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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) 283/2016 & CM No. 36615/2016

Date of decision: 17th May, 2017

SILVER RESORTS HOTEL INDIA PVT LTD Appellant
Through: Mr. Sandeep Sethi, Sr. Advocate
With Mr. Rohan Jaitley, Mr. Tushar
John & Mr. Naman Joshi, Advocates
versus

WIKBERLY ALLISON TONG & GOO (UK) LTD Respondent
Through: Mr. Shambhu Sharan, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE REKHA PALLI

SANJIV KHANNA, J. (ORAL)

This appeal under Section 37(i)(c) of the Arbitration & Conciliation Act, 1996 (Act, for short) impugns order and judgment dated 18.07.2016 whereby objections filed by the appellant – Silver Resorts Hotel India Pvt. Ltd under Section 34 of the Act have been dismissed, upholding the arbitration award dated 03.07.2015.

2. The dispute relates to non-payment of architecture fee, in terms of the “Design Service Agreement” dated 08.12.2011.

3. A number of contentions were raised before the Single Judge, but before us the appellant has raised a singular contention. The

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challenge is to the part of the award which directs payment of the third and the last tranche of £50,000 each under the Fee Schedule set out in Appendix 'B' of the 'Design Service Agreement' dated 8.12.2011.

4. The appellant asserts that the respondent had failed to perform their obligations and had not submitted complete drawings relating to the third tranche of £50,000 towards professional service fee payable on completion of 75% design development. Our attention was drawn to the e-mail dated 21.04.2012 sent by Vipin Thakur of the appellant to Massimo Mallia of the respondent in which specific shortcomings in design and drawings were pointed out. On the principle of quantum meruit, the respondent was not entitled to the fourth tranche of £50,000 as the respondent had not completed 100% design development. The respondent in the statement of claim had adverted having completed 90% of the deliverable work by March, 2012 for which drawings were issued to the appellant on 19.03.2012. It is submitted that this is a case of a perverse award which aspect has been over looked by the learned Single Judge.

5. Learned counsel for the respondent has contested the submissions. Our attention was drawn to the legal notice dated 16.08.2012 for payment of £1,40,059.70 with simple interest @ 12%. The appellant vide reply dated 04.09.2012 had accepted and not disputed the outstanding, albeit pleaded that they would make efforts to settle the outstanding invoice, for due to bad market conditions, which had adversely affected them, they had cash flow problem, causing delay. The appellant had requested the respondent to release

further drawings, for delay in implementation of the project was not beneficial to either party. Thus implying that the appellant was aware that the designs were ready. In the rejoinder filed before the arbitrator, the respondent had affirmed and asserted the appellant were fully aware since inception that development phase drawings would be issued after release of outstanding instalment. The respondent had duly performed their part of the contract. They had prepared all or 100% design development drawings.

6. At the outset, we would note that scope for interference is rather limited and confined to the statutory parameters stated in Section 34 of the Act. The learned Single Judge has rightly referred to the ambit and scope of the said section by making reference to *Oil and Natural Gas Corporation Limited Versus Western Geco International Limited*, (2014) 9 SCC 263 and *Associate Builders Versus Delhi Development Authority*, (2015) 3 SCC 49 which places reliance on *P R Shah, Shares and Stock Brokers Private Limited versus B.H.H. Securities Private Limited and Others*, (2012) 1 SCC 594, to interpret "public policy" etc.

7. The arbitration award dated 03.07.2015 is exhaustive and detailed on the question of amounts due and payable and whether the third and the fourth tranches of £50,000 each, the claim of £35,000 for additional work beyond the scope of agreement and £5,059.70 towards expenses, were payable.

8. The e-mail of Vipin Thakur dated 21.04.2012 complaining about the grids displaced in respect of A 1.00 has been duly noticed and taken into consideration in the award. The relevant portion of the

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said award reads as under :

"5.7 On 3 April 2012, Wimberly wrote to Silver Resorts with reference to an e-mail sent apparently a few days before (30th March) and asking that Silver Resorts to "let them know when the outstanding itself will be transferred to our bank account". On this day, the 3 invoices being LO 7586, LO 7637 and LO 7640 totalling 105,059.70 pounds were outstanding for more than 30 days.

