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

+ **O.M.P. (COMM) 551/2016**

RAJ KISHAN & CO.

..... Petitioner

Through: Mr Arnav Kumar, Advocate.

versus

ENGINEERING PROJECTS INDIA LTD.

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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09.12.2016

VIBHU BAKHRU,J

IA Nos.15335-36/2016

1. Allowed, subject to all just exceptions.
2. The applications stand disposed of.

O.M.P. (COMM) 551/2016

3. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 02.05.2016 (hereafter 'the impugned award') passed by the Sole Arbitrator, Justice S.K. Mahajan (Retired).
4. Certain disputes arose between the parties with respect to the Work Order dated 25.02.1997 placed by the respondent on the petitioner for construction of Group Housing Flats. The said disputes were referred to arbitration, which eventually lead to the making and publication of the

impugned award.

5. The only controversy agitated on behalf of the petitioner is that even though the Arbitrator has held that the respondent is in breach of the contract, the Arbitrator has rejected the petitioner's claim for loss of profits. This, according to the petitioner, renders the impugned award amenable to judicial review under Section 34 (2) (b) (ii) of the Act.

6. The controversy between the parties arises in the context of the following facts:-

6.1 On 24.04.1996, HUDA Urban Estate and Town and Country Planning Employees Welfare Association (hereafter 'HEWO') issued an advertisement inviting tenders for construction of a total 192 Deluxe and Super Deluxe Group Housing Flats in Sector 5, Mansa Devi Complex, Panchkula, Haryana. As per the notice inviting tender (NIT), the estimated cost of executing the works was computed as ₹8,11,83,472/-.

6.2 On 01.10.1996, the petitioner and EPIL entered into a pre-tender tie up/arrangement for execution of the works in question and on the basis of the aforesaid tie up arrangement, EPIL submitted its bid in response to the NIT. On 06.02.1997, EPIL's bid was accepted by HEWO and the contract for executing the works was awarded to EPIL for a total sum of ₹9,30,76,850/-.

6.3 The petitioner claims that the earnest money deposited for EPIL's bid was arranged by the petitioner and as per the pre-tender tie up, the work was to be executed by the petitioner and EPIL on '*back to back basis*'. Accordingly, on 25.02.1997, EPIL issued a work order for execution of the

works in question for a total value of ₹8,90,58,268/-.

6.4 The scope of the works was subsequently reduced and the construction of 88 flats out of 192 flats was withdrawn. Consequently, the value of the contract was also reduced from ₹ 8,90,58,268/- to ₹6,40,60,00/-.

6.5 Admittedly, there were certain delays in the execution of the work, which according to the petitioner were for reasons not attributable to the petitioner. It is also claimed that the reasons for the delay were duly notified from time to time.

6.6 On 07.05.1999, HEWO issued a notice to EPIL pointing out certain defaults on the part of EPIL including sub-letting the works to a sub-contractor without HEWO's permission.

6.7 Thereafter on 18.06.1999, EPIL rescinded the contract with the petitioner on the ground that the petitioner's performance was poor and the progress of works was slow.

6.8 The petitioner alleged that the said termination was *malafide* and for a collateral purpose. The petitioner claimed that EPIL terminated the contract with the petitioner solely for the reason that it had not taken the permission to sub-contract the work from HEWO. It is further claimed that contracts with other sub-contractors engaged by the EPIL were also terminated.

6.9 The petitioner claimed that prior to the termination of the contract, it had already executed works of the value of ₹3,23,41,000/- out of the total value of ₹6,40,60,000/-. The petitioner further claimed that because of the illegal recession of the contract, it was deprived of the opportunity to earn profits by executing the remaining works of the value of ₹3,17,70,000/-. In

view of the disputes, the petitioner invoked the arbitration clause and the disputes were referred to Justice S.K. Mahajan (Retired), the sole arbitrator.

7. Before the Arbitrator, the petitioner claimed, (i) a sum of ₹70,29,650/- on account of the Contractual Dues and deductions made by EPILs; (ii) loss of profit of ₹47,65,500/- on account of illegal recession of the contract; (iii) loss of ₹1,19,27,000/- on account of prolongation of the contract; (iv) interests; and (v) costs.

8. EPIL also raised counter claims of (i) ₹4,50,000/- on account of additional expenditure incurred towards establishment cost; (ii) ₹60,43,121.84 + ₹5,73,736 on account of recoveries and incidental expenses; (iii) ₹3,10,439/- on account of recoveries from the Final Bill; (iv) Interest at the rate of 21% per annum; and (v) Costs.

