

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

+ OMP NO. 41/2007

Reserved on 10th September, 2008
Pronounced on 27th January, 2009

M/s SANDEEP CO-OPERATIVE SOCIETY

..... Petitioner

Through : Mr. Sumit Tomar, Advocate

with Mr. Joginder Singh, President of the society

versus

M/S MANOHAR SINGH & SONS

..... Respondent

Through : Ms. Anasyua Salwan, Advocate

CORAM:

Mr. Justice S. Ravindra Bhat

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat

1. In this proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter “the Act”) the award of a sole arbitrator, dated 10th November, 2006 has been challenged, by the petitioner, a co-operative society (hereafter called “the society”).

2. The facts necessary for purposes of this judgment are that the respondent was awarded the work of construction of 218 residential flats by the society. The total consideration agreed was Rs. 671, 28, 677 (Rupees six crores, seventy one lacks twenty eight thousand, six seventy seven only). The award of works by the society, pursuant to tender notice, was communicated

to the respondent on 3rd January 1991. The parties entered into an agreement, on 6-7-1991. Some relevant conditions and stipulation is agreed upon by the parties, in the agreement, (in which the society was described as the employer, and the respondent, as the contractor) are extracted below:

- "2. That in consideration of the payments to be made to the contractor as hereinafter provided in the letters as well as tender accepted by the employer and subject to the said drawings and such further detailed drawings as may be furnished to him by the said Architect of the employer and described in the said specifications and the said schedule of quantities narrated in the tender within thirty Calendar months from the date of commencement of work at site.*
- 4. That the term Architect in the said conditions shall mean the said Ms. Sharma Tomar & Associates, BHF-93, Shalimar Bag (West), Delhi 110 052, or in the event of ceasing to be the Architects for the purpose of the contract, such other person as shall be appointed for the purpose by the employer.*
- 6. That the employer through the Architects reserves to himself the right of altering the drawings and nature of work and of adding to or omitting any terms of work of (sick) variations shall be carried out within prejudice to this contract and the contractor shall not be entitled to any commission on such work.*
- 7. That the employer reserves the right to exercise control on quality of work, check of measurements, payment certificates, variations arising in view of extra substituted items. The decision of the employer shall be final and binding in this regard.*
- 8. That the time shall be essence in this contract and the contractor hereby agrees to commence the work within ten days of the date of the written order from the employer to commence work, and to complete in all respects connected thereto or a ordered from time to time, within the time period stipulated, nevertheless subject to the provision for extension of time, and to execute the same diligently and consistently the above work in time period specified.*

9. *That the said conditions shall be read and construed as forming part of this agreement and the parties will respectively abide by and submit themselves to the conditions and stipulation and perform the agreement of their parts respectively, in such conditions contained”.*

3. The Notice Inviting Tender (NIT) and the agreement, forming part of it, contained identical conditions which show that the contract was governed by item rate, tender and contract of the Central Public Works Department (CPWD), with these amendments:

- “1. The words Governments of India shall be read as managing committee of Sandeep Cooperative Group Housing Society Ltd.,*
- 2. President of India shall be read as the President of Sandeep Cooperative Group Housing Society Ltd.,*
- 3. Department shall be read as Sandeep Cooperative Group Housing Society Ltd.,*
- 4. Engineer in-charge will be read as Engineer and or representative nominated by the Society by the society and Architects of the society.*
- 5. Divisional Officer-Sub-Divisional Officer Ex. Engineer Superintending Engineer shall be read as Architect of the Society.*
- 6. D.G. Works/ Chief Engineer shall be read as Architect of the Society.*
- 7. Society means Sandeep Cooperative Group Housing Society Ltd.”*

4. The agreement, was valid up to 17-1-1994; it could not be completed. The parties, on 21-1-1994, signed an agreement (Ex. C-77) which mentioned about the society's lack of funds. This document also recorded a lien on every flat constructed by the contractor to the extent of Rs. 300,000/-. Similarly, another agreement was signed by the parties on 29-11-1998 (Ex. P-222) whereby the works were to be completed by that 31-5-1999. Apparently some disputes arose between the parties, and the society claimed that it cancelled and rescinded the contract on 25-10-2000 by issuing a notice, produced as Ex. R-141.

