Arbitrator far exceeded the scope of the jurisdiction under Section 33 of the Act by deciding matters that did not even form part of the original claims filed by BMCL. It was submitted that since under Claim No. 1 the BMCL had not raised any claim on the basis of alleged quantities of work done, there was no occasion for IRCON to offer any comments thereon in its statement of defence filed before the learned Arbitrator. IRCON had urged before the learned Arbitrator that if it had an inkling that BMCL was going to file an application under Section 33 of the Act for rectification of the Awards then IRCON might not have made payment of the awarded amounts and preferred to challenge the Awards. He added that since in respect of Claim No. 1 pertaining to Package II-B the amount awarded for the work done was Rs. 29,448 and in respect of Claim No.1 pertaining to Package II-C the additional amount awarded was only Rs. 1,72,141 IRCON did not consider it necessary to challenge the said Awards. However, what the learned Arbitrator granted in the impugned additional Awards were considerably higher sums.

10. Mr. Gupta further submitted that a perusal of the additional Awards showed that the learned Arbitrator relied on the statements filed by BMCL along with written arguments at the time of final hearing in the main arbitration proceedings. The said written arguments were not exchanged between the parties. Consequently, no response thereto was filed by IRCON. Therefore, in terms of Section 18 of the Act, IRCON was denied an effective opportunity to defend the revised claims. Further according to Mr. Gupta, despite holding that BMCL was not entitled to revised rates, the learned Arbitrator had in the impugned additional Awards entertained the further claims of BMCL on the basis of the revised rates and this was not permissible in law. In short, the submission was that matters which did not form subject matter of Claim No. 1 in each arbitral proceedings were allowed to be raised and entertained by the learned Arbitrator at the stage of final written arguments.

11. Mr. Gupta urged that the additional Awards in respect of Claim No. 1 in both matters to the above limited extend should be set aside and the learned Arbitrator be asked to decide afresh BMCL's applications under Section 33 of the Act concerning the issue of additional claim under Claim No. 1 in respect of each arbitration proceedings. He referred to the decision of this Court in ***Poysha Oxygen Pvt. Ltd. v. Ashwini Suri 2009 (3) Arb.LR 533 (Delhi).*** He further referred to the decision of the Supreme Court in ***Inderpreet Singh Kahlon v. State of Punjab AIR 2006***

SC 2571 and submitted that the mere acceptance of the Awards originally passed by the learned Arbitrator on 23rd May 2002 and the making of payment by IRCON should not be taken as waiver by IRCON of its right to challenge the additional Awards.

12. Mr. Gupta also contended that question of measurement of works was an 'excepted matter' which was covered by Clause 49 (5) of the contract which clearly stated that the decision of the Accepting Authority on any such dispute or difference or interpretation shall be final and binding on both the parties and shall be beyond the scope of the settlement of disputes by arbitration. He referred to the letter dated 14th January 1994 written by BMCL to IRCON disputing the measurements recorded and submitted that no additional claim in respect of such dispute could have been the subject matter of arbitration. He pointed out that this was urged by IRCON in its written submissions filed before the learned Arbitrator and this was one more reason why the impugned additional Awards should be set aside.

13. Mr. Anil Seth, learned counsel for the Respondent/BMCL pointed out that the scope of the present petitions was limited to considering whether the impugned additional Awards dated 11th August 2003 were sustainable in law. As far as the original Awards were concerned, since payments of the amounts awarded thereunder had already been made by IRCON and no challenge thereto was made till date, there was no question of

reopening the original Awards. He sought to demonstrate that what was urged by way of written arguments before the learned Arbitrator was part of the claim petitions filed by BMCL before the learned Arbitrator.

14. Mr. Seth disputed the assertions of Mr. Gupta that what was sought to be claimed by it in application under Section 33 of the Act were the revised rates. According to him, in respect of the claim concerning Package II-B the learned Arbitrator made a mistake in taking from the statement enclosed with the written submissions (which set out the amounts payable in respect of the quantities of work "jointly measured but not paid") the figure of Rs. 29,448. That figure pertained to the amount payable for work concerning the service road as shown in the bottom of the first page (Schedule-I). The total figure of Rs. 5,48,093.97 was shown at the bottom of Schedule II. Even as regards the Award in respect of Package II-C instead of Rs. 11,72,141, the learned Arbitrator took the figure as Rs. 1,72,141. Against Sl.No. 1 in the Annexure to the written submissions the correct figure was Rs. 4366.95 and not Rs. 436695.00. Therefore, the corrections made to the original Awards were justified.

