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

F-313.

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O.M.P. 144/2010

**SHIAM CO-OPERATIVE GROUP HOUSING SOCIETY
LTD.**

..... Petitioner

Through: Ms. Anusuya Salwan with Mr. Kunal
Kohli and Mr. Abhishek Pundir, Advocates.

versus

M/s. KAMAL CONSTRUCTION CO. Respondent

Through: Mr. Raman Kapur, Senior Advocate with
Mr. Varun Kapur, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
15.02.2017

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1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by Shiam Co-operative Group Housing Society Ltd. (hereinafter 'Society') challenges an Award dated 14th December 2009 passed by the Arbitral Tribunal ('AT') in the disputes between the Society and the Respondent M/s. Kamal Construction Co. (hereinafter 'Contractor') arising out of an agreement dated 12th September 2000 entered into between the parties for the work of construction of 120 dwelling units ('DUs') for the Society.

2. The date of commencement of the work was 21st October 2001. The scheduled date of completion was 22nd January 2004. The case of the Society is that the work got delayed and the contract was ultimately terminated on 23rd February 2006. It is stated that the development work was withdrawn from the

Contractor on 2nd December 2003 and awarded to M/s. Veer Enterprises ('VE') by a letter dated 30th December 2003. The Society further claims that payments were made by cheque to VE for the development work.

3. Disputes arose between the parties leading to the Contractor invoking the arbitration clause by a letter dated 24th March 2006. This led to the constitution of three Member Arbitral Tribunal ('AT') which entered upon reference on 28th April 2006. There were 13 claims filed by the Contractor and 2 counter claims filed by the Society.

4. By the impugned unanimous Award dated 14th December 2009, a total sum of Rs.1,33,36,536 was awarded in favour of the Contractor and against the Society. The AT in the impugned Award held as under:

(i) The termination of the contract by the Society by the letter dated 23rd March 2006 was arbitrary, illegal and null and void. Development works were carried out by the Contractor and not VE.

(ii) Claim No.2 in the sum of Rs.29,47,621 towards balance payment against the 10th Running Account ('R/A') bill was allowed in favour of the Contractor.

(iii) Claim No.3 in the sum of Rs.64,68,522 towards balance payment against the 11th R/A bill submitted on 1st December 2005 was allowed in favour of the Contractor.

(iv) As against Claim No.4 in the sum of Rs.17,44,393 towards the balance due for the work done after the 11th R/A bill, the AT awarded the Contractor a sum of Rs.7,78,000.

(v) Against the sum of Rs. 93,387 claimed under Claim No.5 towards labour escalation for the work done after the 11th R/A bill, the AT awarded Rs.46,000.

(vi) As against the sum of Rs.8,06,195 claimed under Claim No.6 on account of interest @ 12% per annum for the delayed payment by the Society, the AT awarded the Contractor Rs.4 lakhs.

(vii) The claim for Rs.2,40,000 under Claim No.7 on account of loss of expected profit on the balance value of unexecuted work was rejected by the AT.

(viii) The entire Claim No.8 for Rs.3 lakhs towards refund of security deposit was allowed.

(ix) Claim No. 9 for Rs.56,56,447 on account of escalation due to increase in prices of material for work executed after the scheduled date of completion, in terms of Clause 10CC, was rejected.

(x) Claim Nos. 10 and 11 for Rs.8,63,943 for extra items of work and Rs.12 lakhs for losses/damages due to idle labour were rejected.

(xi) As against the Claim No.12 for pre-suit, *pendente lite* and future interest, the AT awarded 10% simple interest per annum on the awarded sum of Rs.97,71,621 from the date of entering into reference i.e. 28th April 2006 till the date of the Award i.e. 14th December 2009 which worked out to Rs.35,54,915.

(xii) Costs of Rs.10,000 was allowed.

5. The Counter Claim No.1 for Rs.1,71,34,350 and Counter Claim No.2 for Rs.99,90,210 together with interest @ 15% towards pre-suit interest and 18% interest as *pendente lite* interest were rejected.

