

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 04.07.2017

+ **O.M.P. (COMM) 191/2017**

**M/S SHIPRA ESTATE LTD & JAI KRISHAN
ESTATES DEVELOPERS PVT LTD**

..... Petitioner

Versus

M/S WISHWA MITTAR BAJAJ & SONS

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Amit Mahajan, Mr Kabir Chhilwar, Ms Sonali Jaitley, Mr Jaiyesh Bakshi, Mr Ravi Tyagi, Mr Tarpit Patni and Mr Akshay Sharma.

For the Respondent: Mr Raghvendra M. Bajaj, Mr Samar S. Kachmaha and Mr Shreyas Mehrotra.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. M/s Shipra Estate Ltd & Jai Krishan Estates Developers Pvt. Ltd. (hereafter 'Shipra') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the arbitral award dated 03.01.2017 (hereafter 'the impugned award') made by the sole arbitrator. By the impugned award, the arbitrator adjudicated the disputes that had arisen between the parties in respect of a Work Order dated 19.11.2005 (as subsequently amended) issued by Shipra (and accepted by the respondent) for construction of a multi-storeyed residential building at Ghaziabad.

2. The impugned award has been challenged mainly on two grounds: (i) that no arbitration agreement exists between the parties as the letters dated 10.11.2005, 20.02.2006 and 27.03.2006, as relied upon by the respondent are fabricated; and (ii) that the impugned award is contrary to the terms of the agreement between the parties inasmuch as the agreement was for the payment of a lump sum amount and not on item rates as claimed by the respondent.

Factual background

3. Shipra is a partnership concern engaged in the business of real estate development. The respondent is also a firm engaged in the business of construction and maintenance works on contract basis. The respondent was awarded the contract for '*Construction of Multistory residential Complex- 3 bedrooms (Blocks B6 & B7) {(B+G+10+Pent House), (B+G+6+Pent House)}* at Plot No. 4, Phase IV, Indirapuram, Ghaziabad (Civil, Electrical, Public Health & other Works)' by the letter dated 19.11.2005 (hereafter 'the Agreement') issued pursuant to an offer submitted by it. The consideration as initially agreed was ₹7,07,66,614/-, however, the Agreement was later amended by letters dated 11.07.2007, 06.09.2008 and 27.04.2009 (which were accepted by the respondent) and the agreed consideration was increased to ₹8,15,40,250/-. The term of the Agreement was for a period of sixteen months, starting from December 2005. There were also five other contractors engaged by Shipra for the same project.

4. Certain disputes arose between the parties as Shipra alleged that the respondent had failed to mobilize the requisite resources at the site

within the stipulated time. Shipra stated that despite there being no contractual stipulation providing for mobilization advance, an amount of ₹45,00,000/- was given to the respondent at its request. Further, the progress schedule was submitted by the respondent belatedly on 13.03.2007, that is, after 15 months of taking possession of the site. The respondent disputed the said allegations and alleged that Shipra had failed to release full and timely payment of the running bills (RA bills), supply sufficient quantity of cement and steel and give timely drawings and decisions, leading to inordinate delays in the performance of the Agreement.

5. Thereafter, in December 2010, the respondent stopped work. Shipra alleges that the respondent abandoned the site; the respondent alleges that it could not continue with the works as Shipra was not making the necessary payments. Shipra claimed that it incurred additional financial outlay to get the project completed from other contractors.

6. On 28.05.2014, the respondent filed a petition (Arb. P. 302/2014) under Section 11 of the Act in this Court for appointment of an arbitrator. This Court, by order dated 15.01.2015, appointed Justice J M Malik (retired) as the sole arbitrator to adjudicate the disputes that had arisen in connection with the Agreement.