9. By the impugned award, the Arbitrator awarded a sum of ₹28,76,320/- in favour of the petitioner. The Arbitrator further awarded interests at the rate of 10% per annum on the aforesaid from the date of filing of the statement of claim till the date of the award, which was computed at ₹40,18,603/-; thus in aggregate, the Arbitrator awarded a sum of ₹68,94,923/- in favour of the petitioner. In addition, the Arbitrator also awarded post award interest at the rate of 10% per annum from the date of award till date of payment.

10. Mr Arnav Kumar, learned counsel appearing for the petitioner contended that the impugned award was liable to be set aside inasmuch as the Arbitrator had rejected the petitioner's claim for loss of profits. He submitted that the arbitrator had found that EPIL's action in terminating the contract was motivated by extraneous reasons and was clearly illegal. He

submitted that having so held, the Arbitrator failed to award any sum on account of loss of profits. He submitted that the quantum or the basis of the loss of profits as claimed by the petitioner was not traversed and the only ground urged by EPIL to resist the aforesaid claim was that the termination of the contract was legal and valid. He submitted that once the Arbitrator has decided that issue in favour of the petitioner, there was no reason available with the Arbitrator to reject the petitioner's claim.

11. He also relied on the decision of the Supreme Court in **A.T. Brij Paul Singh & Ors. v State of Gujarat: (1984) 4 SCC 59** and the decision of this Court in **Polosingh & Company v Delhi Development Authority: (2001) 92 DLT 326** in support of his contentions.

12. I have heard the learned counsel for the petitioner at length.

13. At the outset it is relevant to note that the Arbitrator had found that the delay in execution of the contract was on account of both the parties; the Arbitrator found that both the petitioner and EPIL had failed to fulfil their respective obligations under the contract. Undoubtedly, the Arbitrator also held that the termination of the contract was "motivated by extraneous reasons" and was clearly illegal. And, on the aforesaid basis, the Arbitrator rejected EPIL's counter claim in relation to the works executed at the risk and costs of the petitioner.

14. The Arbitrator rejected the petitioner's claim on account of loss of profits mainly for the reason that the petitioner was also guilty for delay in execution of the works and therefore could not contest the withdrawal of work by EPIL. He further held that the petitioner failed to justify its claim. In my view none, of the aforesaid reasons can be faulted. The Arbitrator has

clearly held that the petitioner was also responsible for the delays and had failed to perform its obligations under the contract. In view of the aforesaid finding, any award on account of loss of profits would be unsustainable. Further, admittedly, the petitioner had not produced any material to justify the loss claimed by it. Thus, the Arbitrator had rejected the petitioner's claim for the said reason also and in my view rightly so.

15. The reliance placed by the petitioner on the decision of the Supreme Court in *A.T. Brij Paul Singh & Ors. v State of Gujarat* (*supra*) also does not further the petitioner's cause. In that case, the Supreme Court had noted that in a similar contract between the same parties, the trial court had assessed damages on account of loss of profits at the rate of 15% and rejecting the said measure was too technical. The said decision is not an authority for the proposition that in a works contract, the measure of damages is not required to be proved. The reliance placed by the learned counsel on the decision of this Court in *Polosingh & Company* (*supra*) is also of little assistance to the petitioner. In that case, the arbitrator had on the basis of material on record ascertained the loss at 10% of value of the balance works and provided cogent reasons for the same. The Court after examining the reasoning had found that the assessment made by the arbitrator was reasonable. However, in the present case, the petitioner has failed to establish the loss of profits and accordingly, the Arbitrator has rejected the claim. And, in my view, no interference in the said award is warranted.

16. Even if the petitioner's contention that the Arbitrator had erred in rejecting the petitioner's claim is accepted and it is assumed that the

Arbitrator had erroneously rejected the petitioner's claim for loss of profits, the same would be an error within the jurisdiction of the Arbitrator and no interference with the said award is called for under Section 34 (2) (b) (ii) of the Act. It is well settled that the decision of the arbitrator - whether erroneous or not - is binding on the parties (see: **Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.**; (2006) 11 SCC 181; **Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India**; (2010) 11 SCC 296 and **Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.**; (2009) 10 SCC 63). The only grounds on which an arbitral award can be set aside are exhaustively set out in Section 34 (2) of the Act. Thus, unless the award is shown to be perverse or patently illegal, it cannot be set aside only on the ground that the arbitrator has decided a claim erroneously.

17. This Court is unable to accept the impugned award to be either perverse, patently illegal or otherwise opposed to the public policy of India. Accordingly, the present petition is dismissed. No orders as to costs.

VIBHU BAKHRU, J

DECEMBER 09, 2016

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