

. * IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment pronounced on: April 16, 2014*

+ O.M.P. 298/2012

GOVT OF NCT OF DELHI Petitioner
Through Ms.Nandita Rao, Adv.

versus

M/S A.G KRISHNA MENON & ANR Respondents
Through Mr.S.K.Chandwani, Adv. with
Mr.Sameer Chandwani, Adv.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. By way of the present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) the petitioner has assailed award dated 9th December, 2011 rendered by respondent No.2.

2. Brief facts for the purpose of adjudication of the petition, as set out by the petitioner are as follows:

- (i) The respondent No.1 was engaged as an architect for construction work of modern ISBT at Sarai Kale Khan, New Delhi, pursuant to a limited competition held between some short listed architects, on 31st December 2001.
- (ii) The respondent had specified that the fees payable on the non-repetitive works would be 3% and for repetitive works it would be 0.5%.

- (iii) Subsequently preliminary drawings and designs were submitted and accordingly preliminary estimates were drawn, both of which were revised time to time and finally, in a meeting of the Monitoring Committee of the project under the Chairmanship of Secretary-cum-Commissioner (Transport) took place on 15th September, 2004 it was decided that the Architect's fee would be 2% instead of 3% which would be paid on the project cost.
- (iv) The consultancy agreement was accordingly entered on 28th March, 2005 (hereinafter referred to as "the agreement"). As per Clause 4 of the agreement, the consultation fee was to be at 2% of the actual cost of construction and Clause 6 of the agreement puts limitation on the fee as imposed by the Expenditure Finance Committee at Rs.1.25 crores with project ceiling cost of Rs.62.51 crores.
- (v) The respondent revised the preliminary estimate amounting to Rs.212.32 crores for the said construction and sent it to the Commissioner (Transport) GNCTD for agreement of revised A/A and E/S on 31st May, 2007.
- (vi) The meeting of Expenditure Finance Committee (EFC) on 6th July, 2007 considered a relook into provisions made for different facilities and features and considered that as an alternative, proposal may be considered on PPP basis through DIMTS. Subsequently, the project was transferred to DIMTS on 29th February, 2008 at the preliminary stage itself and the respondent was intimated about the same vide letter dated 23rd May, 2008.
- (vii) Vide letter dated 26th May, 2008, the respondent requested DIMTS to settle the consultancy fee and submitted a bill of

Rs.1,71,16,531/-. DIMTS directed the respondent to approach the petitioner with its bill and accordingly, vide letter dated 8th December, 2008, the respondent approached the petitioner.

(viii) The petitioner finalized the bill for the said project, subsequent to the Chief Engineer conveying approval of foreclosure of the agreement, on 30th September, 2010.

3. Various disputes arose between the parties consequently which were referred to arbitration. The arbitrator framed the following issues in the matter:

- (i) What should be the rate of consultancy fee ?
- (ii) What should be the ceiling cost of the project on which consultancy fees is payable?

4. Accordingly, the arbitrator came to the decision that the consultancy fees was to be calculated at 2%. However, with regard to the second issue, he came to the conclusion that since the scope of work was completely revised on two occasions, after signing of the agreement, in view of clause 4(a) and clause 8(i) of the agreement and applying the principles of harmonious construction, the consultancy fee payable to the architect would be on the revised project cost i.e. Rs.164,05,71,041/-. Further, the claims of the parties were then accordingly decided and the Award dated 9th December, 2011 was passed.

5. The claims No.1, 4, 6 and 7 namely, on account of Consultancy bill for services rendered, on account of interest, on account of pendente lite future interest, and on account cost of arbitration were awarded in favour of the respondent No.1. Aggrieved thereof the petitioner has filed the present petition.

6. The main contention of the petitioner now is that the learned Arbitrator while deciding the second issue, i.e. the ceiling cost of the project on which consultancy fees is payable, disregarding the ceiling set in clause 6 of the agreement, came to the conclusion that since the extent of work was completely revised on two occasions, after signing of the agreement on 28th March, 2005 and in view of the clause 4(a) and clause 8(i) of the said agreement and applying the principles of harmonious construction, the consultancy fee shall be payable to the claimant/respondent herein will be on the revised project cost i.e. Rs.164,05,71,041/-. Other claims were also decided based on these conclusions which amounted to Rs.1,41,17,300/- (claim Nos.1+4+6+7).