5.8 Thereafter on 17 April 2012, Mr. Stephen Michael Albert of Wimberely wrote to Mr. Vipin Thakur of Silver Resorts as follows :

Hi Vipin

I have tried to call you but believe you are in Chandigarh at the moment.

Our MD is very concerned as there are now a number of payments overdue dating back to January and February. These are very overdue (over 60 days) and I'm being told we will not be allowed to issue our updated drawings until these payments are settled. We might even need to stop work. Please can you process these and let me know by return when we can expect payment.

*The following are outstanding :
LO7586 for 50,000.00pounds
LO 7637 for 50,000.00 pounds
LO7640 for 5,059.70 pounds*

I will try to call you again."

5.9 On the very next date i e. On 18 April 2012 Mr. Albert again wrote to Mr. Albert again wrote to Mr. Thakur and this time copied Mr. Sushil Suri informing that on 30 March 2012 Wimberely had already written stating that due to outstanding invoices, no further drawings or schedules would be issued and

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sought payment of outstanding invoices. It wrote as follows :
Hi Vipin

Massimio wrote to you on the 30th March and clearly stated that due to the outstanding invoices, which are still unpaid, our Managing Director is not allowing us to issue any further drawings or schedules. We have completed the area reconciliation chart and are ready to send this and have had it ready prior to 7th April.

I must implore you to settle these invoices which are over 60 days overdue. Until we receive payment our hands are tied and not only can we issue no further drawings but we will be forced to stop work. Our MD has told us that we have to stop end of this week if payment is not made in the next couple of days.

Regarding the level or coordination our drawings are coordinated with the information we have received. Largely the engineering information is well progressed and coordinated but the Interior Design and Landscape are still in Concept and hugely behind. We have made every effort to incorporate the many changes that have arisen out of their input and MGMs to date.

Can I please ask you to settle the invoices as a matter of utmost urgency.

I spoke to Mr. Suri earlier he is in London, and we would be very pleased to meet with him if it helps resolve these issues."

5.10 On 18 April 2012, Mr. Thakur wrote to Mr. Albert as follows:

"I note that WATG has reached 80% stage. At this stage we would expect that the drawings should be fairly coordinated with MEP structure and interiors which I understand still has some way to go. Further we still have not received the Area

Reconciliation Chart which illustrates how you have satisfied the operator's requirements and how you have stayed within the permissible FSI and have achieved the require parking numbers. Any DD package without these details is totally irrelevant and of little use to us. Please ensure that these things are taken care of before we move further. Kindly send the area conciliation asap.

PS: in the last design workshop in London in March WATG had promised to send the complete area reconciliation chart by 7th April (on as is where is basis) but WATG has failed to deliver that."

5.11 On 20 April 2012 Mr. Albert of Wimberely then wrote to Mr. Thakur formally informing that they had stopped work as follows :

"We have not received the outstanding payments that go back over 60 days or expenses for coordination meetings in Delhi for this project that are also considerably overdue. Our MD is not prepared to let this continue and with regret I must inform you that from today we have to stop work on the project.

I've been told that unless payment comes in the next couple of days the matter will be handed over to our corporate collections group."

5.12 Thereafter on 21 April 2012 Mr. Thakur wrote to Wimberely complaining about certain grids being displaced in respect of A 1.00.

5.13 Another mail was written on 21 April 2012 by Mr. Thakur where he informed Mr. Albert "Mr. Suri would advice you about the payments". In this letter, he pointed out certain missing drawings from the design development package uploaded and raised certain complaints stating inter alia as follows :

"Overall, in terms of number of sheets 25 dwgs have been issued out of an apx total expected 75 drawings.

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I know some coordination is required in interiors and landscaping but even the level of detailing done by the ID consultants, facade consultants, landscape consultants and MEP consultants till date (on as is where is basis) has not been fully incorporated in your drawings. Even the structural coordination which is fairly advanced has not been fully incorporated.

In this context, I would require that you should not relate the work with payments and should continue to work and make up for the deficiencies listed above. We are on very tight timelines and stoppage of work from your side would adversely affect the construction activity down the line.

I have already requested Mr. Suri to release payments as appropriate and commensurate with the deliverables on date and release the balance as the work progress. (emphasis added)."

