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

Reserved on: November 9, 2016.

Decision on : November 24, 2016.

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O.M.P. 1126/2013

B L KAPUR MEMORIAL HOSPITAL

..... Petitioner

Through: Mr. Amit Dubey and Mr.Chandan
Gupta, Advocates.

versus

KOTHARI ASSOCIATES PVT LTD.

..... Respondent

Through: Ms. Anusuya Salwan, Advocate.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

24.11.2016

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 10th July 2013 passed by the sole Arbitrator in the disputes between the parties arising out of Consultancy Agreement dated 8th December 2004.

2. The Petitioner, which is stated to be a unit of Lahore Hospital Society, provides tertiary healthcare service. The Respondent company is engaged in the business of providing architectural and structural design consultancy services for turnkey projects. In terms of the above Consultancy Agreement, Respondent was to provide consultancy for architectural utilities for setting up a new state of the art super speciality hospital at New Delhi. The Petitioner was to pay the Respondent a lump sum consideration of Rs.1

crore. In terms of clauses 4.2, 4.3 and 22 of the Consultancy Agreement, there could be no escalation or extra payment.

3. In April 2005, another Consultancy Agreement for structural services hereinafter the 'Structural Agreement' was executed wherein the lump sum payment was specified as Rs.22 lakhs.

4. Disputes arose between the parties leading to the Respondent issuing a letter dated 18th August 2011 to the Petitioner invoking the arbitration clause. On 28th September 2011, Arbitration Petition No. 294 of 2011 was filed in this Court by the Respondent under Section 11 of the Act seeking reference of the disputes arising from the Consultancy Agreement dated 8th December 2004 to arbitration. On 8th February 2012, an ex parte order was passed by this Court appointing a sole Arbitrator to adjudicate the disputes.

5. Claim No.1 before the learned Arbitrator was for a sum of Rs.1,44,15,000. The basis for this claim was that originally a lump sum of Rs.1.22 crores was fixed on the basis of the total built up area including basement being around 4 lakhs sq.ft. However, subsequently the Petitioner had a plan prepared on FAR basis and the total area was increased to 6.60 lakhs sq. ft. This resulted in the designs having to be revised. According to the Respondent, it was agreed that the fee would be increased on proportionate basis and would Rs.1.65 crores for the architectural work and Rs.36 lakhs for the structural work.

6. The case of the Respondent is that during construction the Petitioner wanted a number of changes to be made in the design and assured that the

Respondent would be compensated for the changes made. According to the Respondent it was agreed that an additional fee of Rs.50 lakhs would be paid in view of the change in designs. The Respondent's case was that as against a sum of Rs.2.51 crores agreed to be paid, the Petitioner paid it only Rs.1.42 crores. Accordingly, the balance amount claimed was Rs.1,44,15,000, which included interest @ 15% per annum with effect from 2009 till the date of the claim. Claim No.2 was for pre-suit, *pendente lite* and future interest @ 24% per annum and Claim No.3 was for a sum of Rs.5 lakhs towards cost of the arbitration.

7. As far as the Petitioner was concerned, it preferred two counter-claims. Counter-Claim No.1 for a sum of Rs.1 crore was "for wrong calculation and application of double facade glazing". Counter-Claim No.2 was for Rs.98 lakhs on account of inadequate designing by the Respondent.

8. The following issues were framed by the learned Arbitrator for consideration:

"1. Whether the claimant M/s Kothari Associates Pvt. Ltd. is entitled to receive a sum of Rs. 1,44,15,000/- as claimed in the claim no. 1 of its claim petition?- **OPP**

2. Whether claimant M/s Kothari Associates Pvt. Ltd. is entitled for any interest, if so, at what rate and for which period? - **OPP**

3. Whether the claimant M/s Kothari Associates Pvt. Ltd. is entitled for any cost as claimed in the claim No.3? - **OPP**