7. The respondent filed a statement of claims before the arbitrator, *inter alia*, raising the following claims:-

Sl.No.	Description of Claims	Amount (In Rs.)
1.	Claim <u>No.1</u> for payment of Residual amount of work done at site, i.e. the unpaid Final Bill.	2,54,64,400.00
2.	Claim <u>No. 2</u> for payment of compensation @ 18% P.A. for the damages suffered on account of delay in Payment/Under Payment in R.A. Bills & Final Bill.	2,01,34,000.00
3.	Claim <u>No.3</u> for payment of extra expenditure incurred by the Claimant on additional monthly overhead expenses due to default on the part of Respondent.	2,75,19,800.00
4.	Claim <u>No.4</u> for payment of loss of profit due to reduction in turnover on account of default on the part of Respondent	76,39,197.55
5.	Claim <u>No. 5</u> for reimbursement of payment made to labour, which remained idle due to acts of omission and commission on the part of Respondent	10,20,900.00
6.	Claim <u>No.6</u> for payment of expenditure incurred on idle Machinery and Equipments due to defaults on the part of Respondent	84,02,800.00
7.	Claim <u>No.7</u> for payment of price escalation on work done during extended contract period	79,61,600.00
8.	Claim <u>No.8</u> on account of any other relief which may accrue during the period when claims are settled.	To be intimated.
9.	Claim <u>No.9</u> for payment of interest as per Section 31 Sub Section 7 (a) & 7(b) of Arbitration and Conciliation Act-1996	@ 18% P.A. as per Para 9.4
10.	Claim <u>No. 10</u> for cost of Arbitration & Conciliation Act-1996	5,00,000.00

8. Against the aforesaid claims, the arbitrator has awarded a sum of ₹1,28,75,517/- against claim no.1 and a lump sum amount of `10 lacs against claim no.2. Claim nos.3 and 4 were not pressed by the respondent. Against the remaining claims, the arbitrator has awarded interest at the rate of 18% p.a. on `1,28,75,517/- with effect from 14.05.2011 till realization of the entire amount. In addition, the

arbitrator awarded costs of `5 lacs, ₹5 lacs towards harassment and mental agony; `10 lacs for delay in payment of RA bills and interest at the rate of 18% p.a. on the aforesaid amounts, if not paid within a period of 90 days from the date of the award.

9. Before the arbitrator, Shipra claimed that the Agreement dated 19.11.2005 did not contain an arbitration clause and there was no arbitration agreement between the parties. This was contested by the respondent by claiming that it had initially sent an offer letter dated 10.11.2005 which culminated in execution of the Agreement. The said offer letter contained an arbitration clause which was acceptable to the parties. However, since the Agreement did not contain an arbitration clause, the respondent sent a letter dated 20.02.2006 requesting for amending the Agreement to include certain terms contained in the offer letter including the arbitration clause. The respondent claimed that this was accepted by Shipra and it issued a letter dated 27.03.2006 amending the Agreement, which was accepted by the respondent, thus resulting in a binding contract.

10. Shipra also contested the claims raised by the respondent on merits. It, *inter alia*, contended that the Agreement between the parties provided for a lump sum consideration for each floor based on the floor area. The Agreement did not provide for payment of separate rates for each item or work comprised within the scope of works awarded to the respondent.

11. Since the authenticity and genuineness of several letters including the letter dated 27.03.2006 amending the Agreement was challenged, Shipra filed an application seeking forensic examination of the letters disputed by it. The said application was rejected by the arbitrator by an order dated 17.10.2016. By the said order, the arbitrator also unequivocally held that the documents in question - being (i) offer letter dated 10.11.2005 sent by the respondent to Shipra; (ii) letter dated 20.02.2006 sent by the respondent to Shipra; (iii) letter dated 27.03.2006 amending the Agreement and incorporating the arbitration clause; and (iv) protest letters dated 20.07.2007, 15.09.2008 and 30.04.2009 sent by the respondent to Shipra - were genuine and were admissible in evidence. Resultantly, the arbitrator held that an arbitration agreement existed between the parties and proceeded to examine the disputes on merits. The arbitrator passed the impugned award on 03.01.2017.

