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

+ O.M.P. 590/2010

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Judgment dated 06.11.2012

GOVT OF NCT OF DELHI

...Petitioner

Through : Mr.H.S. Sachdeva and Mr.Mithilesh Kr., Advs.

VERSUS

M/S KABIL PAWAN & ASSOCIATES (JV)

...Respondent

Through : Mr.Jay Savla and Mr.Rajpal Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Petitioner has filed the present objections under Section 34 of Arbitration and Conciliation Act, 1996, to the Award dated 15.5.2010 rendered by the sole Arbitrator, whereby out of the four claims raised by the respondent three claims were allowed. Award only with respect to claim no.3 has been challenged whereby the Arbitrator has awarded a sum of Rs.45.00 lakhs in favour of respondent.
2. The necessary facts, to be noticed for disposal of the present objections are that the respondent herein was awarded a contract for the construction of a Prison Complex including housing at Mandoli Delhi. The petitioner (respondent before the Arbitrator) was desirous of availing the services of a consultant. The respondent herein was appointed as a consultant. In accordance with general requirements and conditions the respondent was to be paid the consultancy charges as per Clause 4 of the agreement dated 27.12.1997. Upon disputes and differences having arisen between the

parties the matter was referred to the Arbitration of Shri S.C. Vasudeva, Sole Arbitrator appointed by the Chief Engineer PWD Zone B- 1, New Delhi as per Clause 25 of the contract between the parties. In all 4 Claims and 2 Counter Claims were raised by the parties before the learned Arbitrator. The following claims were raised before the Arbitrator:

- (i) Claim No.1: Rs.63,14,699.51/- on account of consultancy fees not paid.
- (ii) Claim No.2: Rs.50,000/- on account of cost of model not paid.
- (iii) Claim No.3: Rs.5,56,38,264/- on account of in considerate termination of consultancy.
- (iv) Claim No.4: On account of expenditure for legal advise and interest of the dues shall be worked during processing.

3. As per the Award the learned Arbitrator has awarded a sum of Rs.1,01,375/- against claim no.1 in favour of respondent herein on account of consultancy fee; a sum of Rs.50,000/- has been awarded against claim no.2 on account of the cost of two models; and a sum of Rs.45,00,000/- has been awarded with respect to claim no.3.
4. It is the case of the petitioner that reasons rendered by the learned Arbitrator are illegal, perverse and an inexcusable error has been committed by the Arbitrator, which is patently illegal on the face of the impugned award.
5. Learned counsel for the petitioner submits that the learned Arbitrator fell in gross error while allowing claim no.3, raised by the respondent, and passing the impugned award, which is based on completely erroneous interpretation of the provisions of the Contract Act and it is, thus, against the public policy of India. Counsel further submits that the learned

Arbitrator has overlooked and has not appreciated the basic principles of the Contract Act.

6. It is further submitted by the learned Counsel for the petitioner that the learned Arbitrator has not given any reason for awarding of pro rata amount of consultancy fee to the respondent / claimant. It is further submitted that the learned Arbitrator has erred in adopting a hit a trial method in calculating the amount of Rs 45 Lacs to be paid by the petitioner. Counsel next submits that since the drawings were not submitted by the respondent, the respondent is not entitled to the amount awarded by the learned Arbitrator in terms of the stages 4.1(a) and 4.1(b) besides stages 4.1 (c), 4.2, 4.3(a) and 4.4.
7. Learned counsel for the respondent submits that the Arbitrator has passed a reasoned award and the objections raised by the petitioner are general in nature. It is further submitted that the objections filed by petitioner are without any merit and while deciding the objections the Court does not sit in appeal over the award.
8. I have heard learned counsel for the parties and also perused the award, which has been rendered by the learned Arbitrator, a copy of which has been filed on record. It may be noticed that objections have been filed only with respect to claim no.3. The learned Arbitrator has allowed claim no.3 in the sum of Rs.45 lacs raised by the respondent on the ground that as per Clause 11 the respondent is entitled to consultancy as rendered by him up to the date of termination. Clause 11 of the Agreement dated 27.12.1997 reads as under:-

“11.0 TERMINATION:

That this agreement may be terminated at any time by either party upon giving one month's notice to the other and in the event of such termination, the consultant shall be entitled to all such fee for

the services rendered and liable to refund the excess payment, if any, made to him over and above what is due in terms of this agreement on the date of termination and the Employer may make full use of all or any of the drawings prepared by the Consultant.”

9. While placing reliance on the aforesaid clause, the learned Arbitrator has come to a finding that the respondent was to be paid the consultancy fee till the date of rescission of the contract and for this purpose he was entitled to be paid pro rata on the basis of progress made by him over and above the completed stages considered against Claim no. 1.
10. It would be useful to reproduce the findings of the learned Arbitrator with respect to claim no.3, which is the subject matter of challenge before the present proceedings:

