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

\# **CNR No. DLHC010371092019**

\+ O.M.P. (COMM) 373/2019 & I.A. 12632/2019

UNION OF INDIA .....Petitioner

Through: Ms. Pratima N. Lakra, CGSC with Mr. Shailendra Kumar Mishra, Advocates.

versus

M/S ANS CONSTRUCTION LTD .....Respondent

Through: Mr. Sandeep P. Agarwal, Senior Advocate with Mr. Sushil Aggarwal, Advocate.

(22)

\# **CNR No. DLHC010373192019**

\+ O.M.P. (COMM) 377/2019 & I.A. 12702/2019

UNION OF INDIA .....Petitioner

Through: Ms. Pratima N. Lakra, CGSC with Mr. Shailendra Kumar Mishra, Advocates.

versus

M/S ANS CONSTRUCTION LTD .....Respondent

Through: Mr. Sandeep P. Agarwal, Senior Advocate with Mr. Sushil Aggarwal, Advocate.

Date of Decision: 11th August, 2026

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G E M E N T

TUSHAR RAO GEDELA, J : (ORAL)

1. These are petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "*the Act*") seeking setting aside the Arbitral Award dated 05.04.2019 passed by the learned Arbitrator in the

Arbitration between *"M/s ANS Construction Private Limited vs. Union of India"* bearing Case No.3/2018 (hereinafter referred to as *"the impugned award"*).

2. The brief facts culled out of the petitions, shorn of unnecessary details, are as under:

a. The petitioner herein had awarded work to the respondent company on 07.09.2010 for the construction of 44 Nos. Type-II, 6 Nos. Type-IV, and 2 Nos. Type-V family quarters (20th Bn. HQ) including development work such as UGT, Rain Water Harvesting, Site Office, Electrical Sub-Station, Leveling of Road, Water Supply and Sewer Line etc. at Balrampur (UP). The stipulated date of start and completion as per the agreement dated 28.09.2010 executed between the parties were 29.09.2010 and 28.12.2011 respectively.

b. As per the terms of the contract agreement, the respondent company had furnished an FDR of Rs.9,50,487/- towards Earnest Money Deposit (EMD), Bank Guarantee of Rs.57,91,117/- as Performance Security for due performance of the terms of the contract, Bank Guarantee of Rs.9,50,487/- towards EMD, and a Bank Guarantee of Rs.1,16,994/- on account of Security Deposit.

c. During the subsistence of the contract, certain disputes arose between the parties. Since the contract contained an arbitration clause, those disputes were referred by the Chief Engineer of the petitioner at its Northern Zone-II for adjudication to Shri V.K. Malik, appointed as Sole Arbitrator on 02.05.2014. Originally, there were thirteen (13) claims of the respondent, however, later on, upon request of the respondent, additional twelve (12) claims were also referred to the learned Arbitrator, Mr. V.K. Malik on 23.07.2015 for adjudication.

Counter Claims of the petitioner were also referred to the learned Arbitrator, Shri V.K. Malik. However, after the arbitral proceedings were completed by the earlier learned Arbitrator, Shri V.K. Malik, the respondent again requested the Chief Engineer (Northern Zone-II) of the petitioner to refer six (6) additional claims on 16.02.2017. The petitioner objected to the jurisdiction of the Arbitral Tribunal to adjudicate the additional six (6) claims, and therefore, these six (6) claims could not be adjudicated by the learned Arbitrator in his award dated 26.07.2017 (**First arbitral proceedings**).

d. Since the earlier learned Arbitrator, Shri V.K. Malik refused to entertain the additional six (6) claims of the respondent company relating to release of the bank guarantees in question, the release/discharge of the subject BGs were referred to another Sole Arbitrator, Mr. S.K. Verma, on 25.07.2017.

e. However, before learned Arbitrator, Sh. S.K. Verma could enter upon the reference, Sh. V.K. Malik, on 26.07.2017, gave his final award in the matter whereby an award of Rs.1,63,52,110/- was passed in favour of the respondent company, and against the petitioner, after adjusting an amount of Rs.69,50,947/- on account of Mobilization Advance claimed by the petitioner by way of counter-claim. Thereafter, an application was moved by the respondent company seeking clarification in the award dated 26.07.2017, however, the said application was dismissed *vide* order dated 13.09.2017. The said order was challenged by the respondent company in O.M.P.(COMM) 406/2017, and this Court, *vide* its order dated 27.09.2017, restrained the petitioner from encashing the bank guarantee.