Submissions

12. Mr Amit Mahajan, learned counsel appearing for Shipra assailed the impugned award on two fronts. First, he submitted that there was no arbitration agreement between the parties and the impugned award was wholly without jurisdiction. He contended that the letter dated 27.03.2006 was forged and fabricated and this was evident from the subsequent correspondence between the parties. He pointed out that the Agreement was amended thrice: first on 11.07.2007; second on 06.09.2008; and for the third time on 27.04.2009. None of the aforesaid letters amending the Agreement

referred to the alleged amendments stated to have been carried out by the agreement letter dated 27.03.2006. He also submitted that there was no reference to the said letter in all the five years that the respondent was executing the works.

13. Second, Mr Mahajan contended that the impugned award was contrary to the terms of the Agreement. He referred to the Agreement and pointed out that it provided for payment on a lump sum basis and not on the basis of any item comprised in the works. The subsequent amendments to the Agreement also provided for lump sum rates; nonetheless, the arbitrator had partly accepted the claim and awarded a sum of `1,28,75,517/- on the basis of item rates, which were not a part of the Agreement. He further submitted that no agreed schedule of item rates on the basis of which the awarded amount has been computed was placed on record. He submitted that the respondent had been submitting various RA bills that were paid from time to time except a balance sum of `5,10,922/-. He submitted that the demand for payment of over `10 crores was made for the first time on 14.02.2011 and was wholly beyond the terms of the Agreement.

14. Mr Bajaj, learned counsel appearing for the respondent countered the submissions made on behalf of Shipra. He contended that the arbitrator had examined the evidence on record and had concluded that an arbitration agreement existed between the parties and the said finding could not be faulted. He stoutly contested the contention that the Agreement between the parties did not provide for

payment on item rates. He submitted that the lump sum amounts as initially agreed were based on item rates and quantities. He referred to an e-mail dated 28.12.2010 sent by Mr Rastogi (of Shipra) to the respondent alleging that extra amounts had been paid to the respondent. In support of the said allegation, Mr Rastogi had attached comparative statement which indicated the quantities and rates for various items of work. He submitted that this clearly indicated that the lump sum rates as referred to in the Agreement and in the subsequent amendments thereto were based on analysis of rates. He contended that in terms of paragraph 2 to clause 22 of the Agreement, as inserted by the letter agreement dated 27.03.2006, the rates as mentioned in the Agreement were required to be adjusted based on the actual quantity of work executed.

15. He referred to the decision of the Supreme Court in ***Associate Builders v. Delhi Development Authority: 2015 (3) SCC 49*** in support of his contention that the arbitrator was the ultimate master of the quality and quantity of evidence and his findings are not amenable to judicial review in proceedings under Section 34 of the Act.

16. He relied upon the letters dated 03.01.2011, 14.02.2011, 12.04.2011 and 14.05.2011 sent by the respondent wherein details of the work done by the respondent were forwarded to Shipra. The said details were claimed to have been worked out on the basis of the jointly agreed item rates.

Reasoning and Conclusion

17. The first and foremost question to be addressed is whether there exists an arbitration agreement between the parties. The arbitration agreement is contained in an arbitration clause stated to be incorporated in the Agreement by the agreement letter dated 27.03.2006. The said letter is signed by one Sh. S. K. Aggarwal who was admittedly the employee of Shipra and was the project head at the material time. The witnesses produced by the respondent had affirmed that the said amendment letter dated 27.03.2006 was signed by Sh. S. K. Aggarwal in their presence. The respondent had also produced a letter from Sh. S. K. Aggarwal confirming that he had signed the said letter and had handed over the records to Shipra on leaving his employment. Although, it is not disputed that the letter dated 27.03.2006 was not referred to in any of the correspondence or subsequent amendments carried out to the Agreement - which undoubtedly raises a doubt as to the genuineness of the said letter - the onus to prove that the said letter was fabricated lay squarely on Shipra. However, Shipra did not produce any material evidence to establish that the said letter was fabricated. It neither produced its records nor any credible evidence to establish its case.