15. Mr. Seth submitted that the plea of excepted matter should not be permitted to be raised by IRCON at this stage, particularly since the award of the additional amounts under Claim No.1 as reflected in both original Awards was not challenged by IRCON till date.

16. The Court first would like to deal with the issue concerning the 'excepted matter'. There is no doubt that IRCON had, in its original statement of defence, urged that any dispute regarding measurements constituted an excepted matter under Clause 49 (3) of the General Conditions of Contract ('GCC'). In its letter dated 14th January 1994 BMCL stated in the opening para "we are submitting herewith the final bill in respect of the above mentioned work." This was in relation to the works in Package II-B. According to Mr. Seth, a similar letter was written by BMCL in respect of Package II-C as well. In the said letter there was a dispute raised as regards measurements as claimed and as recorded. In deciding Claim No. 1 in the Awards dated 23rd May 2002 the learned Arbitrator admitted the additional claim for the work done but about which there was a dispute concerning measurements. In para 19 of the Award concerning Package II-B, the learned Arbitrator observed as under:

> "19. The Claimant has pointed out certain discrepancies in respect of quantities as mentioned in the final bill prepared by the Respondent and quantities mentioned in the measurement book Schedule I (Page 91) of the written argument shows that on account of such miscalculations Rs. 29,448 more are payable as per contract rates. That the amount of Rs. 5,23,253 + Rs. 29,448 = Rs. 5,52,701) is payable under this claim is not disputed in written arguments filed by the Respondent."

17. In para 37 of the Award in respect of Package II-C the learned Arbitrator observed as under:

> "37. According to the final bill prepared by the Respondent, Rs. 6,45,137 was payable and out of the amount Rs. 2 lakhs

> were paid. Thus Rs. 4,45,137 are payable. The claimant has pointed out in C-56 and C-57 the discrepancies in recorded quantities and the final bill which would enhance the amount of final bill on agreed rates to Rs. 1,72,141. There was no clear response from the Respondent on this point. Thus I allow Rs. 4,45,137 + Rs. 1,72,141 = Rs. 6,17,278 to the Claimant in the final bill."

18. Therefore, in awarding the additional amounts, the learned Arbitrator rejected IRCON's plea that it was an 'excepted' matter. IRCON did not challenge the Awards soon after they were made. Admittedly, payments were made to BMCL of the awarded amount including additional amounts under Claim No. 1 in each Award dated 23rd May 2002. While accepting payment from IRCON on 23rd July 2002, BMCL made an endorsement that it was accepting the payments subject to the applications made (which referred to those under Section 33 of the Act) on 18th June 2002. Therefore, it cannot be said that IRCON was unaware of the fact that BMCL had applications before the learned Arbitrator subsequent to the original Awards.

19. When the present petitions were filed no doubt in the prayer clause IRCON sought to challenge the Awards dated 23rd May 2002 "to the extent that it allowed additional amounts to the BMCL under Claim No. 1 in each Award." However, while partly allowing the said petitions on 24th September 2007 and setting aside the additional Awards dated 11th August 2003, this Court did not entertain the challenge to the Awards dated 23rd May 2002. It only stated that "it would be open to the parties to challenge

the Awards dated 23rd May 2002 if the law otherwise permits them to do so." Consequently, the present petitions were allowed only to the above limited extent. Admittedly, no appeals were filed by IRCON to challenge the above order dated 24th September 2007 to the extent it negatived the challenge to the original Awards dated 23rd May 2002. Appeals were filed by BMCL to the extent that the additional Awards were set aside on the ground of limitation. While setting aside the order dated 24th September 2007 the Division Bench remitted the matters to this Court to decide the objections of IRCON on merits qua the issue of there being a clerical mistake in the Awards. IRCON thus accepted the original Awards dated 23rd May 2002 to the extent that they also awarded some amount towards additional work done and measured but not paid for. In the considered view of this Court, IRCON cannot be permitted at this stage to challenge the original Awards to the extent they award BMCL additional amounts for the work done and measured on the ground that it was an 'excepted' matter.