It is also challenged by the petitioner that the learned arbitrator apart from awarding the consultancy fee in violation of the express terms of clause 6 of the agreement that set a ceiling of 1.25 crores, also erred in not appreciating that the revised estimate with escalation project cost proposed by the respondent was not approved by EFC and the entire project was transferred to DIMTS on 29th February, 2008, thus the proposed estimate cannot be the basis for determining the consultancy fee and has erroneously interpreted the facts of the case which has resulted in an unfair and unjust award and is liable to be corrected in the interest of justice.

7. The main reason for challenging the Award by the petitioner inter alia is on the following grounds :

- (i) After signing of the agreement, the consultant submitted the drawings in regard to this project to the MCD on 20th September, 2005 for approval. MCD vide letter dated 16th November 2005 demanded development control norms for construction of ISBT. This resulted in preparation of revised

estimate with escalation project cost which was not approved by EFC because the entire project was transferred to DIMTS on 29th February, 2008. The short-comings in the drawings and need for revision was occasioned by the respondent No.1 and not on account of the petitioner.

- (ii) The petitioner had conveyed administrative approval on 28th December, 2004 for sanction expenditure of Rs.81.30 crores with project ceiling cost of Rs.62.51 crores and at the time the project was transferred, this was the only approved expenditure.
- (iii) The project was still under the preliminary stage and approval by various regulatory bodies was still awaited when it was transferred to DIMTS.
- (iv) Upon consideration of the revised plans and estimates the EFC in its meeting dated 6th July, 2007 observed that the provisions made for different facilities and features may be relooked, necessary clearance from various regulatory bodies may be obtained and the detail estimate be prepared for approval. It was also observed that alternatively, proposal for PPP may be considered through DIMTS
- (v) Vide its letter dated 26th February, 2008, the EFC effectively rejected the revised preliminary estimate by transferring the project to DIMTS.

8. In the reply filed by the respondent No.1, it has been stated that the petitioners by letters dated 29th March, 2001 and 31st December, 2001 communicated that the respondent No.1 has been appointed as a consultant and the fees payable would be 3% for the non-repetitive works and 0.50% for the repetitive works. Accordingly, the respondent prepared preliminary

estimates and got approved the drawings, designs and the conceptual plan. The respondent No.1 made several requests to the petitioner for signing the Agreement, however after 39 months the Agreement was executed between the parties.

9. It has been stated the preliminary estimates were revised from time to time and also got the requisite approvals, however, in the meanwhile the petitioner transferred the work to DIMTS and restricted the payment as per Clause 6 of the Agreement for cost of construction. The respondent was asked for providing additional services beyond the scope of work leading to recasting of the preliminary estimate to Rs.212.32 crores.

10. The petitioner had agreed to revised estimated cost of Rs.212.32 crores in view of authorised changes in scope of work and extra service etc. Following that the petitioner also by letter dated 4th July, 2007 confirmed that the revised preliminary estimate of the project has been approved by SFC during the meeting held on 29th June, 2007 and asked the respondent No.1 for obtaining the approval from local bodies on top priority. Notwithstanding the same, rather in view of the different facilities and features as provided in the revised preliminary estimate, the EFC made the observation that it may be re-looked and the necessary clearances from various regulatory bodies may be obtained and detailed estimates be prepared for approval of EFC. However, petitioner did not comply with the said observations of the EFC much less approached the EFC for approval.

11. It is alleged by the respondent that the petitioner's contention that the project was still under preliminary stage when it was transferred to DIMTS is erroneous or misconceived and without basis as considering the fact that the project had been in existence from the letter of award issued on 31st December, 2001 and all throughout the time of over 7 years till the project

was transferred to DIMTS on 29th February, 2008 and over the period meanwhile the respondent No.1 had been undertaking various works or activities and rendering substantial services.

12. It has been stated that the contentions set up by the petitioner in respect of award or claims were itself raised before the arbitrator and have been effectually dealt with and decided by the arbitrator in his Award. The arbitrator was appointed by the petitioner itself and is known for his ability and integrity, and is fully conversant with such type of contracts and the arbitrations. The award is very detailed and well reasoned, the arbitrator has given sufficient and cogent reasons in support of his findings and for the conclusions stated in the award.

13. The scope of challenge to an award is limited to the grounds as expressly stated in Section 34(2) of the Act and the court does not sit as court of appeal over the decision of the arbitrator and examine the correctness of the award on merits or examine the merits of the award with reference to the materials produced before the arbitrator. When the arbitrator has applied his mind to the pleadings of the parties, the evidence adduced before him and the terms of the contract, the court will not re-appreciate the matter as if the objections raised by the petitioner against the award were an appeal. It is also well settled that where two views are possible, the view taken by the arbitrator would prevail.