6. Ms. Anusuya Salwan, learned counsel appearing for the Society submitted that under Clause 8 of the agreement, it was open to the Society to delete any development works in its discretion and this is what was done by its letter dated 2nd December 2003. She also referred to the letter dated 30th December 2003 whereby the development work was awarded to VE. She also referred to the receipts issued by VE on various dates for the payments made to it by way of cheques by the Society. She also referred to an affidavit dated 31st January 2009 by Shri Tapan Nayak working as Manager of VE in which he categorically stated that the development work was done by VE for which it was paid from time to time by the Society. The said affidavit referred to the fact that the third bill of VE was still to be paid as on the date of that affidavit. She referred to the cross-examination of Shri Tapan Nayak which could not elicit anything in favour of the Contractor.

7. Ms. Salwan submitted that the finding by the AT in the face of such voluminous evidence that it was the Contractor who undertook the development work and not VE was perverse and contrary to the evidence on record. She pointed out that the observation of the AT that no evidence was filed by VE was plainly erroneous since the above affidavit dated 31st January 2009 was in fact of the Manager, VE. She submitted that the AT overlooked the fact that there was a change in the management of the Society which led to the confusion arising from a letter written to the Contractor for completion of the development works when in fact by that date the development work already

stood withdrawn from VE. Therefore, the AT was not justified in characterising the letter dated 2nd December 2003 as 'an afterthought'. The Contractor was not justified in seeking payment for any development works with the complete payment having been made to the Contractor in January 2004 itself.

8. Mr. Raman Kapur, learned Senior counsel appearing for the Contractor, referred to the fact that the story of the development work having been withdrawn from the Contractor was disbelieved by the AT. He drew attention to the letter dated 5th April 2004 written by the Architect to the Contractor requesting him to continue with the development work. On the counter there was nothing placed on record to show that VE carried out any development work whatsoever. In fact, the letter dated 2nd April 2007 by the Society to VE referred to the General Body Meeting ('GBM') of the Society which noted that no development work had been done except the part construction of the boundary wall. He submitted that the AT by unanimous view upheld the case of the Contractor and disbelieved the Society and, therefore, unless there was something demonstrably perverse which shocks the judicial conscience, the Court should not interfere.

9. The AT noted in its Award that by the letter dated 2nd April 2004 the Society asked the Contractor to speed up the development works viz., the water/sewer lines. This was also confirmed by the Architect by a letter dated 5th April 2004. Further the Contractor filed copies of the bills along with certificate (Ex. C-8) regarding procurement of material development work. He also produced the cement register (Ex.C-9) showing consumption of cement during the period from 24th May till 25th December 2005 for various development works. The

payment for the construction of the boundary wall was certified by the Architect in the second R/A bill itself. On the contrary apart from the self-serving affidavit of Shri Tapan Nayak, no evidence in the form of purchase bills or bills for the materials procured or the labour deployed was furnished by VE.

10. The AT also referred to the letter dated 2nd April 2007 written by the Society to VE through its Secretary where *inter alia* it was pointed out that since the development work was already in the scope of the work of the main Contractor “there was no reason to award the work to you by the previous Managing Committee without rescinding the work of main contractor without any valid reason therefore your claim for executing development work does not sustain.” That letter also referred to the fact that during the various GBMs held since 3rd April 2005 “it was seen that no development work was done at the site except part construction of boundary wall and there was no WBM and CC path during the said period.” It was categorically stated therein that a physical verification had been carried out between August and December 2005 when it was found that the balance work was still abandoned. VE was told that its claim of having constructed WBM road and laying water line and pipe line during April-May 2004 “does not tally with the physical verification of the site by the General Body members during its various meetings.”

11. It was on the basis of such overwhelming evidence that the AT came to a unanimous factual finding that it was the Contractor who carried out the development work and not the VE. The above factual finding has not been shown to be perverse. It cannot be said to be contrary to the evidence placed on record. It is based on a thorough analysis of the evidence and the conclusion

reached is certainly a plausible one.

12. The scope of interference by the Court with an Arbitral Award in exercise of its powers under Section 34 of the Act is indeed very limited. In ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran (2012) 5 SCC 306***, the Court held:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator."