5. The differences between the parties were sought to be resolved by them, through an agreement, styled as a Memorandum of Understanding (hereafter 'MOU') on 18-2-2001; it concerned itself with the question of payment of bills and was produced in the arbitration proceedings as Exhibit C-314. The earlier agreements dated 06.07.1991, dated 27.10.1994 and dated 29.11.1998 executed between the parties were duly referred to in the MOU. The terms as agreed to between the parties and mentioned in the said MOU read as under:

"1. Payment of Bills: That the Society shall ensure for payment of RA Bills as per following Schedule.

1.1 That all RA bills will be checked and verified by a team of four engineers two engineers from the Society and two engineers from the Contractor's side and their decision shall be binding on the two parties. That the total balance amount, if any, to be paid towards running bills already submitted will be calculated and checked. The verification of running bills be completed by 10.03.2001. The payment if found due towards the aforesaid bills shall be made by the party of the first part to the party of the second party by way of check bank draft in the court where the settlement so arrived at between the parties will be recorded.

1.2 Items which are executed in full shall be taken in the bills for partly executed items, part rates shall be used.

2. Payments Towards Clause (10CC) : The Society shall pay the pending as well as future escalation bills under clause 10 CC of the agreement as follows :

2.1 That the amount of escalation bills which has already been submitted will be checked and verified again by a team of four engineers, two engineers from the Society side and two engineers from the Contractor's side and their decision shall be binding on the two parties. That the total balance amount, if any, to be payable towards the escalation under clause 10 CC of the agreement shall be paid by the party of the first part, if found due

to the party of the second part, in the court of law for getting the settlement recorded. The verification of escalation bills will be completed by 10.03.2001. The payment if found due towards the aforesaid bills shall be made by the party of the first part to the party of the second part by way of check bank draft in the court where the settlement so arrived at between the parties will be recorded.

3. *That the contractor will submit the final bill by 24.02.2001.*

3.1 *That after handing over of the said block the society would make their own arrangement towards watch and ward, maintenance etc., of each block handed over by the Contractor.*

4. *That all the pending cases claims in the courts from the Society towards the Contractor and from the contractor towards the society will be withdrawn and the matter shall be closed for all times. The payment if any shall be paid by the party on the first part to the party on the second part before the court at the time of recording the settlement so arrived at between the parties along with the security earnest money of Rs.5.0 lacs.*

5. *This MOU has been arrived at by the good offices of Mr. Raghbir Singh, R/o S-337, Greater Kailash-II, New Delhi – 110 048.”*

6. There were further disputes between the parties; a sole arbitrator was appointed; one of the parties disagreed with the method or mode, and approached this court. Eventually, the arbitrator entered upon reference. Before him, the respondent-contractor pressed 12 claims, classified in two parts. The society denied liability and preferred 14 counterclaims. By the impugned award, the arbitrator allowed the respondents claims partly in respect of three heads and rejected the rest. He recorded that the society did not press several of its counterclaims during the proceedings and also declined to award any amount in respect of the balance counterclaims, on the merits.

