

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.163 OF 2013

Reliance Media Works Ltd. ... Petitioner
Versus
M/s Construction Cataylsers Pvt. Ltd. ... Respondent

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Mr. Aditya Mehta a/w Mr. Abhishek Kale, Mr. Shriniket Deshpande I/b Naik Naik & Co. for the Petitioner.

Mr. Ramesh Sawant I/b Mr. S.V. Pitre for the Respondent.

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CORAM : S.C.GUPTE, J.

DATE : 4 DECEMBER 2018

P. C. :

. Heard learned Counsel for the parties.

2 This arbitration petition challenges an award of a sole arbitrator passed in a reference arising out of a contract for construction of "Prefabricated Modular Movie Theater".

3 By an agreement dated 11 February 2008, the Petitioner engaged the Respondent for development of a prefabricated modular movie theater. The agreement required the Respondent to make all endeavors to develop and deliver the project to the Petitioner as per the delivery schedule provided for in the agreement. The consideration was in the sum of Rs.1,88,00,000/- and said to be towards development of design and making of a prototype of the said project. It was the case of the Petitioner, who was the claimant before the arbitral forum, that the Respondent had

breached the agreement and fundamentally changed the design and specifications of the project. It was submitted that instead of a prefabricated modular movie theater, what was being built or manufactured was a theater assembled with welded joints in place of removable joints. The Petitioner's case was that a prefabricated modular movie theater should have removable joints, so as to be removed and fitted anywhere else by just assembling the joints. It was the Petitioner's case that this deviation from the agreed design changed the very basis and nature of the project, justifying termination of the agreement. The Petitioner's case was that the Respondent was bound to refund the amount paid by the Petitioner to it. The Petitioner submitted that the only design, which was approved by the Petitioner and in accordance with which the project had to be developed, was the design of 29 April 2008; the project had to be fabricated in accordance with this design. The Petitioner also claimed that the delivery of the project was inordinately delayed by the Respondent. It was the Respondent's case, on the other hand, that the project it was entrusted with was the project of development of a prototype of a prefabricated modular movie theater and that there was nothing to suggest that the prototype had to have only removable joints and not welded joints. The case of the Petitioner that only approved design was the design of 29 April 2008 was also disputed by the Respondent. The Respondent's case was that none of the so called changes in the design including the alleged variation of joints justified termination of the agreement on the part of the Petitioner. The Respondent made its counterclaim in the matter. According to the Respondent, the super structure of the modular movie theater was fully erected and only acoustic and drainage work had been left out. The delay, according to the

Respondent, was attributable to the Petitioner, in particular as a result of its withholding of payment due. The Respondent, in the premises, claimed the balance amount of the consideration from the Petitioner in addition to damages.

4 The learned arbitrator rejected the Petitioner's claim for refund of Rs.96,61,085/- paid by it to the Respondent as also its claim for damages and allowed the counter claim of the Respondent to the extent of the amount withheld with interest. The Respondent's claim for damages was, however, rejected. The Petitioner was, accordingly, directed to pay a sum of Rs.76,14,772/- with interest to the Respondent.

5 At the hearing of the present petition, learned Counsel for the Petitioner makes two submissions. Firstly, it is submitted that in the face of the definition of the term 'pre-fabricated modular movie theater' to be found in the subject agreement and definitions and meanings available in authentic dictionaries, the learned arbitrator could not have interpreted the term and thereby the scope of the Respondent's work as he chose to do. The arbitrator appears to have, in the first place, laid emphasis on the use of the word 'prototype' of a 'modular theater' and then relied on 'Wikipedia Encyclopedia'. Learned Counsel submits that there are judgments which lay down that 'wikipedia' definitions ought not to be accepted. Learned Counsel, secondly, submits that it was nobody's case the theater was not to be designed with the original design of 29 April 2008 and that the learned arbitrator's conclusion that design of 29 April 2008 was not the only design, but there were other designs submitted on 29 September 2008 and that the work could be based on these and other designs, suffers from a

gave infirmity. It is submitted that this could be termed as a perverse assessment, involving breach of public policy of India. Learned Counsel submits that it was not even the Respondent's case that the construction had to be as per the designs submitted on 29 September 2008.

