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

Date of Decision: October 05, 2016

+ **FAO 140/2016**

MAJ GEN (RETD) HOSHIAR SINGH YSM Appellant
Through: Mr. Arunav Patnaik &
Ms. Mahima Sinha, Advocates

Versus

M/S M K CONSTRUCTIONS & ANR. Respondents
Through: Mr.L.B.Rai, Mr.A.N. Mahajan &
Mr.Mohit Kumar Sharma,
Advocates

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

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1. Impugned order of 19th November, 2015, rejects appellant- owner's objection under Section 34 of the *Arbitration and Conciliation Act, 1996* by holding that the objections are without any basis and Arbitrator was justified in passing the Award against appellant. Trial court, after advertng to various decisions of Supreme Court and this Court, has held that objections filed by appellant are not covered by any of the grounds enumerated under Section 34 of *The Arbitration and Conciliation Act, 1996*.

2. Arbitrator's Award of 6th February, 2014 (*Annexure A-2*) notes the

factual details of this case, which are not required to be reproduced here. Suffice to note that there was a construction Agreement between appellant-owner and respondent-builder and the structure/ superstructure on the land in question was to be raised as per the construction Agreement of 8th April, 2008. Before the Arbitrator, appellant had pointed out a number of deviations and defects in the construction work done by respondents vide Show Cause Notice of 23rd July, 2009 which was not responded to. Rectification cost of deviation claimed by appellant was to the tune of ₹17,00,000/-. Admission and denial of documents was got done by Arbitrator and after recording evidence on the pleadings of the parties, the learned Arbitrator had passed the Award directing appellant to make balance payment of ₹8,59,484/- with interest.

3. It is a matter of record that during admission-denial of documents, appellant had admitted the final bill raised by respondent and learned Arbitrator took note of the Architect's Report placed on record by both the sides but had proceeded not to rely upon them because the inspections were conducted by the Architects in the absence of the other side and there was a time gap between inspections conducted and so, the learned Arbitrator chose not to rely upon the Architect's Report of either side and has passed the Award, which was challenged by appellant by way of objections under Section 34 of *The Arbitration and Conciliation Act, 1996* and the said objections have been dismissed vide impugned order.

4. Learned counsel for appellant submits that the Award is patently illegal because it does not deal with appellant's application seeking appointment of an expert as Local Commissioner to conduct the site inspection to find out the defects, in the structure/super structure raised by

respondents. It is submitted by learned counsel for appellant that sole reliance upon an admission by appellant cannot be the basis of the Award, as the endeavour in these proceedings is to find out the truth which could have been easily discovered by getting a report from a government approved Architect appointed as a Local Commissioner and this can be done even now to detect the defects which exists in the super structure raised by respondents. It is submitted on instructions that due to the defects in the construction done by respondents, appellant does not feel safe to live in the residential building in question. It is pointed out by appellant's counsel that the final bill was admitted during admission-denial of documents under sheer misconception that admission is qua existence of the document and not of its contents.

5. At this stage, learned counsel for respondents points out that admission-denial of documents, including the final bill was done by appellants by way of an affidavit of 16th July, 2012 (*Annexure A-19*) and so, there is no question of any misconception.

6. It is pointed out by appellant's counsel that appellant in his evidence before the learned Arbitrator had categorically denied that the joint measurement of the site was conducted in the presence of appellant and even documents showing joint measurement is not signed by appellant and so, final bill raised on its basis cannot be solely relied upon and by doing so, a patent illegality has been committed by the learned Arbitrator. To submit so, attention of this Court has been drawn to the final bill/ measurement jointly done by the parties (*EX. DW-1/2*), copy of which is filed along with the reply filed by respondents, which shows that it is not signed by both the sides.