7. Although the society-petitioner has relied upon several grounds, to challenge the award, essentially arguments were made about un-sustainability of the findings in the award on Claim No. 2 (which dealt with the aspect of escalation) Claim No. 1 and Claim No. 5. In Claim No. 2, the respondent had sought for an award to the extent of Rs. 1,42,86,545/- (Rupees one crore forty two lakhs, eighty six thousand five hundred and forty five only). After considering the rival submissions, the arbitrator awarded the sum of Rs. 54, 48, 131/-. According to the society-petitioner, the arbitrator's findings regarding existence of Clause 10-CC are contrary to the record. The petitioner contends that no such condition existed in the agreement, as it had been deleted. Yet, the arbitrator according to it, relied upon an unauthenticated document to hold that the stipulation existed in on the parties. The society contends that having regard to the fact that two rival versions of the agreement itself were produced before the arbitral tribunal, the question whether Clause 10 CC existed could not have been found in the manner held by him. It is alleged that the document relied upon by the arbitrator, which is a copy of the agreement produced by the contractor did not contain the signatures of the society or its representatives. It is further alleged that the award is not sustainable, as regards this claim because it has ignored and overlooked the copy of agreement produced by the society, which clearly made no mention of the escalation stipulation, which is the alleged Clause 10-CC. It was also urged that there was Cordiant and convincing evidence pointing to the parties never having agreed to an escalation condition. In the circumstances, the finding on Clause 10-CC was vitiated and the award therefore had to be set aside.

8. It was next argued by the society that is though the respondent-contractor had claimed a huge amount of Rs. 76, 93, 522/- on account of pending payments against R.A bills and to its final bill, the arbitrator awarded Rs. In 11, 44, 646/- on erroneous appreciation of facts. It is further argued that the arbitrator also committed in an illegality in awarding the sum of rupees 300,000 to the respondent society, which was lying in security deposit even though that was not the subject matter of the claim. Similarly it is urged that the award of Rupees 200,000 towards balance security deposit cannot be sustained as the respondent was guilty of several serious breaches in working out the construction contract, which perfectly justified the society not to refund or to withhold those amounts.

9. The respondent on the other hand, urged that the court should not interfere with the findings under Section 34 of the Act, having regard to the restricted nature of jurisdiction conferred, which extends only to manifest errors of law, the award being contrary to public policy and contrary to the interests of India. It was submitted that each of the findings attacked by the society, does not measure up to the justifiable grounds of challenge available in law. Each of the findings in the award, it was submitted, are on questions of fact and the court should be loath to interfere with them.

10. Before discussing the merits, it would be essential to recall that after coming into force of the Act, intervention of courts with awards of arbitral tribunals confined to grounds enacted under Section 34. This provision was scrutinized by the Supreme Court, in *Oil & Natural Gas Vs. Saw Pipes Ltd.* 2003 (5) SCC 705 where the Court held that interference was permissible on grounds of public policy, which in turn was explained as the award being contrary to :

- (a) Fundamental policy of Indian Law;
- (b) the interest of India; or
- (c) Justice or morality;
- (d) in addition, if it is patently illegal.

The above decision was affirmed in *Hindustan Zinc Ltd. Vs. Friends Coal Carbonization* 2006 (4) SCC 445; *Mc Dermott International Inc Vs. Burn Standard Co. Ltd.* 2006 (11) SCC 181. In both cases, awards or portions of awards which were contrary to contract or contravened substantive provisions of law, were set aside. Therefore, an award can be interfered with if the court, on an objective consideration of the material, is convinced that the four grounds set out in *Saw Pipes*, or any of them exist. The mere possibility of a view different from the arbitral tribunal's, on the facts of the case, is insufficient justification to set aside the award.

11. First, Clause 10-CC and the award for Rs. 54, 48, 131/- against Claim No. 2, which has been objected to by the society. The parties were at issue on whether an escalation condition in the form of Clause 10-CC existed and bound them at all; the society contended that the copy of the agreement available with it, and duly executed by both parties, showed that that printed condition had been scored off. The contractor on the other hand, relied on a copy which showed that the clause was agreed by the society. The arbitrator considered both the documents, as well as other surrounding circumstances. He reasoned that:

"First of all it has to be examined as to whether clause 10 (CC) of the agreement (which formed part of NIT) stood deleted as alleged by the respondent. As per the copy of the agreement which was filed by the claimant in the Hon'ble Delhi High Court in the case AA No.48/2000, M/s. Manohar Singh & Sons Vs. Sandeep

