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

+ **O.M.P. (COMM) 108/2017**

M/S WIANXX IMPEX PVT. LTD.

..... Petitioner

Through: Mr Vibhor Garg, Mr Sumit Kumar
Mishra, Ms Ishita Bist and Ms Puja
Aggarwal, Advocates.

Versus

MODERN (INDIA) ARCHITECTS (PVT.) LTD. Respondent

Through: Mr Abhijat and Mr Nikhil Parikshith,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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03.03.2017

VIBHU BAKHRU, J

IA No.2771/2017

1. Exemption is allowed, subject to all just exceptions.
2. The application stands disposed of.

O.M.P. (COMM) 108/2017 & IA No.2770/2017

3. M/s Wianxx Impex Pvt. Ltd. (hereafter 'Wianxx') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') challenging the arbitral award dated 10.11.2016 (hereafter 'the impugned award') made by the sole arbitrator in connection

with disputes that had arisen between Wianxx and Modern (India) Architects Pvt. Ltd. (hereafter 'Modern Architects').

4. Modern Architects had made a claim for the amount payable under the contract for rendering architectural and design services to Wianxx. The said claim was partly allowed and the arbitrator had directed payments due upto the stage of works completed along with interest at the rate of 18 % p.a. The counter claims made by Wianxx were rejected. Aggrieved by the impugned award, Wianxx has preferred the present petition.

5. Briefly stated, the factual context necessary to appreciate the controversy are as under:-

5.1 Wianxx intended to construct a multi dimensional business centre cum multiplex (hereafter 'the project') on its plot at Plot No. 39, Industrial Area Site No. 4, Madan Mohan Malviya Marg, Sahibabad Industrial Area, District Ghaziabad, Uttar Pradesh. The said project was later altered as construction of a hotel cum multiplex.

5.2 Modern Architects approached Wianxx for offering their professional services for construction of the aforesaid project. Wianxx desiring to avail of those services, issued a letter of offer dated 17.01.2004 conveying its offer to accept architectural consultancy for design work of the project. By a letter dated 20.01.2004, Modern Architects conveyed their willingness to render their services and requested for an advance payment to be adjusted subsequently. Thereafter, Wianxx issued a letter dated 31.07.2004 formally appointing Modern Architects as the consultant for architectural and allied services at a consolidated fee of 3% of the total project cost (other than the

cost of land).

5.3 Thereafter, the parties entered into a contract dated 13.09.2004 (hereafter 'the Agreement'). In terms of the Agreement, apart from architectural consultancy for designing work, Modern Architects was also required to undertake pre-design and design development studies, furnish list of all required drawings and an activity bar chart enumerating the time schedule of the project, which was stipulated to be completed within 12 months. The works assigned to Modern Architects were segregated into 9 different stages. The approval of Wianxx was a pre-requisite for Modern Architects to initiate any of the stages.

5.4 Modern Architects rendered certain services and raised a running bill under the cover of the letter dated 27.12.2004, aggregating a sum of ₹79,34,400/- (before deduction of tax). Wianxx did not make the payments against the amount billed as it alleged that there were certain deficiencies in the services rendered by Modern Architects. Wianxx also sent letters dated 31.01.2005 and 14.03.2005 to Modern Architects highlighting the deficiencies in the works performed by it. By letter dated 27.06.2005, Wianxx proposed the engagement of an independent third agency to conduct an audit of the work performed by Modern Architects.

6. Since the bills raised by Modern Architects had not been settled and also in view of the disputes between the parties, Modern Architects invoked the arbitration clause. Thereafter, Modern Architects filed a petition under Section 11 of the Act in this Court. And, this Court by an order dated 25.04.2007, appointed Mr Alakh Kumar as the sole arbitrator to adjudicate the disputes between the parties.

7. Before the arbitrator, Modern Architects made a claim aggregating ₹3,00,54,958/- along with interest at the rate of 18% p.a. plus service tax. Wianxx also filed counter claims against Modern Architects claiming loss of revenue and compensation due to delay and cost escalation, recovery of the amounts paid in advance and compensation for loss of opportunity; in all amounting to ₹154.56 crores along with further interest at the rate of 18 % p.a.

8. Wianxx contested the jurisdiction of the arbitrator to consider the claims of Modern Architects in respect of transactions prior to 13.09.2004. It was contended that the letter dated 13.09.2004 embodied the entire agreement between the parties and, therefore, Modern Architects' claim for any work done prior to the said letter was outside the jurisdiction of the arbitrator. Further, it was Wianxx's case that Modern Architects had failed to perform their work and render services as required under the Agreement. Modern Architects, on the other hand, contended that it had performed substantial work in terms of the Agreement and Wianxx was attempting to resile from its payment obligations. It was claimed that Modern Architects had submitted the architectural drawings to the statutory authorities and was only required to periodically supervise the implementation of the designs.

9. With regard to the issue of jurisdiction, the arbitrator held that the services performed under letter dated 17.01.2004 and those provided under the Agreement formed part of the same project and were in continuity; therefore the disputes in connection with the services rendered under the Agreement as well as the letter dated 17.01.2004 fell within the purview of the reference made to the arbitrator.