14. Where the particular claims of the respondent were valid and justified under the contract, the decision is within the competency of the learned arbitrator. By construing the contract in a different manner or re-appraisal of evidence, the court could not take upon itself the burden of saying that the decision of the arbitrator was contrary to the contract.

It is well-settled that if on a view taken on the contract, the decision of the arbitrator is a possible view, though perhaps not the only correct view, the view taken by the arbitrator would prevail. The court will not interfere with the award on the ground that on the documents and materials on record a different view could have been taken. Error apparent on the face of the award does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the learned arbitrator may be held to be erroneous.

Appraisal of evidence by the arbitrator is not a matter which the court questions and considers. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

15. It is within the jurisdiction of the arbitrators to interpret the contract or particular clauses of the contract. As held in *M/s. Sudarsan Trading Co. vs. Govt. of Kerala*, (1989) 2 SCC 38 :

“Once there is no dispute as to the contract, what is the interpretation of that contract, is a matter for the arbitrator and on which court cannot substitute its own decision.”

In the case of *McDermott International Inc. vs. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 it is held as under :

“In *State of U.P. vs. Allied Constructions* (2003) 7 SCC 396, this Court held:

4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret Clause 47 of the agreement having regard to the fact-situation obtaining therein. It is submitted that an award

made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co. v. Govt. of Kerala*). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering (see *U.P. SEB v. Searsole Chemicals Ltd. and Ispat Engg. & Foundry Works vs. Steel Authority of India Ltd.*).”

“It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. ONGC*, (2003) 8 SCC 593 and *D.D. Sharma vs. Union of India*, (2004) 5 SCC 325]”.

16. In the case of *State of Rajasthan vs. Puri Construction Ltd.*, (1994) 6 SCC 485, the relevant part in para 31 of the judgment is as under :

“An erroneous decision of a court of law is open to judicial review by way of appeal or revision on accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have Indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the material on record and have shown definite inclination to preserve the award as far as possible.”

17. Let me now discuss the case in hand. It is the admitted position that the Award dated 9th December, 2011 made and signed by the learned Arbitrator awarded in favour of the respondent, claim No.1 “on account of consultancy bill for services rendered”, an amount of Rs.1,29,94,000/- and (as under Claim No.4) interest @ 10% per annum on the final bill amount i.e. Rs.1,22,80,000/- (awarded under Claim No.1 excluding service charges) from 1st September, 2009 to 30th June, 2010 amounting to Rs.10,23,000/- and future interest on the amount awarded under Claim No.6 excluding service tax i.e. on Rs.1,17,80,624/- @ 10% per annum from 1st July, 2010 to the date of payment and cost of arbitration under Claim No.7 an amount of Rs.1,00,000/-.

18. On the first of the aforesaid two issues i.e. main issue (i), the learned Arbitrator (vide para 2.16 of the Award) has decided that the respondent “is entitled to get consultancy fees at the rate of 2% of the cost of project as worked out under Clause 6 read with Clause 4(a) and Clause 8(i) of the Agreement”. As relating to the rate of consultancy fees, the facts or reasons are stated in paras 2.13, 2.14 and 2.15 of the Award.

19. Though it is argued on behalf of respondent No.1 that as per para 2.15, the agreement was signed by him under coercion, it is observed by the learned arbitrator that the respondent No.1 on two occasions i.e. before the EFC meeting held on 1st August, 2003 and before meeting of Monitoring Committee of transport department held on 15th September, 2004, did try to justify the consultancy fees of 3% on the project cost and conveyed his views to the petitioner vide letter dated 6th August, 2003 and letter dated 17th September, 2004 respectively, but after that he never raised this issue till the submission of final bill on 26th May, 2008 and therefore, as held by the learned arbitrator, it was evident that the signing of the agreement on 28th March, 2005 was with the free consent of both the parties. But the fact remains that the respondent No.1 has not challenged the finding of the Arbitral Award on issue No.1 wherein it was held that the respondent No.1 is entitled to get consultancy fees at the rate of 2% of the cost of project. Thus argument of the respondent No.1 to get the same at the rate of 3% is irrelevant and this court is not inclined to interfere with the said findings. The award is accordingly upheld.