Cooperative Group Housing Society Ltd. and certified copy of which was obtained by the claimant from the Hon'ble Delhi High Court and was filed in the present proceedings on 29.01.2003, clause 10 (CC) very much existed and did not stand deleted. However, as stated in Para 3 of this award, this copy of the agreement shows that it bears the signatures of the claimant only and does not bear the signatures of the respondent society. On the other hand, the copy of the agreement filed on behalf of the respondent is not complete as stated in said Para 3. The said copy of the agreement which is Ex. RW-1/1, consists of 56 sheets only whereas as per index, the agreement consisted of 123 sheets (pages 5 to 127). These 56 sheets, however, bear the signatures of both the parties. In these 56 sheets clause 10 (CC) appears at page 33 to 37 but a portion of this clause appearing at page 33 and portion up to sub-clause 2 appearing at page 34 have been deleted. The deletion of sub-clause 1 & 2 of this clause, however, has not been initiated/signed by the parties. Further, sub-clauses 3 to 8 of clause 10 (CC) which appear on pages 34 to 37 have not been even deleted. Another point to be noted here is that on every page of the agreement, there is a stamp containing 4 columns namely: addition, deletion, correction and over writing. On page 33, 4 paras including sub clause 1 of sub-clause 10 (CC) have been shown as struck off but against the column of deletion, there is no entry. Similarly at page 34, the balance portion of sub-para 1 and complete sub-clause 2 of clause 10 (CC) have been shown as struck off but against the column "Deletion" there is no entry though against the column correction, 1 entry has been shown and against the column 'Overwriting' also 1 entry has been shown. From these facts, it appears that clause 10 (CC) did exist in the agreement. In case clause 10 (CC) had been deleted, then sub-clauses 3 to 6 of the said clause which appear at pages 34 to 37 would also have been struck off. The fact that clause 10 (CC) existed in the agreement is also proved from the facts discussed in the subsequent paragraphs."

"...Again Sh. K. L. Hans (Advocate) President of the respondent society in para 6 of his affidavit filed by way of evidence, has stated that in the agreement dated 29-11-1998 (Ex. C-222) signed between the parties, the escalation was agreed to be paid provided the position of all flats, duly constructed was handed over by the claimant to the respondent society on or before 31-5-1999. As explained hereinabove, though in the said agreement, it was mentioned that the contract will ensure speedy work so that the full work of the society is completed latest by

31-05-1999 but this was not made the condition precedent for making the payment of the amount on escalation. Rather the only condition mentioned herein was that two escalation bills will be kept pending till completion of full work. **Further, Annexure R-3, annexed with the affidavit dated 17-08-2000 of Sh. Sohan Lal, secretary of the society which was filed by the respondent in Hon'ble Delhi High Court in AA 48/2000, shows that the amount of the 01 to 10 Escalation bills was paid to the claimant by the cheque during the period 16-02-1996 to 18-11-1998 which is prior to the agreement dated 29-11-1998.** Sh. R.K. Sharma, Architect who appeared as a witness of the respondent, during his cross-examination dated 13-09-2006, produced copies of five certificates Ex. RW-2/ZA to RW-2/ZE by which the amounts of 3rd, 5th, 6th, 7th & 9th Escalation bills submitted by the claimant were verified by him. **These certificates show that amounts of these Escalation bills were verified by the Architect during the period January, 1997 to December, 1997 which is alien prior to 29-11-1998..**"

"... Exh. CW-1/R1 and Exh. CW-1/R2 which have been relied upon by the respondent itself for the purpose of verification and correcting (which led to reduction of the amount) the final bill. In para 2 of this MOU also, it is stated that "the Society shall pay the pending as well as future escalation bills under Clause 10 (CC) did not exist, there was no occasion for the respondent to sign the agreement dated 29.11.1998. Exh. C-222, Memorandum of Understanding dated 18.02.2001, Exh. C-314 and also making the payment of substantial amount under clause 10 CC."