18. Shipra's contention that Sh. S. K. Aggarwal was not authorized to execute the said letter, was plainly unsustainable as the Agreement was also signed by Sh. S. K. Aggarwal on behalf of Shipra and thus he was undeniably authorized to execute agreements between the parties. In view of the evidence available on record, this Court is not persuaded to accept that there was no arbitration agreement between the parties and the impugned award is without jurisdiction.

19. The next question to be examined is whether the impugned award runs contrary to the Agreement between the parties. At the outset, it is relevant to observe that claim no.1 (which has been partly awarded in favour of the respondent) was not a claim in the nature of damages but for contractual payments for work done. In order to establish the said claim, it was incumbent upon the respondent to establish that (i) it had completed the work done as claimed and (ii) that the parties had agreed on the consideration claimed for such work.

20. At this stage, it is necessary to refer to the offer letter dated 10.11.2005, submitted by the respondent. The relevant extracts of the said letter are as under:-

“Dear Sir,

We are pleased to submit our best rates for construction of subject work for completion as per specifications, items and conditions laid down in tender documents

Sl.No.	Name of Floor	Rate per sqft.
1.	Basement	755.00
2.	Ground floor	375.00
3.	Typical floor (1 to 10)	570.00
4.	Pent House (Jpper) – 12 th floor	570.00
5.	The House (Jpper)-12 th floor	570.00
6.	Terrace floor – 11 th & 12 th floor	210.00
7.	Terrace floor – 12 th floor roof level	210.00
8.	Terrace floor at G.F. level	110.00

Terms and conditions

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5. There will be no major change in Drawings, alteration in specifications or site conditions.

6. The rates given above are based on list of items maintained in your office, the items included shall not be excluded.

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10. Payment of Bills will be on or within 7 working days of submission of the same and regularity in payment will be ensured.

11. All disputes or differences in respect of scope of work, substituted, increased, altered, additional work, etc during execution of work, abandonment or completion of work shall be resolved in terms of Arbitration and Conciliation Act-1996 by a Sole Arbitrator and Delhi Courts alone shall have exclusive jurisdiction over the same.”

21. The aforesaid letter was initially denied by Shipra, however, it was subsequently conceded that the said letter was received by Shipra and was the subject matter of discussion between the parties which culminated in execution of the Agreement.

22. The relevant extract of the Agreement (Work Order dated 19.11.2005) is set out below:-

“1. The rates given below include all items of civil, electrical, sanitary, plumbing, television, telephone, conduiting for fire detection & related works, etc. and are for ensure completion of the project as per the specification, detailed drawings, items and conditions of tender documents/drawings, drawings issued by consultant for execution/completion of building/project and as per the direction of our Engineer-in-charge given to you from time to time.

Sl. No.	Name of Floor	Area (Sq.ft)	Rate (Rs.)	Amount (Rs.)
1.	Basement	18792	618.00	11613456.00
2.	Ground Floor	13638	297.00	4050486.00
3.	Typical Floor (1 to 10)	114277	408.00	46625016.00
4.	Pent House (Lower) – 11 th Floor	8484	408.00	3461472.00
5.	Pent House (Upper) – 12 th Floor	6314	408.00	2576112.00
6.	Terrace Floor – 11 th & 12 th	7818	140.00	1094520.00
7.	Terrace Floor – 12 th Floor Roof level	6894	143.00	985842.00
8.	Terrace Floor at G.F. level	5534	65.00	359710.00
	Total			70766614.00

2. a. No mobilization/secured advance shall be paid under this contract.
- b. The areas are only indicative and the quantity may increase or decrease as per actual at site/drawings/direction of consultant/Engineer-in-Charge. However, the quoted rates per Sq. ft. shall remain same. Covered area shall be as per calculation in consultation with the Consulting Architect, and will be considered for payment.
- c. The rates agreed upon are for complete turnkey work and no escalation, extra items, substitute items etc. are payable till successful completion of the above said work, unless and until expressly directed and approved in writing by the Architect/Engineer-in-charge and nothing extra in any form will be payable to the contractor. Payment shall be made as per tender stipulations.