10. The arbitrator noted that the work to be performed by Modern Architects was divided into several stages. And, based on the material on record, he concluded that Modern Architects had completed work upto Stage-III. The arbitrator also found that Wianxx had breached the Agreement, *inter alia*, by not making payments within time and by repeatedly changing the projections of the work to be executed.

11. The arbitrator rejected Wianxx's claim that the work performed by Modern Architects was deficient and noted that Modern Architects had proceeded from one stage to next with the knowledge and implicit approval of Wianxx. He observed that if Wianxx had any grievance regarding non-completion of work at any stage, it could have stopped Modern Architects from proceeding further. The arbitrator concluded that there was no default on the part of Modern Architects.

12. In view of the finding that Modern Architects had only completed work till Stage-III, the arbitrator held that Modern Architects were entitled for the amount payable upto that stage. The amount payable upto Stage-III was determined at ₹54,00,000/- and since Modern Architects had already received a sum of ₹11,70,000/-, the arbitrator awarded a sum of ₹42,30,000/- (the balance amount payable upto Stage-III) along with interest at the rate of 18% p.a.

13. Mr Vibhor Garg, learned counsel appearing for Wianxx submitted that the impugned award is perverse and ought to be set aside on the grounds that, (i) it was unreasoned; and (ii) the arbitrator had ignored vital evidence placed on record.

14. The learned counsel for Wianxx also relied upon the alleged minutes of meeting held on 16.12.2004 to contend that Modern Architects had not submitted the conceptual interior drawings till that date. The learned counsel also referred to certain letters sent by Wianxx alleging deficiencies of services. He submitted that concept drawings were to be submitted at the first stage (Stage I) and the aforesaid minutes of the meeting indicated that Modern Architects had not completed the work required to be performed in Stage-I. He submitted that Modern Architects had not completed the work required under any stage in entirety.

15. He submitted that the arbitrator had ignored the evidence on record and the impugned award was liable to be set aside on the said ground.

16. Next, Mr Garg submitted that the arbitrator had rejected the counter claims without assigning any reason and, therefore, the impugned award was liable to be set aside.

17. He also relied on the decision of the Supreme Court in **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49** in support of his contention that an arbitral award rendered by ignoring evidence would be amenable to judicial review under Section 34 of the Act.

18. Mr Abhijat, learned counsel appearing for Modern Architects countered the submissions made by Mr Garg. He submitted that the arbitrator had examined the evidence in detail and, therefore, the impugned award could not be interfered with. He submitted that the alleged minutes of the meeting held on 16.12.2004 relied upon by Wianxx were unsigned and

had been denied by Modern Architects; thus, no reliance on the same could be placed.

19. I have heard the learned counsel for the parties.

20. The arbitrator has found, as a fact, that Modern Architects had completed the work till Stage-III. The said finding being a finding of fact cannot be interfered with by this Court by reappraisal of the evidence lead and material produced before the arbitrator. A bare perusal of the impugned award indicates that the arbitrator had accepted the evidence produced by Modern Architects to establish the extent of work done.

21. In ***Associate Builders*** (*supra*), the Supreme Court had observed as under:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

22. As mentioned above, a bare perusal of the impugned award indicates that the arbitrator had listed out various documents that were relied upon by Modern Architects to show that it had completed the work till Stage-III. It is not permissible for this Court to re-appreciate the evidence and to supplant

its view over that of the arbitrator. This Court is also unable to accept that the arbitrator's finding that Modern Architects had completed the work till Stage-III is either perverse or unsupported by any evidence. Modern Architects had listed the documents indicating the work performed at each stage; the arbitrator had accepted the same. The minutes of the meeting dated 16.12.2004 referred to by Mr Garg is a disputed document and in any event it is only one of the many documents placed on record and cannot be held to be determinative of the controversy at hand. As stated hereinbefore, it is not open for this Court to re-examine and re-appreciate the evidence in these proceedings. This Court is satisfied that the finding is not based on no evidence at all and there is sufficient material on record to indicate that Modern Architects had completed works upto Stage-III. Therefore, the finding of the arbitrator in this regard is final and warrants no interference in these proceedings.

23. There is no dispute that Wianxx had not paid the bills raised by Modern Architects for work done upto Stage-III. The arbitrator had found that the failure of Wianxx to do so constitutes a breach of the Agreement between the parties. The contention that the work performed by Modern Architects was deficient and wanting has not been accepted by the arbitrator. The finding of the arbitrator in this regard is final and since it is based on appreciation of evidence and material on record, the same cannot be interfered with.

24. It is also not disputed that Wianxx had altered its projections several times. The arbitrator had found the same to constitute a breach of the

Agreement. Although Wianxx was entitled to give inputs and Modern Architects was obliged to carry out the changes, the same does not entitle Wianxx to change projections repeatedly. Thus, the arbitrator's finding that Wianxx had breached the Agreement cannot be held to be perverse or patently illegal.

25. In the aforesaid circumstances, the impugned award cannot be set aside on the grounds available under Section 34(2) of the Act and this Court declines to do so.

26. Accordingly, the petition and the pending application are dismissed. No order as to costs.

MARCH 03, 2017
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VIBHU BAKHRU, J