

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

+ **FAO No. 324/2017**

% **1st August, 2017**

NOIDA CYBER PARK PVT. LTD. Appellant
Through : Mr. P. P. Malhotra, Senior
Advocate with Ms. Mamta
Tiwari, Mr. Vijay Kumar and
Mr. Anshul Rawat, Advocates

versus

BHAYANA BUILDERS PVT. LTD. Respondent
Through : Mr. Saurabh Kirpal and
Mr. Nishant Nigam, Mr. Mohit
Mahla and Mr. Yashvardhan
Bandi, Advocates

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CAV No. 689/2017

Since counsel for the caveator has entered appearance, the
caveat stands discharged.

CM Nos. 27232/2017 & 27233/2017

Exemptions allowed subject to all just exceptions.

CMs stand disposed of.

FAO No. 324/2017

1. This first appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugns the judgment of the Court below dated 30.03.2017 whereby the objections filed by the appellant/objector under Section 34 of the Act have been dismissed.

2. Objections were filed by the appellant against the Arbitral Award of the Arbitrator dated 27.08.2016. By the Award dated 27.08.2016 the Arbitration Tribunal allowed certain claims of the respondent/claimant in terms of paras 120 and 121 thereof and which paras read as under:-

"120. Final relief:-

i. Claim No.1	Rs. 25 lacs
ii. Claim No. 2	Rs. 6,28,336.88
iii. Claim No. 3	Rs. 5,28,458/-
iv. Claim No. 4	Nil
v. Claim No. 5	6% p.a.
vi. Claim No. 6	Rs. 4 lacs
Total	Rs. 40,56,794.88
vii. Stamp Duty	Rs. 4,100/-
Grand Total	Rs. 40,60,894.88

121. In view of the above I hereby pass award in favour of the claimant and against the respondent for Rs.40,60,894.88 (Rupees Forty Lacs Sixty Thousand Eight Hundred and Ninety Four and Eighty Eight Paise) with interest @ 6% per annum from September, 2010 till realization of the awarded amount."

3. The subject Award dated 27.08.2016 was passed as there

arose disputes between the respondent/claimant/contractor and the appellant/owner with respect to construction of an IT Park at C-28 and 29, Sector-62, Noida, U.P. Parties entered into a contract in this regard dated 28.02.2007 which was a contract for a sum of Rs. 31 crores with completion period being of 12 months. As per the respondent/claimant, it completed the entire contract and a virtual completion certificate was issued by the Project Manager of the appellant on 26.08.2008. As per the contract, out of each bill, 5% of the amount of each bill was to be withheld as retention amount. 50% of this retention amount was to be paid to the respondent/contractor within 30 days of giving of the virtual completion certificate and the remaining 50% of the retention money was payable after the expiry of 12 months defect liability period. The basic claim filed by respondent/contractor in the arbitration proceedings was with respect to the return of the second part of 50% of the retention amount payable after 12 months defect liability period.

4. There are three main issues which have been urged before this Court on behalf of the appellant/objector. First issue argued is that the amount awarded to the extent of award of interest and costs is

against the contract and once the Award is against the terms of the contract, the Award is argued to be *ex facie* illegal and liable to be set aside. The second issue which was argued is that the claim petition filed by the respondent/claimant was time barred. The third issue which is argued is in relation to the second issue of the claim petition being time barred inasmuch as it is argued that the Arbitration Tribunal as also the court below has wrongly taken the reply given by the appellant to the winding up petition filed by the respondent in the Company Court as an acknowledgment of liability, whereas there was no acknowledgement of liability but there was only acknowledgement of appellant having with it 50% of the retention amount.

5. On the first aspect as to the Award being against the contract by granting interest for pre-litigation period the appellant relies upon Clause 30.1 of the contract. The respondent in reply relies upon Clause 118.3 of the contract. These two clauses read as under:-

“30.1 No interest shall be payable on any money due to the Contractor against earnest money, security deposit, interim or final bills or any other payments due under this contract.”

“118.3 The arbitrators shall have the power to award interest on any sum awarded pursuant to the arbitration proceedings and such sum shall carry interest, if awarded, at the rate of six (6) month LIBOR (London Interbank Offered Rate) plus 5% per annum until the actual payment of such amounts.”

6. It is argued on behalf of the appellant that the harmonious meaning of both the provisions will mean that Arbitrator can only grant *pendent lite* and future interest but cannot grant interest with respect to the pre-litigation period.

7. In my opinion, so far as grant of interest for pre-litigation period is concerned, I need not go into this aspect in detail inasmuch as I have held in the judgment in the case of ***Union of India vs. N. K. Garg Company, 2015 (224) DLT 668*** that a clause in a contract which bars payment of interest is illegal and is hit by Section 23 of the Indian Contract Act, 1872 and, therefore, such a clause has to be ignored and interest granted to a person whose moneys are illegally retained by the guilty party.

8. At this stage, learned counsel for the respondent before this Court has taken this Court to para 120 of the Award and it is seen that as per the total amount awarded under the Award there is no pre-litigation interest awarded. This has been pointed out to the learned senior counsel for the appellant who concedes to this position. Therefore no argument remains with respect to alleged illegality in grant of pre-litigation interest in as much as no pre-litigation interest

has been given by the Award.

9. On the aspect of award of costs to the respondent/claimant the counsel for the respondent/claimant agrees that this award of costs be set aside in view of Clause 118.4 of the contract. Ordered accordingly.