9. Thereafter, the award refers to the cross-examination of Stephan Albert and makes reference to the letter written by Stephen Albert to Sushil Suri of the appellant and the response given by the latter on the same day via e-mail. The relevant para of the said email by Sushil Suri reads as under :-

"thanks Stephen, you had always been a good support. Will give you the exact schedule when I reach India on Monday. Tell your accounts department they wont need an agency to do collect the money."

10. The award thereafter considers and refers to further correspondence which had taken place between the parties including the letter dated 24.05.2012. The letter was followed by legal notices sent by the Solicitors of the respondent dated 11.06.2012 and

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16.08.2012. In response to the last legal notice, the appellant had stated as under :-

"We are making all the efforts to settle the outstanding invoices at the earliest however due to bad market conditions, the cash flows of the Company have been adversely affected which has resulted in the delays. We have no intention to default in the payments but it is only a delay. We seek 60 days time (on or before Nov 3, 2012) to clear the outstanding bills. We also seek a support from WATG to release the drawings, as delay in implementation of the project will not be beneficial to either party. It will only further delay the cash inflows. We hope you will accede to our request and we shall make all the efforts to settle the bills at the earliest. "

11. It is apparent to us that there is comprehensive and due consideration and appreciation of the relevant evidence by the arbitrator before he arrived at the finding in favour of the respondent. By no stretch, can we consider the reasoning and conclusion as perverse or one based upon no evidence or even mis-reading of evidence. The view expressed and the outcome is lucid and well considered. The final conclusion is more than plausible, ^{and is} ~~if not~~ entirely acceptable.

12. Reliance placed by the appellant on paragraph 7 of the statement of claims filed by the respondent is misconceived. Paragraph 7 of the statement of claim has to be read along with paragraph 5 which refers to and quotes Appendix B of the Design Service Agreement. Appendix B was the phase-wise fee schedule for payment by the appellant to the respondent and reads as under :

"Fee Schedule"

"The payment schedule calls for monthly billings and monthly

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payment of fees for services provided by WATG in approximate relationship to the phases of the project. The schedule depends on the client providing timely approval and written instruction to proceed to each phase as set out in the scope of work.

<i>Month Timing for Guidance Purposes</i>	<i>Architecture Fee (Pounds)</i>
<i>Mobilisation</i>	<i>£50,000</i>
<i>Month 1</i>	<i>25% Design Development-£50,000</i>
<i>Month 2</i>	<i>50% Design Development-£50,000</i>
<i>Month 3</i>	<i>75% Design Development-£50,000</i>
<i>Month 4</i>	<i>100% Design Development-£50,000</i>
<i>Total</i>	<i>£250,000</i>

In para 7, the respondent had pleaded that :

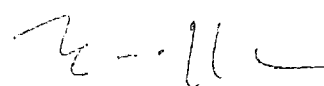
“In conformity with the said Agreement, the Claimant had completed 90% of the deliverable work by March 2012 and the drawings for the same were issued to the Respondent on 19th March, 2012. However the Respondent failed to keep its promise in terms of the said Agreement and started defaulting in making payments to the Claimant.”

The aforesaid paragraph in the claim petition would indicate that the respondent had claimed that they had completed 90% of the deliverable work by March, 2012 and the drawings for the same were issued to the appellant on 19.03.2012. The appellant however had not kept their promise to make payment. The appellant may have denied that the respondent had completed 90% of the deliverable work by March 2012, but this is a disputed question of fact which had to be considered by the arbitrator. The assertion of paragraph 7 would not

show and establish that the drawings were never completed and ready. The respondent in the rejoinder had affirmed and reiterated that they had completed the entire or 100% design development assigned to them as per the contract and were ready with the design development drawings. These drawings were not released as the appellant had failed to make payment for the third tranche of £50,000 raised vide invoice dated 27.01.2012. Paragraph 7 refers to deliverable work by a particular date and not that the 100% drawings were not complete and remained pending.

13. Two bills were thereafter raised on 27.02.2012 and on 03.05.2012 for £5059.70 and £35,000 for expenses and additional work, respectively. These invoices were not disputed or denied at any time.

14. Having considered the contentions and arguments raised, we do not think that the impugned order and judgment dated 18.07.2016 upholding the arbitration award dated 03.07.2015 and rejecting the objections requires interference. We do not find any merit in the appeal, which is dismissed with no order as to costs.


SANJIV KHANNA, J


REKHA PALLI, J

MAY 17, 2017/P