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22. The extra/substitute items shall be derived on the basis of DSR-2002 or market rates. The decision of Engineer-in-charge shall be final and binding to the contract.

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28. The quoted rates shall be firm till the completion of work and no escalation whatsoever shall be applicable.”

23. The Agreement was amended by the letter dated 27.03.2006, the relevant part of which reads as under:-

“Dear Sir,

In continuation of your work order Ref.: SEL/JKEDPL/WMBS/05-06/51 date: 19.11.2005 and in reply to your letter dated 20.02.2006 the following amendment is carried out:-

Add: Sl. No. 29 & 30 as under:-

29. Payment against running bill shall be made within 15 days of submission or 7 days of verification and checking of the same, whichever is earlier.

All disputes in relation to the Subject Contract Agreement shall be resolved as per the provisions contained in Arbitration & Conciliation Act 1996, through appointment of a sole arbitrator by the High Court at Delhi who alone shall have exclusive jurisdiction in the subject matter.

Clause ‘b’ and ‘c’ at Sl. No. 2 is deleted and substituted for the same be added be added to Sl. No. 22 as Para 2.

The areas are only indicative. In case the quantities of items increase or decrease, after measurement, as per actual at site, as per drawings, as per directions by Engineer-In-Charge, Consultant, the quoted rates shall also stand revised from as shown in Clause 1 of the work order. Covered area shall be as per actual calculations and will be considered for payment.

All other terms and Conditions will remain same as per provisions of the Work Order, dated, 19.11.2005.”

24. The Agreement was subsequently amended on 11.07.2007, 06.09.2008 and 27.04.2009 whereby the lump sum rates as provided in the Agreement were increased. The relevant extract of the letter dated 27.04.2009 whereby the Agreement was amended for the third and the last time, reads as under:-

“In continuation of your work order no: SEL/JKEDPL/WMBS/05-06/51 dated 19.11.2005, SEL/JKEDPL/WMBS/07-08 dated 11.07.2007 & SEL/JKEDPL/WMBS/08-09 dated 08.06.2009. The cost of work will increase from Rs.74225285.37 to Rs 81540250.54. As detailed below:-

Sl. No.	Name of Floor	Area (Sq. ft)	Rate (Rs.)	Amount(Rs.)
1.	Basement	18123.17	668.00	12106277.56
2.	Ground Floor	14860.09	360.00	5349632.40
3.	First Floor	13927.96	508.00	7075403.68
4.	Typical Floor (2 to 10)	94207.88	508.00	47857603.04
5.	Lower Pent House	7650.14	508.00	3886271.12
6.	Upper Pent House	5827.82	508.00	2960532.56
7.	Terrace			
a)	Lower Terrace & Upper Terrace	7850.17	140.00	1099023.80
b)	Top Terrace	6253.71	143.00	894280.53
c)	G.F. & F.F. Terrace	4788.09	65.00	311225.85
	Total			81540250.54

Terms and conditions will be same as per your previous work order dated 19.11.2005.

Thanking you,

Yours faithfully

I/We accept the terms and conditions as Mentioned above.

For SEL/JKEDPL

Sd/-

For M/s Wishwa Mittar Bajaj & Sons.

Authorized Signatory

Sd/-

(Authorized Signatory)”

25. Admittedly, the said amendments were duly accepted and signed by the respondent. This was expressly recorded in each letter of amendment as is apparent from the above. However, the respondent claims that after signing each of the amendment letters, it sent protest letters (three in number). All the protest letters are to a similar effect wherein the respondent stated that the amendments were not reasonable and justified as per actual measurement at site and that they were accepting the amendments under protest with a request to further amend the rates based on actual analysis and actual quantities of each item to be worked out jointly by them.