20. On the second of aforesaid two issues, i.e. main issue (ii) What should be ceiling cost of the Project on which consultancy fees is payable ? The learned Arbitrator, firstly, in para 2.17 of the Award has referred to the

provisions of Clauses 4(a) and 8(i) of the Agreement and therein the limitation of consultancy fee mentioned in last para of Clause 6.0 as Rs.1.25 crores (i.e. 2% of the Project cost i.e. Rs.62.51 crores as approved in the meeting of Monitoring Committee on 15th September, 2004) and has therein observed that this ceiling of Rs.1.25 crores was fixed by the petitioner on its own. It is further observed that this ceiling cost mentioned in the last para of Clause 6.0 was contrary to the provisions of Clauses 4(a) and 8 (i) of the agreement. As further in the said para 2.17, the learned Arbitrator has examined the provisions of Clause 4(a) and 8 (i) and therein, firstly, referring to the relevant part of Clause 4(a) which provides that in the event of authorized changes in the work, the ceiling cost shall be based on the cost including such extra cost of approved modifications or actual cost of construction of such work including modifications whichever is lower, the learned Arbitrator has held : “Therefore, as per Clause 4(a) the ceiling cost mentioned under Clause 6 was not final and was subject to revision in case there were authorized changes.” Thereafter, referring to the provisions of Clause 8(i) providing for the right of employer to request changes, additions, modifications or deletions in the design and drawings of any part of the work and in case of the employer deviating substantially from the original scheme, the Consultant then being compensated for such extra services and expenses on quantum merit basis at percentage applicable under the agreement and to be determined mutually, the learned arbitrator has held : “Therefore, in view of the provisions contained in Clause 4(a) and Clause 8(i) of the agreement the provision of ceiling cost mentioned in last para of Clause 6 becomes redundant because there has to be a coherence and consistency between the different clauses of the agreement.”

21. Thereafter, coming to the revision in the cost of project, as observed by the learned Arbitrator in para 2.18, the preliminary estimate amounting to Rs.81.30 crores as approved by the transport department on 31st December, 2004 was on the lower side because certain essential provisions were deleted to bring down the cost of project and later on after the receipt of A/A & E/S of the project, explained to the transport department by the petitioner itself through various letters. This was the first major change in the scope of project. Thereafter, the complete scope of work relating to the project was again changed in view of the development control norms for ISBT being approved by the DDA and notified in the “New Master Plan of Delhi 2021” on 6th February, 2007 providing for substantial increase in the ground coverage and FAR and making provision of 30% FAR for commercial development and, as observed in para 2.18, therefore, the respondent No.1 reworked the entire proposal of the project considering Development Control norms for ISBT and submitted the revised drawings and which were approved by the transport department on 12th March, 2007 and then resubmitted to MCD for approval.

22. Lastly, as observed in para 2.19, the revised preliminary estimate amounting to Rs.212.32 crores as prepared by respondent No.1 and processed by the petitioner’s executive engineer, PWD BPD-113 and also processed by the Project Manager, BPC-B-11, PWD was submitted by the petitioner through its Chief Engineer (B-1)’s letter dated 31st May, 2007 to the Commissioner (Transport), Govt. Of Delhi for conveying A/A and E/S and in which revised preliminary estimate the ceiling cost of the project for consultancy fee purpose was taken as Rs.164,05,71,041/-. As further observed in the said para 2.19, in the meeting of EFC that took place on 6th

July, 2007 when this project i.e. C/o Modern ISBT at Sarai Kale Khan, New Delhi came up for discussion, the Transport Department has not raised any objection to the revised project cost. In para 2.19 it is further observed that the petitioner never approached the EFC after attending the EFC's observations and respondent No.1 cannot be made to suffer on account of lapses on the part of the transport department or the petitioner and therefore the learned arbitrator has rejected the petitioner's contention as to the revised preliminary estimate amounting to Rs.212.32 crores being not approved by EFC.

Even, Clause 4(a) of the agreement stipulates the petitioner to pay the professional fees to the consultant for the approved revised preliminary estimate where such revision was considered necessary by the employer under clause 2.1 (a) of the agreement and in that even the ceiling shall be based on the cost including extra cost of the approved modifications. The agreement also defines in clause 1(i) of the agreement that "Approved" means the approved by the employer's representative in writing including subsequent confirmation of previous approval and the "employer's representative" is defined in clause 1 (iii) which means the Secretary (PWD), Govt. of National Capital Territory of Delhi or any person authorized by him/her as would be incharge of the work and would sign the agreement on behalf of President of India. The agreement was signed by the Executive Engineer on behalf of the President of India. The ceiling referred by the petitioner under clause 6 is not applicable to the facts of the case herein and a fresh ceiling is to be worked out as per Clause 4 (a) as the revised preliminary estimate was itself approved by the Executive Engineer as observed by the learned Arbitrator.