12. It was contended by the society that the MOU concededly signed by it, was never acted upon by the parties and that the arbitrator should not have relied upon it to hold -- as he did-- that the escalation clause existed and could be relied upon by the respondent. In this respect, the arbitrator rested his reasoning, in the award about that document, by relying on objective material. These were Ex. CW-1/R1 and CW-1/R2, registers which recorded inspection and measurement of work by a team of engineers, two each representing the respondent and me society, respectively. These had, as is evident from the extract of the award, reproduced

above, noticed the extent of construction and progress by the respondent in respect of the flats of stock the arbitrator also relied upon the evidence of The Architect.

13. This court is of the opinion that the society's objections about the escalation clause and the methodology adopted by the arbitrator in determining whether it existed, and whether it bound the parties, as contended by the respondent cannot be faulted. Though presented with rival versions about the existence -- or absence of the clause, the arbitrator did not rest his decision merely on the basis of examination of the two documents. He proceeded to consider probabilities based upon other materials and documents. These were in the form of the MOU of 2001 as well as the earlier agreement dated 2911-1998. He also examined other documents to satisfy himself before concluding that an escalation clause had been agreed upon. In the circumstances, this court can discern neither infirmity in the procedure adopted nor illegality in the award. In any event the manner in which the finding was arrived at cannot be characterized as contrary to the public policy in India so as to justify court intervention under Section 34. The court is also satisfied that as against the amount claimed (Rs. 1,42, 86, 545/-) the award is confined to Rs. 54,48,131/-. That sum is based on the calculation by the Architect, Shri Sharma, who verified the bills and determined, in a statement (Ex. R-158) that the total sum payable was Rs. 200, 90, 037/-. It was found that out of this amount, Rs. 1, 46, 41, 906/- had been paid toward escalation charges by the society; the arbitrator therefore determined that the balance amount Of Rupees 54,48,131/- was payable by the Petitioner-society. This finding also, in the considered opinion of this court, is unexceptionable. It is neither contrary to law not can be characterized as opposed to fundamental policy of Indian law. It is based on

materials duly verified by the society's Architect, who also conceded that in the course of arbitral proceedings. In the circumstances the challenge to award of this amount is hereby negatived.

14. As regards Claim No. 1, the total amount sought in arbitral proceedings by the respondent was Rs. 76,93,522/- towards outstanding and pending payments. The arbitrator held that the Architect approved the final bill to the extent of Rs. 11, 44, 646/-. The arbitrator overruled the respondents complaint against reduction of the amount, holding that the sum determined by the Architect was arrived at after dual verification of the work. Similarly the arbitrator overruled the society's objection that the MOU had not been acted upon by relying on the evidence including the statements made in the arbitral proceedings. These findings have been rendered after considering the materials on record; there is nothing arbitrary unreasonable or manifestly illegal in this respect. Therefore the objection to the award as regards Claim No. 1 are not sustainable. It may be noticed that having held that the respondent was entitled to the amounts verified by the society's architect, towards final bill, there was no fundamental infirmity in holding that refund of security amount had to be made. Therefore, the direction in respect of Claim No. 5 too is neither erroneous nor illegal.

15. This court is of opinion that the overall approach of the arbitrator, who rendered his findings in an elaborate 82 page award, does not disclose any fundamental error in appreciation of facts or application of law. It is also not opposed to any provision of law; it cannot be characterized as opposed to public policy in India. Perhaps an appellate review may persuade the court to adopt a different approach towards findings of fact; yet the findings in

the award are not so implausible as to warrant intervention under Section 34 which can and should be the only *rationale* for setting aside commercial awards.

16. In view of the above findings, the petition has to fail; it is therefore dismissed. In the circumstances, the petitioner shall bear the costs of proceedings, quantified at Rs. 50,000/- to be paid to the respondent, within two weeks.

DATED: 27th January, 2009

S. RAVINDRA BHAT

(JUDGE)