26. These protest letters were disputed by Shipra. However, the arbitrator had accepted the same to be genuine. Be that as it may, the said letters would be of little consequence insofar as the claim awarded is concerned as the claim awarded is not one for damages but for work done on alleged agreed rates. The only conclusion that can possibly be drawn from the protest letters is that the respondent was not happy with the rates as agreed, as according to it, the same were liable to be increased based on actual analysis of work executed. However, the consideration finally agreed to be paid by Shipra was as recorded in the amendment letter dated 27.04.2009, as there is no other material which would establish that Shipra had agreed to rates other than as reflected in the letter dated 27.04.2009.

27. A plain reading of the Agreement and the subsequent amendments indicate that the rate per sq. ft. of area for different floors had been increased. The respondent claimed that such rates were revised on *ad hoc* basis and were not reasonable in view of details/actual measurements at site and thus were required to be further reconciled.

28. It is apparent from the above that the respondent essentially seeks to claim an amount larger than what was agreed under the Agreement (as subsequently amended). This would be plainly impermissible as the respondent had agreed to the lump sum rates and it was not open for the respondent to claim a higher amount than as agreed merely on the basis of unilaterally claiming that the rates were not reasonable or justified. The protest letters sent after expressly accepting the rates as specified in the amendment letters would be of little consequence. Since the claim awarded is on the basis that the amount awarded was contractually payable to the respondent, it would be essential for the respondent to establish that Shipra had agreed to pay the amounts claimed or at least the basis on which such amounts were computed.

29. It is essential to understand the nature of the claim awarded to the respondent under the impugned award. According to the respondent, the rates as indicated in the Agreement were based on item rates for various items comprised in the works and the amounts to be paid were arrived at by multiplying the quantities of items of works with the agreed rates. It is claimed that the lump sum consideration as

specified in the Agreement was arrived at between the parties on the aforesaid basis. It is the respondent's case that the actual quantities of items of work involved were larger and therefore the rates as specified in the Agreement as amended on 27.04.2009 were required to be reworked. In other words, it was the respondent's case that the rates as accepted by it, by signing the amendment letter dated 27.04.2009 was not applicable and was required to be reworked.

30. Plainly, in order to sustain such claim, it was necessary for the respondent to establish (a) that Shipra had agreed to certain item rates for various items of work; (b) that Shipra had agreed that the scope of works would involve specified quantities of item works; (c) that the quantities of item works executed were in excess of the specified quantities of work and consequently the lump sum rate per sq. ft. of the specified floor was required to be revised; and (d) the amount paid by Shipra to the respondent for work done fell short of the amount payable on such revised rates.

31. During the course of the arguments, the learned counsel for the respondent was pointedly asked whether there was any material on record to establish the analysis of item rates and quantities providing the break-up of the rate per sq. ft. as initially agreed under the Agreement and as subsequently revised. He had fairly conceded that apart from the e-mail dated 28.12.2010 sent by Mr Rastogi, wherein Shipra had alleged that excess payments had been made to the respondent, there was no other document on record which could establish the item work quantities and the rates used to calculate the

amount payable on the basis of item rates and quantities. He also added that the item rates as indicated in the said e-mail were also incorrect and did not take into account subsequent increases.

32. This Court finds it difficult to accept that the e-mail dated 28.12.2010 sent by Mr Rastogi (of Shipra) establishes that the parties had agreed that the respondent would be paid on the actual quantity of item works executed on item rates basis as per the Agreement, as the subsequent amendments signed by the parties indicate that payments were to be made on a lump sum basis. However, even if it is accepted that this was so, there is nothing on record which would establish the various item rates allegedly agreed to by Shipra considering that the respondent claims that the item rates as mentioned in the annexures to the said e-mail were not correct.

33. It is relevant to observe that the offer made by the respondent was also on a lump sum basis. The respondent had quoted rates on per sq. ft. basis for different floors. These rates were obviously subject to negotiations and the rates as finally agreed between the parties were recorded in the Agreement executed on 19.11.2005. All subsequent revisions only revised the agreed rate per sq. ft. Even if it is accepted that the initial offer and the Agreement were based on an analysis of rates and quantities, it would be essential for the respondent to not only establish the quantities of item works but also the item rates justifying the rate per sq. ft. as agreed to by the parties in the Agreement. In addition, the respondent would have to establish that the parties had agreed to revise the item rates since the respondent was

not accepting the item rates as indicated in Mr Rastogi's e-mail dated 28.12.2010 (which as stated earlier is concededly the only document emanating from Shipra which records any separate rate for item works).