4. Whether the respondent has paid the entire amount to

the claimant M/s Kothari Associates Pvt. Ltd. as agreed in terms of the agreement dated 08/12/2004 and of April 2005? - **OPR**

5. Whether the claim of the claimant M/s Kothari Associates Pvt. Ltd. is barred by limitation? - **OPR**

6. Whether the claim petition has not been signed and verified by the legal and authorized person? - **OPR**

7. Whether the counter claimant Dr. B.L.Kapur Memorial Hospital is entitled for a sum of Rs. 1.98 Crore as claimed in its counter claim on , account of damages due to breach of contract and negligence in services of the claimant M/s Kothari Associates Pvt. Ltd. In performing the terms and conditions of Agreement Dated 08.12.2004 and of April 2005? - **OPR**

8. Whether the Counter claimant Dr. B. L. Kapur Memorial Hospital is entitled for any interest on its claim amount, if so, at what rate and for which period?- **OPR**

9. Whether the counter claimant Dr. B.L. Kapur Memorial Hospital is entitled for any cost as prayed in the counter claim petition? - **OPR**

10. Whether the counter claim of Dr. B. L. Kapur Memorial Hospital is barred by limitation as alleged? - **OPR**

11. Relief?"

9. On behalf of the Respondent, its Managing Director Mr. Anoop Kothari was examined as CW-1. On behalf of the Petitioner, Dr. Praneet Kumar, CEO was examined as a witness.

10. In the impugned Award dated 10th July 2013, the learned Arbitrator

decided the above issues as under:

(i) As regards Issue No.1, part of the claim of the Respondent pertained to structural services which were not covered by the Consultancy Agreement dated 8th December 2004. Since no dispute under the Structural Agreement was referred to the learned Arbitrator, that part of the claim could not be granted.

(ii) The reason for the Respondent not invoking Structural Agreement of April 2005 was that the Clause 4(a) therein provided “the Consultant shall be responsible for providing complete structural design for the entire covered area, being approximately 5 lacs sq. ft., or any other enhancement of area in the existing plot”. Clause 4.2 did not prohibit escalation of the rates.

(iii) It was proved that the Respondent had executed work in terms of the FAR-2 as per Government notification dated 12th July 2005. Denying the extra payment to the Contractor would place the employer in a position of unfair advantage. If indeed no escalation was permissible then there should be some valid explanation for the Petitioner already having paid Rs.1.42 crores to the Respondent. Therefore, the Respondent was held entitled to enhanced fee of Rs.1.65 crores for the architectural consultancy work.

(iv) However, the Respondent was not entitled to any extra payment on account of changes in the drawings since there was a specific bar in that regard in Clause 4.2. After adjusting Rs.1.24 crores already received by the Respondent towards architectural consultancy, it was held that it was further

entitled to a sum of Rs.41 lakhs on account of additional fee under the Consultancy Agreement dated 8th December 2004.

(v) As regards Issue No.2, the learned Arbitrator allowed interest @ 12% per annum on the aforementioned sum from 13th September 2009 till the date of payment. As regards Issue No.3, Respondent was awarded costs of Rs.1 lakh.

(vi) On Issue No.4, the learned Arbitrator held that the Petitioner herein had failed to prove that it had paid the entire amount or that the last payment was made in full and final settlement of all the claims. On Issue No.5 it was held that Respondent's claim was within limitation.

(vii) On issue No. 6, it was held that the Mr. Utkarsh Kothari, being one of the Director of the claimant company was competent to sign and verify the pleadings and file the claim on behalf of the claimant. As regards Issue No.7, on analysing the evidence in great detail, the learned Arbitrator held that the counter-claim was a mere counter blast to the claims preferred by the Respondent and, therefore, liable to be rejected. Consequently, Issue No.8 was also answered in the negative.

(viii) As regards Issue No.9, it was held that the Petitioner herein was not entitled to costs. As regards Issue No.10 it was held that the counter-claim was barred by limitation.

