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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM) 172/2016

SANJAY MANGLA & ANOTHER

..... Petitioners

Through: Mr. Sudhir Naagar and Mr. Vijay
Kasana, Advocates.

versus

RAJ KUMAR GANDHI

..... Respondent

Through: None.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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02.11.2016

1. None appears for the Respondent despite a passover.
2. The challenge in this petition is to an Award dated 3rd January 2014 passed by the sole Arbitrator.
3. The background to the present petition is that the Petitioners are the owners of property at I-173, Ashok Vihar, Phase-I, Delhi-52. They entered into an agreement dated 19th August 2012 with the Respondents for construction of the said property. In terms of the said agreement, it was agreed that for retaining the second and third floors the Respondent shall pay the Petitioners Rs.1.71 crores in cash in instalments. The Respondents paid Rs.5 lakhs in cash and further agreed to pay Rs.12 lakhs within seven days from the date of the agreement.

4. When there was a default in making any further payment, the Petitioners doubted the intention of the Respondent. However, according to the Petitioners, since Respondent when questioned turned abusive and aggressive towards Petitioner No.1, the Petitioners decided to terminate the agreement dated 19th August 2012. They accordingly sent a legal notice to that effect to the Respondent on 21st September 2012. The Petitioners then offered that the Respondent could collect back Rs.12 lakhs within seven days failing which it would be treated as forfeited. The Petitioners state that they did not receive any reply to the said notice.

5. According to the Petitioners on 12th January 2014, they received a copy of the impugned ex parte Award dated 3rd January 2014.

6. One of the first objections raised to the impugned Award is that the very basis of the arbitration proceedings is non-existent since there was no clause in the agreement dated 19th August 2012 as was signed between the parties. In support of this plea, the Petitioners have, apart from making a specific averment to that effect in para (N) of the petition, also placed on record the copy of the agreement as was available with the Petitioners as (Annexure-A) and copy of the agreement as relied upon by the Respondent (Annexure-E). It is seen that in Annexure E the crucial words “in case of any dispute then the matter shall be referred to Sole Arbitrator appointed mutually” is added by hand without any initials by either party alongside. The above words added by hand do not figure in the copy of the agreement dated 19th August 2012 available with the Petitioners.

7. It is seen that in reply to para (N) of the present petition there is a general denial by the Respondent that the above arbitration clause was added to the agreement after it was signed by the parties. All that it said is: “It is submitted that even otherwise it is a matter of evidence and could have been agitated before the Ld. Arbitrator but the petitioners chooses not to appear before the Ld. Arbitrator.”

8. There is no explanation as to why the copy produced by the Respondents of the agreement differs in the material aspect from the copy of the agreement available with the Petitioners. Since this goes to the very root of the matter, the Court is of the view that the reply given by the Respondents is not satisfactory.

9. In para P (3) of the petition it is stated by the Petitioners as under:

“3. That even as per forged and fabricated Agreement dated 19.08.2012 filed by respondent before Ld. Arbitrator, the respondent had no right to appoint any Arbitrator in the matter as the same could not have been done unilaterally.”

Further in para P (5) it is stated that the Petitioners “were not given any notice of appointment of Sh. Ramesh Sethi as an Arbitrator and of the Arbitration proceedings.”

10. In the reply filed by the Respondents, it is simply stated “It is incorrect that the respondent has no right to appoint Arbitrator, as alleged in the para under reply.” It further stated “the Ld. Arbitrator has given notices to the petitioners and the said fact is very much mentioned in the agreement and

the postal receipts that have been filed.”

11. What is not denied by the Respondent is that the appointment of the Arbitrator was done unilaterally by the Respondent and not in accordance with the arbitration clause, even if one were to proceed on the basis that such a clause did exist. The Petitioners are right in contending that there could not have been a unilateral appointment of Arbitrator without notice to the Petitioners. There is nothing placed on record by the Respondent to show that the appointment was by mutual consent by the parties. This apart it is seen that by letter dated 23rd February 2013 the Arbitrator informed the Petitioners as well as the Respondent that “he has been appointed Arbitrator by Addressee No.3” i.e. the Respondent. There is, therefore, nothing to show that the appointment of the Arbitrator was as per the mutual agreement of the parties. This again vitiates the entire arbitral proceedings.

12. It is also seen that the first proceedings before the learned Arbitrator took place on 23rd February 2013. On that day nobody was present and notice was directed to issue to both parties. On 9th March 2013, again nobody appeared and a fresh notice was directed to be issued. On 4th April 2013, the learned Arbitrator noted “Pr. Claimant with his counsel and they filed their statement of claim. Same is taken on record and wait for one month for receiving back the AD receipt or the presence of opposite parties.”

13. What is strange is that the copy of the statement of claims filed in the arbitration proceedings reveals that it was filed only on 17th July 2013 as per the verification and the affidavit filed in support of the claims. Therefore, it

is not known on what basis the Arbitrator noted on 4th April 2013 that a claim had been filed by the Respondent Claimant.

14. Now coming to the crucial aspect of service of notice on the Petitioners in the arbitration proceedings, in the Award itself it is noticed as under:

“It is submitted that since the postal receipts of the aforesaid notices are not available in the office of Arbitrator because either it can be attached with some other file or is lost and the same is not traceable, but, the claimant has filed an envelope showing that there was service upon him. But, even otherwise I have again served all the parties vide my reminder dated 02.12.2013, in which I have directed all the parties to appear before me on 15th December 2013 and in spite of the said service no body from the respondent's side has appeared before me.”

15. There is nothing in the record, therefore, to show that notices sent by the Arbitrator were in fact served on Petitioners. This is, therefore, a serious defect in the entire arbitral proceedings.

16. The Court is satisfied that the impugned Award cannot be sustained in terms of Section 34(2)(a)(ii) and (iii) of the Arbitration and Conciliation Act, 1996. The Court accordingly sets aside the impugned Award.

17. The petition is accordingly allowed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

NOVEMBER 02, 2016

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