7. Attention of this Court is also drawn by appellant's counsel to Arbitrator's order of 5th October, 2013 to show that the orders on appellant's application for appointment of expert as Local Commissioner was not declined but was left open to be considered at the final stage but it has not been considered at all by the Arbitrator while rendering the Award. It is further pointed out that it is evident from the aforesaid order of 5th October, 2013 that the orders on the said application were deferred because the evidence of experts i.e. Architects of both the sides was already recorded. Thus, it is submitted that the impugned order discloses utter non-application of mind and Award of the Arbitrator is rendered perverse on account of afore-referred patent illegality and it is prayed that appellant's application for appointment of Expert as Local Commissioner ought to be allowed for inspection at site, so that the defects, as pointed out by appellant in the Show Cause Notice of 23rd July, 2009, can be verified and upon finding substance in the claim petition of the appellant, it be allowed and counter claim of respondents be dismissed.

8. To the contrary is the submission of learned counsel for respondents, who supports the impugned order and the Award passed by the Arbitrator and draws attention of this Court to Section 34 of *The Arbitration and Conciliation Act, 1996* to submit that the parameters within which objections of appellant has to be considered are quite narrow and proceeds to rely upon the decisions in *P.R. Shah, Shares and Stock Brokers Private Limited Vs. B.H.H. Securities Private Limited & ors.* (2012) 1 SCC 594 and *NHAI Vs. Oriental Structural Engineers Ltd.* 2013 (4) Arbitration Law Reporter 99 to submit that this Court is not to sit in appeal over the Award and the Award in question is not open to

challenge on the ground that the Arbitrator has reached a wrong conclusion or that the interpretation given by the Arbitrator to the provisions of the Contract is incorrect. It is submitted that there is no patent illegality in the Award or the impugned order because it is based upon an admitted document i.e. the final bill and so, this appeal ought to be dismissed.

9. Upon considering the submissions of both the sides and on perusal of the impugned order, evidence on record, Award in question and the decisions cited, I do find that this Court cannot sit in appeal over the Award and the arbitral Award cannot be set aside while dealing with objections under Section 34 of *The Arbitration and Conciliation Act, 1996*, merely because this Court takes a different view than the one taken by the learned Arbitrator. However, Sub-Section 2A of Section 34 of *The Arbitration and Conciliation Act, 1996* clearly provides that the Award cannot be interfered on the ground of erroneous application of law or re-appreciation of evidence but the Award can be set aside if it is vitiated by patent illegality. This Court is conscious of the fact that challenge to an arbitral Award under Section 34 of *The Arbitration and Conciliation Act, 1996* lies in a very narrow compass.

10. In the instant case, the impugned Award is solely based upon appellant's admission of the final bill. In view of the mandate of Order 12 Rule 6 of CPC, a judgment can be based on an admission provided the admission made is categorical. The object of aforesaid provision is to enable a party to obtain speedy judgment. However, relief under Order 12 Rule 6 of CPC is discretionary and the power under this provision has to be judiciously exercised and that too, when the admission is clear,

unambiguous and unconditional. A judgment on admission is not a matter of right and is rather a matter of discretion. It is equally true that an admission can be explained away and if it is so done, then it cannot be relied upon.

11. In the aforesaid background, appellant's admission of the '*Final Bill/ Measurement Jointly Done By The Parties*' ought to have been considered by the learned Arbitrator. A bare perusal of the '*Final Bill/ Measurement Jointly Done By The Parties*' (Ex. DW1/2) reveals that it is only signed by respondent- *Malkhan Singh* and not by appellant. This by itself dilutes the evidentiary value of the aforesaid document (Ex. DW1/2). It is being so said because in the cross-examination of appellant, suggestions have been put by respondents to appellant qua the so called admission of document (Ex. DW-1/2) and the suggestions put have been denied. The substratum of the '*Final Bill/ Measurement Jointly Done By The Parties*' is washed away by the cross-examination of appellant, which is as under:-

"It is wrong to suggest that on 10.06.2009, I and Mr. Malkhan Singh had undertaken a joint measurement of the site. It is further wrong to suggest that after the above said joint measurement, Mr. Malkhan Singh raised bill of the amount of Rs.64,90,484.75. It is wrong to suggest that on 10.09.2009 I and Malkhan Singh had not undertaken joint measurement of the site. All the deviations including defects and use of sub-standard material were noted down in the joint measurement and the same was handed over to Mr. Malkhan Singh but he declined to acknowledge the same. It is wrong to suggest that there was no defect or deviation in the construction and as such I had not given any such list to Mr. Malkhan Singh."