(ix) The net result was that an Award of Rs.41 lakhs together with interest @ 12% per annum from 13th September 2008 till the date of payment was

passed in favour of the Respondent and against the Petitioner.

11. Mr. Amit Dubey, learned counsel appearing for the Petitioner submitted that while dealing with Claim No.1, the learned Arbitrator ignored the cross-examination of CW-1 and the answers given by the witness and also ignored Clause 22 of the Consultancy Agreement which prohibits variation of the terms and conditions unless signed by the parties in writing. It is further pointed out that the Respondent had failed to file any drawing or plan to substantiate its claim of having worked in an increased area to substantiate its claim for enhancement. Further the claims were beyond the scope of the Consultancy Agreement dated 8th December 2004. It was further submitted that Clause 4 of the Consultancy Agreement dated 8th December 2004 was in particular not taken into account and that no reasons were given for awarding a sum of Rs.41 lakhs.

12. Ms. Anusuya Salwan, learned counsel for the Respondent on the other hand pointed out that the Award is a reasoned one and has a detailed discussion of the relevant clauses of the Consultancy Agreement. It was submitted that this Court is not expected to re-appreciate the evidence in a petition under Section 34 of the Act and interfere with the Award only because a different view is able to be taken from the evidence produced before the learned Arbitrator.

13. At the outset, the settled principles of law as regards interference with an Award under Section 34 of the Act requires to be recapitulated. In ***Associate Builders v. Delhi Development Authority 215 (2014) DLT 204*** the Supreme Court observed that “an Arbitral Tribunal must decide in accordance with

the terms of the contract, but if any arbitrator construes a term of the contract in an unreasonable manner, it will not mean that the Award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.” It was further reiterated that “once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts.” The Supreme Court also reiterated that “an award can be said to be against justice only when it shocks the conscience of the Court.” The Court observed that it is settled law that where a finding is based on no evidence, and the AT takes into account something irrelevant to the decision which it arrives at, or ignores vital evidence in arriving at its decision, such decision would be termed as perverse. The above principles were reiterated in **ONGC Limited v. Western Geco International Limited 2014 (9) SCC 263** where the Supreme Court elaborated on what construes “the fundamental policy of Indian law” for the purposes of Section 34 (2) (b) (ii) of the Act.

14. In the present case, the Court finds that the learned Arbitrator has been careful to make a distinction between the claims that were relatable to the Consultancy Agreement dated 8th December 2004 and those that related to the Structural Agreement of April 2005. The learned Arbitrator has specifically rejected that part of the claim that pertains to the Structural Agreement.

15. Secondly, the learned Arbitrator has undertaken a fairly detailed analysis not only of the claims with regard to the Consultancy Agreement but also of

the evidence of the two witnesses. He has specifically referred to the admissions by the witnesses of the Petitioner as regards extra payment made and the fact that the plans for the construction work had to be revised as a result of revision of the FAR. Indeed the Petitioner itself had paid admittedly, a sum of Rs.1.42 crores which was beyond the agreed sum of Rs.1.22 crores. This clearly was an admission of extra work having been done for otherwise there was no occasion for such extra payment.

16. As regards the actual extension of the work done, there was evidence led by the Respondent before the learned Arbitrator which satisfied the learned Arbitrator that the claim of the Respondent to some extent was justified. It is after adjusting the payment already made that the balance sum payable by the Petitioner was worked out at Rs.41 lakhs. The Court is not persuaded to hold that the above determination of the learned Arbitrator as regards Claim No.1 was contrary to the record or without reasons as is sought to be contended by the Petitioner.

17. The rejection of the Petitioner's counter-claim also does not call for interference. The award of interest @ 12% per annum or costs of Rs. 1 lakh cannot be said to be unreasonable or excessive.

18. For the aforementioned reasons, this Court dismisses the petition but in the circumstances with no order as to costs.

NOVEMBER 24, 2016
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S. MURALIDHAR, J.