f. It is stated that in respect of the additional six (6) claims of the respondent company, several notices were issued to the respondent for submitting the Statement of Claims, but it was not submitted till 13.12.2017. In view of the respondent company failing to file the Statement of Claim before the learned Arbitrator, Sh. S.K. Verma, the second arbitral proceedings were terminated by the learned Arbitrator on 15.02.2018 under Section 25(a) of the Act (**Second arbitral proceeding).**

g. Pursuant thereto, an application under Section 9 of the Act was preferred by the respondent namely petition no.O.M.P.(I)(COMM) 180/2018 before this Court seeking release of bank guarantees. *Vide* the order dated 04.09.2018, this Court had appointed Ms. Justice Prathiba Rani (Retd.) as an Arbitrator to adjudicate the six (6) additional claims of the respondent company, out of which, one claim was to release of FDR of Rs.13,38,620/-, another three (3) were related to release of bank guarantees for performance guarantee, Security Deposit, and part EMD, and the two (2) claims were related to release of bank guarantee for mobilization advance and repayment of compensation.

h. The impugned Award in respect of six (6) additional claims was passed by the learned Arbitrator on 05.04.2019.

i. Aggrieved thereof, the petitioner has preferred the present petitions.

3. The primary contentions of Ms. Pratima N. Lakra, learned CGSC appearing for the petitioner are two fold. One that the first Arbitral Award dated 26.07.2017 did allow all the claims of the respondent/claimant, however, in respect to six (6) additional claims, which are stated to have been raised by the respondent subsequently, learned Arbitrator refused to entertain the same confining the respondent/claimant to raise the claims elsewhere. She

further states that the first Award was passed on 26.07.2017, and in terms thereof, the petitioner had appointed one Mr. S.K. Verma, as the Arbitrator on 25.07.2017 in respect of the six (6) additional claims. She states that pursuant thereto, the said Arbitrator Mr. S.K. Verma sent a number of communications to the respondent/claimant requiring them to file the Statement of Claim, which they utterly failed to do so. According to her, it is by way of the communication dated 15.02.2018 that the second Arbitrator i.e. Mr. S.K. Verma had terminated the Arbitral proceedings finally on account of failure of the respondent/claimant to file its Statement of Claim regarding the six additional claims.

4. In the aforesaid background, Ms. Lakra, learned CGSC asserts that the impugned award premised on the same six additional claims could not have been passed on the legal issue of maintainability itself, having regard to the fact that the second round of the Arbitral proceedings initiated by the department had already been terminated *vide* the letter dated 15.02.2018. In support thereof, she refers to the order of the Supreme Court in ***M/S Tantia Constructions Limited v. Union of India,*** Special Leave Petition (Civil) No.10722 of 2022 dated 15.07.2022.

5. *Per contra*, Mr. Sandeep P. Agarwal, learned senior counsel appearing for the respondent/claimant states that the learned Arbitrator in the award dated 26.07.2017 categorically held that the respondent/claimant has no liability under the contract to pay any amount to the petitioner/respondent, and thus, the said bank guarantees, which were subject matter of the claim need not be extended after one month of making of the Award.

6. He submits that post the Award, the petitioner herein sought to encash the bank guarantees a number of times *qua* which an application under Section 9 of the Act was preferred by the respondent/claimant before this

Court. He also points out that *vide* order dated 06.04.2018 of this Court, the petitioner herein was restrained from encashing the bank guarantees pending the disposal of the said petition. He also points out that *vide* the order dated 04.09.2018, and only to ensure that the disputes are resolved by adjudication through arbitration, this Court, after noting the mutual agreement between both the parties, passed the following order:-