12. In the face of afore-noted cross-examination of appellant qua the so called admission, the said admission cannot be said to be categoric and since the aforesaid document (*EX. DW-1/2*) which purportedly contains appellant's admission, lacks evidentiary value in the absence of appellant's signature, therefore, sole reliance upon it by the learned Arbitrator totally vitiates the impugned Award. Such a view is being taken because no prudent person would rely upon the so called admission made by appellant, in light of the above-referred cross-examination. Supreme Court in its recent decision in *Associate Builders Vs. Delhi Development Authority* (2015) 3 SCC 49 while dealing with the ambit of objections under Section 34 of *The Arbitration and Conciliation Act, 1996* has reiterated that it is a settled position of law that a finding which ignores vital evidence in arriving at a decision, would necessarily render the Award perverse.

13. The patent illegality committed by learned Arbitrator in the instant case is that when appellant's application for appointment of an independent expert as a Local Commissioner to inspect the site was filed, the orders on the said application were deferred because the evidence of Architects in support of Reports placed on record by both the sides was already there. However, the said application was not decided and orders on said application were deferred by the learned Arbitrator, with the rider that it would be considered at the final stage. It is a matter of record that learned Arbitrator had not decided the said application for appointment of a Local Commissioner, when Award was rendered and this assumes importance in view of the fact that learned Arbitrator in the impugned Award had chosen not to rely upon the Architect's Reports placed on

record by both the sides but has erroneously proceeded to solely rely upon appellant's admission, which has been found to be defective for the reason that the so called joint measurement on the basis of which final bill is raised, is not signed by appellant. Then, how in such a situation, it can be said to be a joint measurement of the work done at the site. In the considered opinion of this Court, this by itself is a patent illegality which is apparent on the face of it and it goes to the root of the matter and is sufficient to vitiate the Award. Reliance placed by respondents' counsel upon the decisions referred to above, is of no avail in view of the aforementioned glaring illegality, which renders the impugned order and the Award perverse. If at the final stage, the learned Arbitrator had chosen not to rely upon the Architect's Report placed on record by both the sides, then in such a case, instead of solely relying upon appellant's so called admission, which stands explained away in appellant's cross-examination, the prudent course to be adopted by learned Arbitrator was to allow appellant's application for appointment of a Local Commissioner. A Government approved Architect, ought to have been appointed as a Local Commissioner to inspect the site as the variation between the measurements, as reflected in appellant's document and the '*Final Bill/ Measurement Jointly Done By The Parties*' is substantial.

14. In the light of the above, the impugned order is rendered unsustainable and while allowing appellant's application under Section 34 of *The Arbitration and Conciliation Act, 1996* the impugned Award is set aside with direction to learned Arbitrator to appoint a Government approved Architect as Local Commissioner (*to be chosen by the learned Arbitrator*), who shall inspect the site after putting the parties to notice of

date and time of inspection and submit a report to learned Arbitrator. The fee of Government approved Architect/Local Commissioner be quantified by learned Arbitrator which shall be initially borne by appellant and it would be adjusted in the costs while passing the Award afresh.

15. After a report is obtained from the Local Commissioner, his/her evidence be recorded on affidavit and after giving opportunity to both the sides to cross-examine the Local Commissioner, learned Arbitrator shall, in the light of evidence on record and after hearing both the sides, render the Award afresh with expedition. Since the dispute in question pertains to the year 2012, therefore, all endeavours shall be made by learned Arbitrator to render the Award within six months from the date when report from Local Commissioner is received.

16. The parties through their respective counsel shall appear before learned Arbitrator on 4th November, 2016. Trial court record and record of the learned Arbitrator be remitted back forthwith.

17. With aforesaid directions, this appeal is disposed of.

(SUNIL GAUR)
JUDGE

OCTOBER 05, 2016

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