13. In ***Sumitomo Heavy Industries Ltd. v. ONGC (2010) 11 SCC 296***, it was held:

"43...The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in ***Kwality Mfg. Corporation v. Central Warehousing Corporation: (2009) 5 SCC 142*** the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

14. In ***Associate Builders v. DDA (2015) 3 SCC 49*** while discussing "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996 the Supreme Court observed:

"42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads:

42.1(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature.

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42.2 (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality-for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3(c) Equally, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable 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."

15. In *National Highways Authority of India v. ITD Cementation India Limited* (2015) 5 SCALE 554, the settled law was reiterated. After referring to the decisions in *Pure Helium India (P) Ltd. v. ONGC*: (2003) 8 SCC 593 and *D.D. Sharma v. Union of India*: (2004) 5 SCC 325 it was held:

"20. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do."

16. It was then submitted by Ms. Salwan that the objections to the report of the Local Commissioner (LC) submitted to this Court in the proceedings under Section 9 of the Act were not adverted to and discussed by the AT. Ms. Salwan referred to the fact that while disposing of the Arbitration Petition No. 375 of 2005 on 27th September 2006, this Court had granted liberty to the Petitioner to

press its objections to the LC's report before the Arbitrator. It is submitted that the said objections were not decided and the AT proceeded to make an Award on the basis of the LC's report.

17. In reply it is pointed out by Mr. Kapur that in fact the AT considered the objections raised by the Society to the report of the LC. This was in the context of Claim No.4 which was for work executed after the 11th R/A bill up to 7th February 2006.

18. A perusal of the impugned Award reveals that the AT has in fact considered not only the report of the LC but also the objections to the said report of the Society. In fact the following paragraphs in the impugned Award makes this explicit:

“The Advocate for the Respondents submitted that (Rs.17,44,393/- work after 11th R/b), the claimants relied on the report of local commissioner. The respondent had filed an objection against the report of local commissioner in A.A. No. 375/05. This petition was heard and decided on 27.09.06 by the Hon’ble High Court of Delhi. As per the order, it was agreed between the parties that the respondent shall be at liberty to press the same as well before the Ld. Arbitrator, therefore, the bill raised on the basis of report of local commissioner, is not accepted, sustainable and payable. The photocopy of objection filed by respondent and order dated 27.09.06 are enclosed as Mark R-6 & R-7.”

19. Immediately thereafter the Award proceeds to discuss the report of the LC and the AT observed:

“After carefully considering the arguments of both the parties and considering the Status Report of the Local Commissioner we are of the opinion, that the incomplete items out of this claim can be completed at an estimated cost of Rs.8,00,000/-. We, therefore, award an amount of 15,78,893-8,00,000=Rs.7,78,893/- say

Rs.7,78,000/- against this claim in favour of the claimants.”

20. Consequently, the contention of Ms. Salwan that the AT failed to consider the objections of the Society to the report of the LC is hereby rejected.

21. As regards Claim No.2, Ms. Salwan submitted that the 10th R/A bill which had been certified by the Architect on 30th June 2005 stood revised with further site inspection undertaken thereafter. Consequently, on 1st August 2005 the Architect had certified that a sum of Rs.35,71,221 was payable.

22. Mr. Kapur on the other hand pointed out that the Architect had initially issued a certificate on 13th June 2005 for payment of the 10th R/A bill in the sum of Rs.71,73,191. As against the said amount, the Society paid only Rs.42,21,751. Once the Architect had after due consideration of all relevant facts certified the 10th R/A bill any further revision was entirely uncalled for. This is what weighed with the AT in allowing Claim No.2. The finding of the AT that the Architect revised the bill for the wrong reasons cannot be said to be an improbable view. It does not call for any interference.

23. The challenge to the rest of the Award in respect of Claim No. 3 deals entirely with the factual aspects. The Court finds that the AT has based its conclusion on the evidence placed on record. The Court is not expected to re-appreciate the evidence and interfere with the Award only because a different view is possible. The award of interest also cannot be said to be extraordinary or contrary to what is permitted in law. There has been no challenge to the impugned Award insofar as the counter claims have been rejected.

24. Consequently, the Court is unable to find any ground to interfere with the impugned Award within the scope of Section 34 of the Act. The petition is

accordingly dismissed, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J

FEBRUARY 15, 2017

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