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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on January 29, 2015
Judgment Delivered on February 05, 2015

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O.M.P. 612/2012

M/S MULTITECH CONSTRUCTION CO.

.... Petitioner

Through: Mr.Sandeep Sharma, Advocate with
Ms.Risha Mittal, Advocate

versus

GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms.Anjana Gosain, Advocate with
Mr.Pradeep Desodya, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act' in short) impugns the award dated March 20, 2012 passed by the Sole Arbitrator whereby the Sole Arbitrator, has, awarded Rs. 1 lakh (against claim no. 1) Rs.8856/- as bank charges (against claim no.2.3) and simple interest @ 2.25% p.a. on Rs.7,32,128/- for the period between July 16, 2009 to June 29, 2010 (against claim no. 2.4) pendente lite interest at 9% on Rs. 8856/- and future interest @ 12% on Rs.1,08,856/- (against claim no. 4) apart from granting cost of Rs.10,000/- (against claim no. 5).

2. It is necessary to mention herein, during the submissions, the learned counsel appearing for the petitioner has confined himself to claim No. 1, which is the claim related to loss of profit.

FACTS:

3. In September, 2009, the work related to covering of MCD Nala along with August Kranti Marg from Kamala Nehru College to Siri Fort Auditorium turning to Outer Ring Road was granted to the petitioner vide letter dated September 18, 2009. The agreement of the same date was also executed. The total cost of the project was Rs.3,01,12,949/-. The stipulated date for the start of work was October 10, 2009 and the completion date being January 09, 2010. The Clause 25 of the agreement was an arbitration clause.

4. It is the case of the petitioner that, on October 7, 2009, the petitioner submitted performance guarantee and entered into an agreement with Ahlcon Mix Concrete (Pvt.) Ltd. for supply of RMC. The petitioner's stand in the petition is that on October 12, 2009, as per the instructions and letter from the respondent, the petitioner had contacted the Assistant Engineer for taking over the site. It was the case of the petitioner that the work was to be completed before the Commonwealth Games 2010 and the petitioner had accordingly deployed staff and establishment and raised other infrastructure keeping this in mind. Till February 2010, it did not receive any communication from the respondent despite

repeated requests and only found out through a letter of the said date that the site to be developed was under litigation. On June 24, 2010, the agreement was foreclosed by the respondent. Suffice to state, the dispute arose between the parties and the matter went to Arbitration, which resulted in the impugned award dated March 20, 2012.

5. Five claims were raised by the petitioner and one counter claim by the respondent. The claims of the petitioner were; (1) claim No. 1 of Rs.45,17,092/- as loss of profit; (2) claim No. 2 of Rs.3,73,940 on account of bank charges on bank guarantee for the performance guarantee and loss of interest on amount of performance guarantee and the EMD; (3) claim No. 3 of Rs. 5,00,000/- on account of compensation for the losses and damages suffered due to idle labour, machinery and TND; (4) claim No. 4 on account of interest pre suit, pendente lite and future interest @ 18% p.a.; and (5) claim No. 5 on account of the cost of arbitration proceedings.

6. The counter claim of the respondent was on account of the cost of arbitration for which, they have claimed Rs.1 lakh. Insofar as the claims are concerned, the Arbitrator has held as under:

1. Claim of INR 45,17,092 (Indian Rupees Forty Five Lakh Seventeen Thousand and Ninety Two Only) on account of expected loss of profit

The Arbitrator decided against the respondent basing his decision on the language of Clause 3A of the Agreement. Clause 3A states

“In case the work cannot be started due to reasons not within the control of the contractor within 1/8th of the stipulated time for completion of work, either party may close the contract. In such eventuality, the Earnest Money and the Performance Guarantee of the contractor shall be refunded but no payment on account of interest, loss of profit or damages etc. shall be payable at all” (Emphasis supplied)

The arbitrator has looked into the language of the clause and held that:

- There was no time limit on the operation of Clause 3A as long as it was claimed after the expiry of 1/8th of the stipulated time for completion of the contract.
- There is unambiguous bar on the payment of loss of profit in Clause 3A of the Agreement and since the action taken by the respondent under Clause 3A has been upheld, the claimant is not entitled to any loss of profit.
- Further, the Arbitrator has held that the Petitioner had not proven that it had suffered substantial damages on account of being tied to the subject work. The Arbitrator has held that since the site had not been handed over to the Petitioner, it did not need to mobilise manpower or resources and any award of loss of profit would amount to unjust enrichment, which is not permitted by the law.
- The Arbitrator has also looked at Section 28(3) of the Arbitration and Conciliation Act, 1996 (Act) which reads
“(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall “take into account the usage of the trade applicable to the transaction”
- Taking this into account, the Arbitrator has held that since Clause 3A stipulates bar on payment of loss of profit, and since the arbitral tribunal has to decide in accordance with the terms of the contract, no award can be made for the claim of expected loss of profit.
- The Arbitrator awarded the Petitioner the sum of INR 1,00,000 (Indian Rupees One Lakh Only) for costs incurred by it from submission of tender till the closure of contract.

2. *Claim of INR 3,73,940 (Indian Rupees Three Lakh Seventy Three Thousand Nine Hundred and Forty Only) on account of bank charges on bank guarantee for performance guarantee (PG) and loss of interest on the amounts of PG and earnest money deposit (EMD).*
 - Here the Arbitrator rejected the claim of INR 2,25,854 (Indian Rupees Two Lakh Twenty Five Thousand Eight Hundred and Fifty Four) claimed as loss of interest on PG as it was in the form of a bank guarantee.
 - The Arbitrator awarded actual expenditure of INR 8,856 (Indian Rupees Eight Thousand Eight Hundred and Fifty Six Only) on bank charges against a claim of INR 60,230 (Indian Rupees Sixty Thousand Two Hundred and Thirty Only)
 - The Arbitrator also awarded simple interest @ 2.25% per annum on INR 7,32,128 (Indian Rupees Seven Lakh Thirty Two Thousand One Hundred and Twenty Eight Only) against a claim of interest @ 15% per annum.
3. *Claim of INR 5,00,000 (Indian Rupees Five Lakh Only) on account of compensation for the losses and damages suffered due to idle labour staff, machinery and T&P*
 - Denied by the Arbitrator as claimant was unable to substantiate this claim.
4. *Claim of interest @ 18% p.a. on account of interest pre-suit, pendent-lite and future*
 - Awarded simple interest @ 9% p.a. on INR 8,856 (Indian Rupees Eight Thousand Eight Hundred and Fifty Six Only)
 - Awarded future interest @ 12% p.a. on INR 1,08,856 (Indian Rupees One Lakh Eight Thousand Eight Hundred and Fifty Six Only) as future interest from 21 March 2012 up to the date the award amount was paid by the Respondent; not to be paid if award amount was paid within three months from date of receipt of award.
5. *Claim of INR 1,00,000 (Indian Rupees One Lakh Only) on account of cost of arbitration proceedings*

- Awarded a sum of INR 10,000 (Indian Rupees Ten Thousand Only) towards costs.

7. Mr.Sandeep Sharma, learned counsel appearing for the petitioner would submit that the learned Arbitrator has failed to appreciate the facts in the proper perspective. It is his case that the clause 3(A), as interpreted by the learned Arbitrator is not sustainable inasmuch as clause 3(A) contemplates that if the work cannot be started due to the reasons not within the control of the contractor within 1/8th of the stipulated time for completion of work the contract could be closed. He would state that the contractor i.e. the petitioner was ready and willing to do the work. It was the respondent, who could not able to give the site to the contractor for executing the work. According to him, even assuming that there was a restraint order from the Supreme Court from doing the work, the same cannot be attributed to the petitioner herein. In other words, since the work cannot be started due to the reasons not within the control of the respondent, clause 3(A) has no applicability. It was also his submission that the starting date of the work was October 10, 2009 and the completion date was January 09, 2010. The agreement was foreclosed on June 24, 2010, which is six months after the stipulated date of completion. According to him, since the foreclosure was after the duration of the work, the petitioner was entitled to the loss of profit, which was allowed only to the extent of Rs.1 lakh by the learned Arbitrator. He would state that the conclusion of the learned Arbitrator that the petitioner for claiming

damages/loss of profits has to prove its case on the basis of credible evidence, which has not been done by the petitioner, is a perverse finding. He would refer to page No. 15 of the documents in support of his contention. According to him, the sequence of events and important dates as highlighted in the claim petition would reveal that the petitioner in furtherance to the agreement, had entered into an MoU with RMC; mobilized the staff and labour. He would also state that at no point of time till February 2010, the petitioner was told about the litigation pending before the Supreme Court because of which, the work could not commence. He would rely upon the judgment of the Single Judge of this Court in the case of *M/s. Simplex Concrete Piles (India) Ltd. Vs. Union of India, CS (OS) No. 614A/2002*.