6 None of the two challenges spelt out by the the Petitioner before this court qualifies as a permissible challenge under Section 34 of the Arbitration and Conciliation Act, 1996. The learned arbitrator had to construe the scope of the Respondent's work vis-a-vis the term 'prefabricated modular movie theater', in the light of the concept of a 'prototype'. The very opening recital of the agreement between the parties talks about a novel theater known as "Prefabricated Modular Movie Theater", a prototype of which was sought to be developed. Development of a prototype of a prefabricated modular movie theater was stated to be the project, which was the assignment of the Respondent. No doubt, the agreement defines the term 'prefabricated modular movie theater'. The term meant, as per the agreement, an independent light weight Prefabricated Structure kit design based on the desired module of screens. At the same time, what was to be developed was but a prototype of such theater. The agreement does not contain any definition of the word 'prototype'. It was open to the learned arbitrator to explore the meaning of the term 'prototype', in the light of the agreement as a whole and considering what the industry understands by the term 'prototype' and for doing so, the learned arbitrator could take help of such material as was available in public domain as regards the concept of a 'prototype'. There is nothing wrong *per se* in the approach of the learned arbitrator. It is not something which can be termed as that which no fair or judiciously

mind person could arrive at or which would shock the conscience of the court. The learned arbitrator came to his conclusion in this behalf after analyzing the agreement between the parties. The learned arbitrator noted that the work of development of the prototype was divided into four categories :- (i) civil work; (ii) light weight building structure; (iii) interior work; and (iv) miscellaneous works; the second category involved (a) roof structure and roof cladding; (b) side wall and rear wall; (c) structural steel work; and (d) structural floor arrangement. Learned arbitrator observed that in all these categories, different works and materials relevant to the category were enumerated, the common factor being 'hardware'. The learned arbitrator then considered, after referring to wikipedia, that a prototype was an early 'sample' or 'model' built to test a concept or process, or to act as a thing to be replicated; that, by definition, a prototype will represent some compromise from the final design; and that the prototype usually differed from the final production variants in three fundamental ways, viz. materials, processes and fidelity. There is nothing wrong with this assessment. A prototype, as understood by the industry, is not something very different even going by other available technical literature. It is an early conception of the thing in itself. A prototype may differ from the final production in different ways, including, as the arbitrator puts it, in terms of materials, processes or fidelity. In the light of the project, namely, development of a prototype of 'prefabricated modular movie theater' and understanding of the industry as regards prototypes, the learned arbitrator assessed the actual fabrication work carried out by the Respondent. So far as the designs are concerned, it is not that the arbitrator ruled that the project was to be based on the designs of 22 September 2008. What the learned arbitrator noticed was that the designs of 22 September

2008 had certain additions compared of the designs of 27 April 2008 and yet, they did not signify any contradiction; these additions did not fundamentally change the nature of the structure of the project. It is to be remembered that the learned arbitrator made these observations in the context of the Petitioner's case that the project had to be carried out in accordance with the approved designs of 29 April 2008 alone and no deviation was permissible. The learned arbitrator considered the drawings of 22 September 2008 as something containing additions to the designs of 29 April 2008, which did not, at any rate, materially alter the nature of the project. This again exhibits a possible view and not a view which is either impossible or a view which no fair or judiciously minded person could arrive at or a view which would shock the conscience of the court.

7 There is, in the premises, neither contravention of public policy of India nor patent illegality appearing on the face of the award, in the present case. There is, accordingly, no merit in the challenge.

8 The Arbitration Petition is dismissed. There shall be, in the facts of the case, no order as to costs.

(S.C. GUPTE, J.)