20. The next plea concerns the scope of the jurisdiction of the learned Arbitrator under Section 33 of the Act, which 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."

21. The above provision permits the arbitral Tribunal to correct an error of the type referred to in Section 33 (1) (a). The error could be clerical, typographical or of a similar nature. Under Section 33 (1) (b) the arbitral

Tribunal may also be requested to interpret a specific part of the Award. As far as the present case is concerned, the errors which were sought to be corrected pertained to Section 33 (1) (a) of the Act.

22. There is no merit in the contention of IRCON that it was denied an effective opportunity of presenting its defence to BMCL's applications under Section 33 of the Act. Not only were oral arguments addressed but written submissions were also filed by both parties before the learned Arbitrator. By the time the applications under Section 33 were heard, IRCON had copies of the written submissions filed by BMCL after final arguments in the main arbitration.

23. The learned Arbitrator was conscious that he had no powers to review the original Awards which already rejected the claim for revised rates. In the additional Award concerning Package II-B the learned Arbitrator observed as under:

> "24. Now coming to the merits of the application. There has come about a calculation error in determining the actual amount payable in para 19 of the Award. In Claim No. 1, Rs. 88,81,785 were claimed. Basically, this claim was based on the plea of the Claimant that it was entitled to have the revised rates. It was held that the claimant was not entitled to the revised rates. This claim also asked for finalization of the final bill. The Respondent prepared the final bill for Rs. 8,23,253 and had paid Rs. 3 lakhs and thus Rs. 5,23,253 were allowed by me as payment due in the final bill. Apart from this, the Claimant had claimed Rs. 5,48,090.07 as the amount due on the basis of joint measurements of specified items on the plea that the quantities recorded in measurement book were less than recorded in joint measurement document. I allowed the amount of Rs. 29,448 and referred

to on page 91 of written arguments in para 19 of the Award.

However, the total amount as per page 91 and 92 of written arguments was Rs. 5,48,903.07. Thus on the fact of it, a calculation error crept in the award."

24. The learned Arbitrator also acknowledged that he was only correcting a typographical error. In para 26 of the additional Award he observed as under:

"26. There is no power of review conferred on arbitral Tribunal under the Act. Thus in deciding the present application, I cannot allow any new plea to be urged under Section 33 of the Act. I have only to see as to whether any computation errors have occurred or not. Thus the additional amount payable to the Claimant is Rs. 5,48,093 – 29,448 = 5,18,545. The prayer of the Claimant made in subsequent communication dated 29th July 2002 for grant of any amount of escalation and interest are not within the scope of Section 33 of the Act and are rejected."

25. Indeed, what appears to have happened is that while perusing the chart showing the quantities jointly measured but not paid, the learned Arbitrator took into account the amount appearing in the bottom of the Schedule-I whereas the total agreement amount in respect of the quantities measured and not paid was Rs. 5,48,093.07 which figure is shown at the bottom of Schedule-II.

26. The contention that the learned Arbitrator awarded the revised rates is not correct. What was sought to be corrected pertained to the 'agreement amount' calculated on the basis of 'agreement rate' and not revised rates or the revised amount. The measurements set out in the annexures to the

written submissions were no different from those already incorporated in the main statements of claims filed by BMCL. Therefore, there is no merit in the contention of IRCON that what was sought to be claimed by BMCL by way of application under Section 33 of the Act was beyond its statements of claim filed originally before the learned Arbitrator.

27. Likewise as regards the Award in respect of Package II-C, this Court finds that in the statement titled 'Financial implication of additional work entrusted during Feb'1993 (Ex.C-56 and C-57) on the basis of agreement rates' the total amount at the bottom of the page is Rs. 11,72,141.09. It was this amount that had to be taken into account by the learned Arbitrator whereas he took into account Rs. 1,72,414. This Court is, therefore, satisfied that what the errors in both original Awards which were corrected by the learned Arbitrator were either clerical or typographical and therefore within the scope of his jurisdiction under Section 33 of the Act.

28. This Court does not find grounds having been made out by IRCON under Section 34 of the Act to interfere with the two additional Awards dated 11th August 2003. Both petitions are dismissed with no order as to costs.

S. MURALIDHAR, J.

November 8, 2012
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