8. On the other hand, learned counsel for the respondent, who has also filed reply to the petition, would submit that there is no illegality in the finding of the learned Arbitrator on claim No. 1. She would state that clause 3(A) was rightly invoked and in support of her contention, she would rely upon the judgment of the Single Judge of this Court in the case of *Arvind Kumar Shangle Vs. Union of India, OMP No. 947/2012 decided on October 8, 2012*, wherein the learned Single Judge has interpreted the same clause which was invoked foreclosing the agreement and also, the order of the Division Bench of this Court in FAO(OS) 593/2012, which is an order in appeal against the order of the learned Single Judge, wherein, the Division Bench, has upheld the order dated October 8, 2012.

Further, it is her submission that the agreement was rightly foreclosed as there was a restraint order by the Supreme Court and the work could not be carried out. She would further state that there was no occasion for the petitioner to even start the process of work in view of the restraint order. According to her, the petitioner was well aware of the compelling circumstances arising out of the dispute at site. At no point of time, did the petitioner made an attempt to foreclose the agreement in terms of clause 3(A). She would state that the learned Arbitrator has rightly come to a conclusion that in the absence of any credible evidence for claiming damages/loss of profit, having suffered by the petitioner, the claim as made by the petitioner cannot be allowed. In any case, to meet the ends of justice, the learned Arbitrator had awarded an amount of Rs. 1 lakh.

9. Having heard the learned counsel for the parties, insofar as the interpretation sought to be advanced by the learned counsel for the petitioner on clause 3(A) is concerned, suffice to state, that the interpretation stands settled by the learned Single Judge of this Court in the case of *Arvind Kumar Shangle (supra)*, wherein, the learned Single Judge has held that the clause makes it clear that even where non performance of the contract is not for any reason attributable to the petitioner, the petitioner cannot claim any loss of profit. The said conclusion has not been interfered by the Division Bench in the appeal filed by Arvind Kumar Shangle in FAO (OS) 593/2012. The submission made by Mr.Sandeep Sharma, interpreting clause 3(A) needs to be rejected. The only

issue need to be decided is, whether on the basis of the stand taken by the petitioner before the learned Arbitrator, the claim of loss of profit needs to have been allowed. The submission of Mr. Sharma that the judgments of the Single Judge and Division Bench in the case of **Arvind Kumar Shangle** (*supra*) are not applicable is concerned, such a submission also needs to be rejected inasmuch even in the impugned award dated March 20, 2012, the learned Arbitrator has concluded as under:

“7. For claiming damages/loss of profit, the claimant has to prove its case on the basis of the credible evidence of having suffered substantial damages but the claimant has not done so. Claimant has also not submitted any document to establish that it was deprived of any profit earning opportunity on account of its being tied to the subject work. It is also not the case of the claimant that its participation in the tenders during the relevant period has been adversely affected because the work in hand restricted the bidding capacity. Thus all along the claimant had full opportunity to earn profit. In construction work, contractor (claimant) has to be mobilize financial resources, deploy men & machinery and provide various other inputs which gradually fructify till the completion of work and generate profit. In the case at hand, the work has not commenced and as such no investment was required to be made to mobilize by the claimant resources. Thus under the given circumstances, it is held that award of expected loss of profit will tantamount to ‘unjust enrichment’ which is not permitted under the law.”

10. A perusal of the aforesaid finding of the learned Arbitrator would reveal that even in this case, the petitioner had not placed any credible evidence of having suffered damages/loss of profit. The sequence of events and the important dates on which reliance was placed would reveal that except the fact that the petitioner had entered into an MOU with RMC and the staff and labour was employed, would not prove loss of profit. Moreover, the conclusion of the learned Arbitrator is a finding of fact. I note even in these proceedings, the petitioner has not placed anything on record to show that, in fact, it suffered loss. I note, even the Single Judge and the Division Bench in *Arvind Kumar Shangle (supra)*, have upheld a similar award wherein Mr. Shangle was awarded an amount of Rs.1 lakh against loss of profit. The relevant observations in that regard of the learned Single Judge, are reproduced below:

“15. The learned Arbitrator has correctly interpreted Clause 3A of the agreement which reads thus:

“In case the work cannot be started due to reasons not within the control of the contractor within 1/8th of the stipulated time for completion of work, either party may close the contract. In such eventuality, the Earnest Money Deposit and the Performance Guarantee of the contractor shall be refunded, but no payment on account of interest, loss of profit or damages etc. shall be payable at all.”