23. There is a force in the submission of respondent that the scope of work was revised on two occasions and applying the principle of harmonious construction of various clauses of the Agreement the learned Arbitrator in para 2.20 has decided that consultancy fees to the respondent No.1 architect is payable on the revised project cost of Rs.164,05,71,041/- as shown by the petitioner itself in revised preliminary estimate amounting to Rs.212.32 crores.

24. After deciding the issues, under claim No.1 “on account of consultancy bill for services rendered” the learned arbitrator vide para 3.13 has awarded in favour of the respondent No.1 a total amount of Rs.1,29,94,000/- and therein stated the relevant facts and reasons.

25. As regards claim No.4 for interest on the amount of respondent’s final bill the learned arbitrator considering the relevant facts as stated in para 3.43 has awarded to respondent No.1 interest @ 10% per annum on the final bill amount of Rs.1,22,80,000/- as till then amounting to Rs.10,23,000/- for the period from 1st September, 2009 to 30th June, 2010 and further under Claim No.6 as stated at para 3.6 of the award future interest on Rs.1,17,80,624/- @ 10% per annum from 1st July, 2010 to the date of payment and under claim No.7 the learned arbitrator has awarded to the respondent No.1 a sum of Rs.1,00,000/- as the cost of arbitration vide para 3.7 of the Award.

26. Considering the overall facts and circumstances as explained above, the first of the said issues was decided holding that the agreement signed by the parties on 28th March, 2005 was with the free consent of both the parties. Thus, the respondent No.1 architect is entitled to consultancy fee at the rate of 2% of the cost of project as worked out under clause 6 read with clauses

4(a) and 8(i). The learned Arbitrator vide para 2.20 has decided the second issue i.e. What should be the ceiling cost of the project on which consultancy fees is payable ? as applying the principle of harmonious construction of various clauses of the agreement and therein referring to the relevant clauses 4(a) and 8(i) and clause 6 as analyzed in para 2.17 of the award.

27. As in first sub para of the said para 2.17 at page 23 the learned arbitrator has observed that “this ceiling of Rs.1.25 crore was fixed by the respondent i.e. “petitioner herein of their own” and as next in second sub para it is held : “However, this ceiling cost mentioned in last para of clause 6 of agreement was contrary to the provisions of clause 4(a) and 8(i) of the agreement.” Thereafter in the said para 2.17, firstly, referring to clause 4(a) it is observed that “as per clause 4(a) the ceiling cost mentioned under clause 6 was not final and was subject to revision in case there were authorized changes” and next as referring to clause 8(i) it is observed that “similarly under Clause 8(i) providing for the employer’s right to request the consultant changes, additions, modifications or deletions in the design and drawings of any part of the work, if the employer deviates substantially from the original scheme then the consultant may be compensated for such extra services and expenses on quantum merit basis at percentage applicable under the agreement and to be determined mutually”. The learned Arbitrator therefore, held that : “Therefore in view of the provisions contained in clause 4(a) and clause 8(i) of the agreement the provision of ceiling cost mentioned in last para of clause 6 becomes redundant because there has to be coherence and consistency between the different clauses of the agreement.”

28. The learned Arbitrator has interpreted the contract or particular clauses of the contract and given the reasons for his interpretation of relevant clauses 4(a) and 8(i) and clause 6. The interpretation as made or given by the learned arbitrator is just and equitable and in accordance with law and the terms of contract. He has gone into the relevant facts as adequately and fairly and decided the rival contentions or controversies between the parties in accordance with the law and terms of the contract. The learned arbitrator has given sufficient and cogent reasons for the findings and conclusions as arrived at by him and stated in the award.

29. In view of aforesaid reasons, facts and circumstances in the matter and settled law, I am of the view that the learned Arbitrator has rightly interpreted the contract. Thus, no interference is called for.

30. The petition under Section 34 of the Act filed by the petitioner is accordingly dismissed.

31. No costs.

(MANMOHAN SINGH)
JUDGE

APRIL 16, 2014