“On consideration of the pleadings, arguments and documents on record, I find that Respondents had been asking for detailed drawings and detailed estimate ever since 20.04.98 i.e. exhibit C-5. This demand was further raised by the Respondents vide exhibit C-6 dated 21st March 2005 followed by reminders. This document submitted at the stages of preliminary design/drawings and that to DUAC were more than just preliminary design/drawings though these cannot be really called proper detailed design/drawings. Similarly, the estimate submitted by the Claimants was more than just a preliminary estimate as it was based on details but still fell short of a proper detailed estimate. It is not clear from the documents on record of this case as to what prompted the Respondents to issue a show-cause notice on 3rd Feb. 2006 (and then rescinded the contract) particularly when the Claimants had made submissions of revised LOP and model to DUAC on 19.12.05 (page 57 of the booklet) and they were in the process of attending to the observations of DUAC. I am not pronouncing any judgment in regard to the recession of contract as this matter is not a subject matter of arbitration before me. However, I am only stating the facts as evident from the documents on record of this case. In any case, it is clear that the Claimants have to be paid the consultancy fee till the date of rescission of contract and for this purpose, pro-rata progress made by the Claimants over and above the completed stages considered against claim No.1 has to be considered. Pro-rata

payment against incomplete stages, as already stated before, is in terms of the agreement. Looking to the quantum of consultancy work done till the date of rescission of contract, I find that consultants are entitled to receive pro-rata payment over and above the completed stages 4.1 (a) and 4.1 (b) (considered claim No.1 against stages 4.1 (c), 4.2 4.3(a) & 4.4. I estimate that pro-rata payment due against stage 4.1(c) is 3% (as also followed by the Respondents in the 9th R/A bill), against stage 4.2 is 5% (as MCD had already cleared), against stage 4.3(a) is 5% & against stage 4.4 is 2%. The total pro-rata fee due to the Claimants over and above the completed stages 4.1(a) & 4.1(b) considered against claim No.1 works out to 15% (i.e. 3 + 5 + 5 + 2).

Total fee payable :- ----- Rs.3,00,00,000/-

15% of the fee payable for the part stages 4.1 ©, 4.2, 4.3 (a) & 4.4.
----- Rs.45,00,000/-

Amount actually paid by the Respondents : ----- Rs.NIL

Balance amount of fee due to the Claimants: --- Rs.45,00,000/-

In regard to (ii) above i.e. regarding the claim for compensation towards loss of professional reputation and trauma, I wish to mention that this claim does not fall in my purview as per the provisions of Arbitration & Conciliation Act 1996. Claimants may, if they so desire, take recourse to legal remedy for the same. As such, I am unable to award any amount in favour of the Claimants under claim No.3 (ii).

It will thus be seen from the above discussion that an amount of Rs.45.00 lacs is due to the Claimants against this claim. I award accordingly. “

11. The law with regard to Section 34 of the said Act is well settled that the Courts exercise limited jurisdiction over the award of the Arbitrator and cannot go into the merits of the case nor reappraise and re-examine the evidence, nor look into the insufficiency of the evidence as the scheme of the said provision aims at keeping the supervisory role of the Court at a

minimum level. It has also been held that parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for Arbitration as they prefer the expediency and finality offered by it.

12. It is well settled that an award is not a subject matter of an appeal nor can a challenge under Section 34 be construed as an "appeal" against the award. [See (2001) 2 Arb LR 469(Del) & (2008) 2 Arb LR 175]. Relevant portion reads as under:

"A Civil Court examining the validity of an arbitral award under Section 34 of the said Act exercises supervisory and not appellate jurisdiction over the awards of an Arbitral Tribunal. A Court can set aside an arbitral award, only if any of the grounds mentioned in Section 34 (2)(a)(i) to (v) or Section 34 (2)(b)(i) &(ii) or Section 28(1)(a) or Section 28(3) r/w Section 34(2)(b)(ii) of the Act, are made out. [J.G. Engineers private Limited Versus Union of India And Another (2011) 5 SCC 758 Paragraph 10]."

13. In P.R. Shah, Shares and Stock Brokers Private Limited Versus B.H.H. Securities Private Limited And Others reported in (2012) 1 Supreme Court Cases 594 the Apex Court in paragraph 21 observed as under:

"21. "A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at".

14. Present objections are to be considered in the touchstone of the law laid down by the Hon'ble Supreme Court of India with regard to section 34 of the said Act.
15. While rendering the award the learned has also taken into account the quantum of the consultancy work done till the date of rescission of contract. The learned Arbitrator has also recorded a finding and awarded

the amount as per the work which was carried out by the respondent. As per stage 4.1(c) the respondent was entitled to 10% of the fees, as per stage 4.3(a) the respondent was entitled to 25%, as per stage 4.3(b) the respondent was entitled to 10% of the fees, whereas after considering the material on record, the learned Arbitrator has granted 3%, against stage 4.1(c), 5%, against stage 4.2, 5% against the stage 4.3(a) as also 2% against the stage 4.4 of the agreement.

16. The learned Arbitrator came to a definite finding that based on the documents on record that respondent herein would have to be paid consultancy fee till the date of rescission of the contract and has taken the view that for this purpose pro-rata progress made by the respondent over and above the completed stages are to be considered. The Arbitrator has rightly rejected the claim of respondent herein for compensation towards loss of provisional reputation and trauma.
17. On the basis of the submissions made by counsel for the petitioner, I am of the opinion that there is no infirmity in the award passed by the Arbitrator. The petitioner has failed to satisfy the Court on any of the grounds enumerated under the Act for setting aside an arbitral award. A reading of the award shows that the Arbitrator has decided the matter fairly and the view taken by the Arbitrator is reasonable and cogent and in view of the documents which have been placed on record, the objections sought to be raised by the petitioner, are without any merit. Consequently, present objections are dismissed.
18. DASTI to both parties.

G.S.SISTANI, J

NOVEMBER 06, 2012

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