> *"1. Learned counsel for the parties agree that the captioned matter can be disposed of with the following directions, which, inter alia, include appointment of an arbitrator by this Court and continuation of the interim order dated 6.4.2018:*
>
> *(i) Ms. Justice Pratibha Rani, former Judge of this Court (Mob. 9910384626) is appointed as an arbitrator in the matter.*
>
> *(ii) Interim order dated 6.4.2018, passed in the captioned petition, shall continue to operate only in respect of the following bank guarantees:*
>
> *(a) BG No.26/2012 dated 21-07-2012– Rs.57,91,117/-*
>
> *(b) BG No. 26/2013 dated 25-07-2013– Rs.1,16,994/-*
>
> *(c) BG No. 31/2010 dated 01-07-2010– Rs.9,50,487/-*
>
> *(iii) The learned Arbitrator will adjudicate upon the additional six claims referred to in letter dated 16.2.2017 appended at Pg.116 of the paper book.*
>
> *(iv) The interim order dated 6.4.2018, as modified today, shall continue to operate till such time the learned Arbitrator, after hearing the parties, issues appropriate directions.*
>
> *(v) The learned Arbitrator will have liberty to vacate or confirm or even modify the order dated 6.4.2018.*
>
> *(vi) Till such time the learned Arbitrator makes an order, the petitioner will keep the three bank guarantees, referred to above, alive with liberty to make a claim for interest and charges, if any, paid qua the same to the concerned bank. Proof with regard to the same will be placed before the Arbitrator.*
>
> *(vii) Learned Arbitrator, apart from the claims referred to in letter dated 16.2.2017, will also adjudicate upon a claim, if any, filed by the*

petitioner for repayment of interest and/or charges paid to keep the aforementioned bank guarantees alive.

6. The petition is, accordingly, disposed of.

7. Consequently, pending application shall stand closed."

7. Pointing out to the aforesaid order the learned senior counsel states that as per sub-para (iii) of the para 1 of the said order, the learned Arbitrator, who was appointed therein, was directed to adjudicate the six (6) additional claims referred to in the letter dated 06.07.2017. Moreover, in terms of sub-para (vii) of para 1, the Court had also directed the Arbitrator to adjudicate, apart from the aforesaid claims, any claim towards repayment of interest and/or charges paid to keep the aforementioned bank guarantees alive. In view thereof, the petition under Section 9 of the Act was disposed of.

8. Learned senior counsel further states that it was in pursuance of the aforesaid order, and also in consonance with the agreement between the parties that the Arbitrator, who was appointed, had passed the impugned Award.

9. Apart from the aforesaid, learned senior counsel also pointed out that the impugned Award dated 26.07.2017 was challenged by the petitioner by an Arbitration Petition bearing no.O.M.P.(COMM) 6/2018 under Section 34 of the Act before this Court. Vide order dated 09.03.2018 the said petition was dismissed and further corrections were carried out vide order dated 23.03.2018. It is also stated that the matter was further carried in an appeal under Section 37 of the Act by the petitioner herein in FAO(OS)(COMM) 289/2018. Handing over the decision dated 24.01.2024 passed in the said appeal, learned senior counsel referred to paras 13.2, 14 and 15 to state that on account of the settlement having arrived at between the parties, the learned Division Bench disposed of the Appeal observing that the view expressed by

the learned single Judge was correct. Learned senior counsel also states that once the petitioner had drawn up a settlement agreement with the respondent in respect of the claims awarded in the first arbitral award passed by the learned Arbitrator on 26.07.2017, and having paid the amounts in terms of the said settlement, there is no question of the petitioner retaining any right whatsoever over either the performance bank guarantees or the FDRs in respect of the performance securities or even the security deposits.

10. The said decision dated 24.01.2024 in FAO(OS)(COMM) 289/2018 is taken on record.

11. Subsequently, learned senior counsel also invited attention of this Court to various paragraphs of the impugned Award to submit that there is no perversity or any violation of the fundamental policy of India for this Court to interfere in the said Award under Section 34 of the Act, and that, the present petition may be dismissed.

12. Contrary to the aforesaid arguments, Ms. Lakra, learned CGSC while reiterating and reaffirming her arguments, states that in the first Arbitral proceedings, the learned Arbitrator, according to her, by way of separate order/letter dated 28.04.2017, had declined to adjudicate the six (6) additional claims, and left it open to the Chief Engineer (MZ-(II)) to appoint another Arbitrator to decide the additional six claims. She states that it was in pursuance thereto that the petitioner had appointed the second Arbitrator, Mr. S.K. Verma, who had by the letter dated 15.02.2018 terminated the Arbitral proceedings. She states that in such circumstances the six (6) additional claims could not have been referred to another Arbitrator, and therefore, the impugned Award is *non est* in law.

13. This Court has heard the arguments of Ms Lakra, learned CGSC for the petitioner and Mr.Sandeep Aggarwal, learned senior counsel for the

respondent and perused the records.