10. On the second aspect of the claim petition filed by the respondent being time barred, it is seen that the respondent relies upon its communications dated 20.09.2010 and 28.09.2010 which are said to have been served upon the appellant. As per Section 21 of the Act, arbitration commences on receipt of a notice invoking arbitration. The issue before the Arbitration Tribunal was that whether notices dated 20.09.2010 and 28.09.2010 were served upon the appellant. Arbitration Tribunal in this regard has given detailed findings in paras 46 to 52 of the Award and as per which discussion and conclusion, Arbitration Tribunal has found that the notice Exhibit C-7 dated 20.09.2010 is duly sent to the appellant company by registered post and, therefore, there is presumption of service under Section 27 of the General Clauses Act, 1897. The Arbitration Tribunal also holds that this notice Exhibit C-7 dated 20.09.2010 is also additionally served

upon C&MD of the appellant and it cannot be held that merely because the notice is sent to Logix Cyber Park, it was not received by the appellant inasmuch as another letter Exhibit C-9 shows that at this address itself appellant has been receiving notices. The relevant paras of the Award, being paras 46 to 52, read as under:-

“46. The question is whether invocation notice dated 20.09.2010 sent by the claimant by speed post reached the respondent or not. This notice was sent to the respondent as its two addresses at New Delhi and NOIDA for appointment of sole arbitrator after mutual consent as provided in the agreement to adjudicate the claims set forth in the said notice. A copy of the notice dated 20.09.2010 along with speed post’ receipts is Exhibit C-7.

47. This notice Ex. C-7 dated 20.09.2010 is addressed to Sh. Shakti Nath Ji C&MD at the following two addresses:-

1. Noida Cyber Park Pvt. Ltd.
18, Kotla Lane, Lower Ground Floor,
Rouse Avenue, New Delhi-110002.
2. Logix Cyber Park
A4-5, 4th Floor,
Sector-16,
Noida.

48. In so far as the first address of Mr. Shakti Nath is concerned, the same is correct with its correct pin code. The postal receipt i.e. the speed post receipt for notice at this address appears at page 340. The address as well as the pin code of Mr. Shakti Nath is correct. There is thus due presumption of service of notice dated 20.09.2010 Ex. C-7 at Rouse Avenue, New Delhi address. The invocation was annexed with the statement of claim.

49. In so far as the second address of Sh. Shakti Nath Ji as shown in notice Ex. C-7, it is of “Logix Cyber Park”. Ld. Sr. Counsel Mr. A. K. Singla submitted that Logix Cyber Park is no legal identity. The question is whether Noida Cyber Park Pvt. Ltd. Is also known as “Logix Cyber Park”. In fact the name of the building is “Logix Park”. The question is whether notice addressed to Sh. Shakti Nath Ji at Logix Cyber Park A4-5, 4th Floor, Sector-16, Noida would have reached him. In this connection I may refer to letter Ex. C-9 of Mr. G. Sundrani Team Leader of Gherzi Eastern Limited sent to the Director Project of the claimant with copy to GM/Corporate (Logix Park, A-4 & 5, Sector-16, Noida). It does seem that the letter even without being addressed to the company Noida Cyber Park

Pvt. Ltd. can reach it even if it is sent in the name of building i.e. Logix Park.

50. Ld. Sr. Counsel for the respondent however submits that the postal receipt which is shown at the top of Ex. C-7 as Ex. C7/A shows that it was sent to S. Nath at Pin Code-201001 whereas the actual pin code of Noida is 201301. It is correct that the actual pin code of Noida is not shown on the speed post stamp receipt. However, it cannot be presumed that if correct address is mentioned by a party for Noida, U.P., it may not reach there only because the postal authority has shown wrong pin code on the postal stamp.

51. I now come to further notice dated 28.09.2010 Ex. C-17 given by the claimant company in continuation of their previous notice dated 20.09.2010 requesting for appointment of arbitrator after mutual consultation. This notice is also sent to Sh. Shakti Nath C&MD of the respondent company at the same two addresses on which notice dated 20.09.2010 was sent. The said notice Ex. C-17 appears at page 341. The postal stamps however show correct pin codes i.e. pin code 110020 for Delhi address and pin code 201000 for Noida. That however does not mean that if the envelopes show the correct address of the addressee, the postal article will not reach the addressee only because pin code on the postal stamp is incorrectly printed. I may also add that the address of Rouse Avenue, New Delhi written by the claimant company on the envelope contains the correct pin code i.e. 110002. Hence, I hold that even the additional notice dated 28.09.2010 was also served upon Mr. Shakti Nath C&MD of the respondent company.

52. There is due presumption of the receipt of letter under Section 27 of the General Clauses Act 1897. Section 27 of General Clauses Act, 1897 reads as under:-

“27. Meaning of service by post. Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

(underlining added)

11. The law is well settled that the court hearing objections under Section 34 of the Act does not sit as an appellate court to re-

apprise findings of facts and conclusions arrived at by the Arbitration Tribunal. Once the findings and conclusions of the Arbitration Tribunal are one possible and plausible finding and conclusion and such finding and conclusion is not in any manner grossly illegal or perverse, the court hearing objections under Section 34 of the Act will not substitute its view for that of the Arbitration Tribunal.

12. In view of the detailed discussion and finding of Arbitration Tribunal contained in paras 46 to 52 of the Award, in my opinion no valid objections can be raised under Section 34 of the Act to question the service of the notices dated 20.09.2010 and 28.9.2010.

13. The third issue, in my opinion, need not be commented upon by this Court once the second issue has been decided in favour of the respondent/claimant and against the appellant/objector.

14. In view of the above discussion, there is no merit in the appeal. Dismissed.

AUGUST 01, 2017
SR

VALMIKI J. MEHTA, J