34. Further, not only was it necessary for the respondent to establish the revised item rates agreed to by Shipra but it was also necessary for the respondent to project an agreed modified rate per sq. ft. for each floor. This is so because even as per the respondent, in terms of paragraph 2 to clause 22 of the Agreement - as amended by the letter dated 27.03.2006 - the rates as quoted in the Agreement were required to be revised. Concededly, no such revised rate was projected by the respondent. To further illustrate this point one may refer to the consideration payable for the basement floor. The rate per sq. ft. of the basement floor was agreed at `618 per sq. ft. This was revised subsequently and in terms of the amendment agreed to by the parties on 27.04.2009, the said rate was increased to `668 per sq. ft. According to the respondent, such rates were required to be revised on the basis of analysis of actual quantities executed. Thus, the respondent was required to establish a revised rate (per sq. ft.) on the basis of which its claim could be computed. However, no such rate has been projected by the respondent. More importantly, there has been no determination by the arbitrator as to what rates (per sq. ft.) were to be applied in terms of the Agreement between the parties while partly awarding claim no.1 in favour of the respondent. The arbitrator has merely accepted the statement of work done as claimed by the

respondent in its letter dated 14.05.2011. It is relevant to mention that in the said letter, the respondent had claimed that it had executed various quantities of items of work for which it was entitled to be paid at specified rates. There is no document or evidence on record which would establish that Shipra had agreed to pay the revised item rates as indicated in the said letter. A perusal of the impugned award also indicates that there has been no clear determination by the arbitrator of the item rates as indicated in the said letter being agreed to by Shipra. The least that was required was that a determination/ adjudication be made as to (a) the quantities of items of work executed by the respondent and (b) the agreed rates of such items of work. This Court is unable to find that there has been any such clear determination by the arbitrator.

35. Concededly, there is no material on record which would indicate that Shipra had agreed to any revised item rates of item works. Further, it is the respondent's case that the lump sum rates were amended thrice but such revision was *ad hoc* and without any basis, thus concededly, the said revisions were not on the basis of any rate analysis of separate item of works. However even if it is assumed that Shipra had agreed to a revision of item rates which were evidenced by the amendments to the Agreement, it was still necessary for the respondent to establish the item rates for separate items of work or at least establish that the revised per sq. ft. rates translated to item rates as claimed by the respondent in its letter dated 14.05.2011, but no such exercise was carried out by the respondent or by the arbitrator.

36. Whilst, there can be no quarrel to the proposition that an arbitrator is the final fact finding authority and his decisions on questions of fact are final and binding on the parties, it is essential that there has to be a reasoned determination. A mere award without determination/adjudication of the facts necessary to return findings would render the arbitral award susceptible to challenge under Section 34 of the Act.

37. This Court has also examined the impugned award and it is apparent that the arbitrator has not determined the real questions involved in partly awarding claim no.1 in favour of the respondent. There is no determination of the agreed item rates for various items of works and when and how such rates were agreed to by Shipra; there is no determination of the quantities of separate item works to be executed under the Agreement and the quantities which were actually executed by the respondent; and there is no determination regarding the applicable revised rate (per sq. ft.) for each floor in terms of the Agreement, considering it was the respondent's case that such rate was to be revised based on actual analysis.

38. In view of the above, this Court is unable to sustain the impugned award, first of all for the reason that the claim awarded is not in terms with the Agreement (as subsequently amended) on record and secondly, there is no reasoned determination of the necessary components required for such award; thus, rendering the impugned award, arbitrary and clearly opposed to the fundamental policy of Indian Law.

39. Accordingly, the impugned award is set aside and the petition is allowed.

40. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JULY 04, 2017

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