14. Ms Lakra had argued that the six (6) additional claims were not adjudicated in the first arbitral proceedings, and were in fact referred by the Competent Authority to a new Arbitrator, who had issued a number of communications to the respondent to submit its claim which were never submitted. On the failure of such submission, the new Arbitrator had finally terminated the arbitral proceedings itself. Predicated on the above, Ms Lakra argues that once the arbitral proceedings regarding the additional claims were referred to and subsequently terminated, the further reference and adjudication of the same by the Arbitrator appointed by this Court was not permissible in law.

15. Though the argument appears to be attractive, however, does not have any substance. This is for the reason that post the passing of the first arbitral Award dated 26.07.2017, and various proceedings initiated thereafter, it was *vide* the order dated 04.09.2018 in O.M.P.(I)(COMM) 81/2018 captioned ***"ANS Construction Private Limited vs. Union of India and Another",*** that this Court had appointed an Arbitrator to adjudicate upon the very six additional claims that are referred to by Ms. Lakra to be part of the proceedings which were finally terminated. It is to be noted that in the order dated 04.09.2018, there is neither any resistance nor any objection raised by the petitioner herein to oppose the appointment of an Arbitrator on the ground that the very same six additional claims were subject matter of a previous arbitral proceedings, which were terminated on 15.02.2018 on non submission of the statement of claim, and thus could not be referred to arbitration. Having regard thereto, raising the said argument at this belated stage is not permissible. Furthermore, it is relevant to observe that rather than objecting, the order dated 04.09.2018 notes that the counsel appearing for the petitioner

in that case had categorically agreed for appointment of an Arbitrator to adjudicate upon those very six additional claims.

16. Thus, the said objection does not seem to be sustainable in law, and also on facts keeping in view of the aforesaid background facts and accordingly is held to be unmerited.

17. At this stage, it would be apposite to extract the relevant paragraphs of the impugned award in order to appreciate as to why this Court need not interfere in the impugned Award. The relevant paragraphs are as under:-

> *"20. It is clearly evident from the above that the dispute between the parties under the contract agreement has been finally adjudicated in the earlier arbitration and the same has attained finality inter-parties inasmuch as after passing of the arbitral award the matter was amicably settled between the parties in proceedings under section 34 of the Act and consequent upon settlement, the compromise amount also stands paid to the Claimant. Hardly any dispute is left between the parties that might give a cause to the Respondent to en-cash the Bank Guarantees/FDR in question. It shall be significant to mention that the Bank Guarantees/FDR in question was given by the Claimant to the Respondent at the time of contract agreement only to secure the due performance of the contract. This arbitral tribunal is of the view that after determination of the reciprocal obligations of the parties under the contract agreement in the earlier arbitration, nothing survives in favour of the Respondent to allow it to en-cash the Bank Guarantees/FDR in question. The contention urged on behalf of the Respondent that a challenge against the order of the Hon'ble Delhi High Court dated 23.03.2018 is pending before the Division Bench is of no legal consequence in the peculiar facts and circumstances of this case. The law is well settled that the doctrine of res-judicata or constructive res-judicata predominantly is a principle of equity, good conscience and justice. It would neither be equitable nor just nor fair in accordance with the principles of natural justice that the identical or similar issues concluded earlier be permitted to be raised again in different proceedings like the present one. Judicial verdict has a special sanctity and cannot be the subject matter of discussion at a future point of time thereby resulting in the possibility of conflict of views. It needs to be mentioned here that the Ld. Counsel for the Respondent on being specifically asked could not point out anything from record to show any amount remains due and payable by the Claimant under the contract for the recovery of which the Respondent could probably enforce the BGs in question.*
>
> *21. While referring the disputes between the parties on the issue of Bank Guarantees, Hon'ble High Court in its referral order dated 04.09.2018 in*

OMP No.180/18 has also directed that apart from the claims referred to in letter dated 16.02.2017, the claim, if any, filed by the Claimant for repayment of interest and/ or charges paid to keep the subject Bank Guarantees alive was also to be adjudicated. Since after accepting the award, the action of the Respondent in invoking the Bank Guarantees repeatedly was wholly unreasonable and unjustified, the Respondent is also liable to reimburse the Claimant the amount spent by it in renewal of the BGs in question from time to time. The Claimant has placed on record cogent and satisfactory evidence that it has spent an amount of Rs.04,74,525/- till filing of the claim and thereafter Rs.2,33,850/- till 03.04.2019 (Total Rs. 7,08,375/-) as bank charges for keeping the Bank Guarantees alive.