16. The above Clause makes it clear that even where non-performance of the contract is not for any reason attributable to the Petitioner, the Petitioner cannot claim any loss of profit. As correctly observed by the learned Arbitrator, even if one were to

ignore the above clause, the Petitioner would still have to show that it suffered losses. In the instant case, the Petitioner was unable to produce any documents to substantiate any of its claims. In the circumstances, the learned Arbitrator was justified in rejecting the claims of the Petitioner except to the extent of awarding a sum of Rs. 1 lakh under Claim No. 1.”

11. Similarly, the Division Bench while upholding the order of the Single Judge has dismissed the appeal, by holding as under:

“This Court has gone through the impugned order which noticed that the appellant made no attempt to show/prove that it had committed its man-power, equipment or capital or deployment of material also for carrying of the work at any stage. The mere fact that the Court under Section 34 of the Arbitration and Conciliation Act, 1996 or even the Appellate Court might be inclined to take a different view as regards the quantum is by itself no consideration for interference under Section 34 of the Arbitration and Conciliation Act, 1996 which imposes stringent standards for entertaining objections and interfering with awards.

In view of the above discussion and having regard to the materials, the Court is satisfied that the impugned order does not suffer from any infirmity warranting appellate interference. The appeal is accordingly dismissed.”

I do not think, this Court should take a different view than the one taken by the learned Single Judge and the Division Bench in **Arvind Kumar Shangle (supra)**.

12. Insofar as the reliance placed by the learned counsel for the petitioner on the judgment of the learned Single Judge of this Court in *M/s. Simplex Concrete Piles (India) Ltd. (supra)* is concerned, there, the learned Single Judge, was dealing with the provision in the contract, which stipulated damages cannot be claimed by a contractor. The Court, after observing on the contrasting opinions delivered by the two judges' Bench of the Supreme Court in the case of *Ram Nath International Construction (Pvt.) Ltd. Vs. Union of India, (2002) 2 SCC 453* and *Asian Techs Limited Vs. Union of India and Ors. (2009) 10 SCC 354*, was of the view that a clause of such nature would be void being against the public interest and public policy as such a clause also defeat the provision of law, which is surely not in the public interest of commercial relations. In the case in hand, the *vires* of clause 3(A) has not been challenged, at least, on the ground that such a provision in the contract is unconscionable. In the absence of any challenge to the *vires* of clause 3(A), the interpretation as given by the learned Single Judge and upheld by the Division Bench of this Court in *Arvind Kumar Shangle (supra)* needs to be reiterated and I do so.

13. Further, the scope of interference in an arbitral award is well settled. A Division of this Court in the case of *State Trading Corporation of India vs. Toepfer International Asia Pte. Ltd. 2014 (3) Arb. LR 105 (Delhi) (DB)* after referring to various judgments of this Court and the Supreme Court on the scope of Section 34 of the Act has held as under:-

"6.A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of documents/evidence, is non-interferable under Section 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in

application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

XXX XXX XXX

11.A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e. concerning legitimacy of the process of decision....

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17. The Supreme Court in Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran (2012) 5 SCC 306 refused to set aside an

arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering the material before it and after interpreting the provisions of the Agreement and if the Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. (2010) 11 SCC 296 and on Kwaliti MFG. Corporation Vs. Central Warehousing Corporation (2009) 5 SCC 142. Similarly, in P.R. Shah, Shares & Stock Broker (P) Ltd. V. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594 it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at. A Division Bench of this Court also recently in National Highways Authority of India Vs. M/s. Lanco Infratech Ltd. MANU/DE/0609/2014 held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Tribunal and even if an error exists, this is an error of fact within jurisdiction, which cannot be reappreciated by the Court under Section 34 of the Act. The Supreme Court in Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63 even while dealing with a

challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relatable to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion."

14. In view of my above discussion, I do not think, any reason to interfere with the impugned award. The present petition is dismissed. No costs.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 05, 2015/akb