23. For the reasons given hereto above, an award is hereby passed in favour of the Claimant and against the Respondent in the following terms:-

(i) The Respondent is permanently restrained from encashing the BG No.08/2010 dated 24.02.2010 for Rs.13,38,621/- (towards Earnest Money Deposit); BG No.25/2012 dated 21.07.2012 for Rs.1,04,29,106/- (Performance Guarantee); BG No.24/2013 dated 25.07.2013 for Rs.6,78,437/- (Security Deposit) and FDR No.137401010602/1 dated 24.02.2010 of Rs.13,38,621/-;

(ii) The Respondent is directed to immediately arrange the return/release of the above mentioned Bank Guarantees to the Claimant;

(iii) The Respondent should pay an amount of Rs.7,08,375 to the Claimant on account of money spent by it in keeping the subject Bank Guarantees alive from time to time till date;

(iv) The Claimant had been forced into litigation by the Respondent despite accepting the award given by earlier Sole Arbitrator Sh. V.K. Malik whereby all the claims of both the parties having bearing on encashment of Bank Guarantees, against Performance Guarantee, Security Deposit including EMD and Mobilization Advance had been decided holding that the Claimant had no liability under the contract to pay any amount to the Respondent. Despite accepting of award and acting upon the same, the respondent continued invoking the Bank Guarantees thereby compelling the Claimant to seek his legal remedy. The Claimant is thus held entitled to the arbitral cost to the extent of this Tribunal fee incurred by the Claimant.

(v) In case the Respondent would fail to pay the award amount to the Claimant within three months of the date of passing of this Award, the Award amount shall carry interest thereafter @ 12% p.a. till realisation."

18. This Court has considered the reasoning rendered by the learned

Tribunal in the impugned Award, and finds that the same is in consonance with the settled principles of law. It cannot be disputed that the petitioner had settled the first arbitral Award by way of the Settlement Agreement dated 05.12.2017, and had in fact acted upon it, and paid the sums as settled with the respondent/claimant. If that be so, then once the main claims in respect of the dispute arising out of the contract between the parties is adjudicated and subsequently the arbitral award is settled between parties, there is no reason as to why and on what basis the performance bank guarantees, security deposits, FDRs in respect thereto, can be retained or sought to be invoked by the petitioner.

19. Ms. Lakra, learned CGSC pointed out to sub-para (iii) of para 23 of the impugned Award whereby the claim of Rs.4,14,191/- to the respondent/claimant on account of money spent by it in keeping the subject bank guarantees alive from time to time by the impugned arbitral award was allowed. This allowance, according to her, is erroneous and perverse. She states that it could neither have been adjudicated nor granted to the respondent/claimant inasmuch as the renewal and keeping bank guarantees alive from time to time till impugned Arbitral Award was passed, was on account of order passed by this Court dated 04.09.2018, and therefore, the liability of defraying such expenses cannot be placed upon the petitioner. In fact, according to her this claim was not part of the six additional claims and was extraneous to the original reference.

20. This Court is not inclined to agree with the learned counsel for the petitioner, for the reason that it was specifically noted *vide* order 04.09.2018 that the parties by consent not only agreed for appointment of an Arbitrator but also to the claims noted therein. In particular, it is relevant to note sub-para (vii) of para 1 of the order dated 04.09.2018, which is extracted as

under:-

> *"(vii) Learned Arbitrator, apart from the claims referred to in letter dated 16.2.2017, will also adjudicate upon a claim, if any, filed by the petitioner for repayment of interest and/or charges paid to keep the aforementioned bank guarantees alive."*

21. It is not disputed that the direction contained in sub-para (vii) of para 1 of the order dated 04.09.2018 was never challenged by the petitioner herein, and therefore, to contend that such a claim could not have been allowed by the Arbitral Tribunal is contrary to the record.

22. In view of the above, this Court does not find any reason, muchless any violation of fundamental policy of India or any perversity in the findings recorded by the Arbitral Tribunal in the impugned Award.

23. As a consequence, the petitions are dismissed.

TUSHAR RAO GEDELA
(JUDGE)

AUGUST 11, 2026/*Sumit*