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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION NO. 87 OF 2017
WITH
NOTICE OF MOTION NO. 51 OF 2017

The Bombay Dyeing and Manufacturing
Co. Ltd

...Petitioner

V/s.

Knight Frank Property Services Pvt Ltd

...Respondent

Mr. Ravi Kadam, Senior Advocate a/w. Dr. Birendra Saraf a/w. Mr. A. Daver a/w. Ms. Rujuta Patil a/w. Ms. Niyathi Kalra i/b Negandhi Shah & Himayatullah for Petitioner.

Mr. Naresh Thacker a/w. Ms. Rhia Banerjee a/w. Ms. Vaishnavi Chillakaru i/b. Economic Laws Practice for Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 14TH MARCH, 2018.

P.C. :-

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Said Act'), the petitioner has impugned the arbitral award dated 25th October 2016 passed by the learned arbitrator thereby allowing the claims made by the respondent and rejecting the counter claims made by the petitioner. Some of the relevant facts for the purpose of deciding this arbitration petition are as under:

2. On or about 1st November, 2010, the parties executed an agreement termed and styled as Letter of Intent, whereby the respondent was appointed as "The Facility Manager" to provide various services in accordance with the terms and conditions described in the said Letter of Intent.

3. It is the case of the petitioner that due to various issues relating to non-performance, non-compliance, defaults and non-completion of testing and commissioning, the work at the premises in question was greatly hampered with which in turn slowed down the progress in carrying forward and furnishing the assignments. There was thus delay in handing over the possession to the customers of the petitioner upto a period of three months. The parties failed to arrive at any amicable settlement. The respondent through its advocate's letter dated 12th June, 2012 invoked the arbitration clause in the agreement entered into between the parties.

4. The petitioner through its advocates letter dated 26th June, 2012 replied to the said letter dated 12th June, 2012 and concurred with the appointment of a former Chief Justice of Allahabad High Court as a sole arbitrator.

5. Pursuant to the directions issued by the learned arbitrator, the respondent filed statement of claim on 28th September, 2012. The petitioner herein filed a statement of defence and counter claim on

15th December, 2012 before the learned arbitrator. The respondent filed reply to the counter claim on 17th January, 2013.

6. Both the parties also led oral evidence before the learned arbitrator and filed written submissions. On 25th October, 2016, the learned arbitrator rendered an award thereby directing the petitioner to pay a sum of Rs. 77,02,738/- with simple interest at the rate of 12% p.a. from 1st June, 2012 till the date of award and simple interest at the rate of 12% on the principle amount from the date of award till the date of final payment. The learned arbitrator also directed the petitioner herein to pay the cost quantified at Rs. 25,00,000/- and rejected the counter claim filed by the petitioner.

7. The learned counsel for the petitioner invited my attention to some of the findings rendered by the learned arbitrator. He also invited my attention to some of the clauses of the agreement and more particularly Clause-10 and Clause-11 of the agreement and would submit that the shorter period provided in Clause-11 of the agreement for providing an appropriate clarification within 15 days of the receipt of the monthly invoices, chalans and bills is contrary to Section 28 of the Indian Contract Act, 1872. He submits that the learned arbitrator did not consider this aspect in the impugned award.

8. The next submission of the learned counsel is that the finding of the learned arbitrator that even if there were deficiencies that

cannot result in denying to the respondent, the amount that they were entitled to after performing their duties under the contract. He submits that this finding of the learned arbitrator is totally perverse. It is submitted that since the work of the respondent was full of deficiencies, the petitioner was not expected to make any payment in respect of the invoices raised by the respondent.

9. The learned counsel for the petitioner states that the work of the respondent was clearly proved by the petitioner by leading an oral and documentary evidence before the learned arbitrator and more particularly by various emails exchanged between the parties.

10. In so far as rejection of counter claim is concerned, it is submitted by the learned counsel that the petitioner had produced the proof in support of the claim for counter claim inspite thereof, the learned arbitrator has rejected the claim on the ground that the petitioner had failed to prove the damages alleged to have been suffered by the petitioner. The learned counsel placed reliance on the judgment of Delhi High Court in the case of Delhi Development Authority Vs. Pandit Construction Company delivered on 19th April, 2012 in FAO (OS) 382 of 2007 and in particular paragraph 9 and 11.

11. The learned counsel for the respondent on the other hand, invited my attention to the grounds of challenge raised in the arbitration petition and also to various findings of fact rendered by the

learned arbitrator in the impugned award. He submits that the petitioner had nor raised any issue of Clause-11 being allegedly in violation of Section 28 of the Indian Contract Act, either before learned arbitrator or before this Court in this petition and thus the petitioner cannot be allowed to raise this issue for the first time across the bar.

12. It is submitted by the learned counsel that the learned arbitrator has recorded various findings of fact which being not perverse cannot be interfered by this Court in this petition filed under Section 34 of the Arbitration Act.

13. It is submitted by the learned counsel that the petitioner also failed to prove claim for damages made before the learned arbitrator. The learned arbitrator has considered the oral and documentary evidence produced by both the parties and has also interpreted the terms of agreement entered into between the parties. This Court cannot substitute the possible interpretation of the learned arbitrator of the clause of agreement by any other interpretation.

14. The learned counsel for the petitioner in rejoinder submits that the findings rendered by the learned arbitrator are perverse and thus cant be interfered by this Court in this arbitration petition under Section 34 of the Arbitration Act.

REASONS AND CONCLUSION

15. A perusal of the record indicates that the respondent has examined 4 witnesses. The petitioner had also examined a witness. The respondent had made a claim against the petitioner in the sum of Rs. 77,02,738/- being the amount outstanding from the unpaid invoices with interest thereon from 1st November, 2011 at the rate of 12% p.a. thereon. The petitioner had filed a counter claim before the learned arbitrator praying for a sum of Rs. 1,47,00,590/-. The learned arbitrator has referred to the large number of correspondence in the impugned award, exchanged between the parties and has also dealt with the oral evidence in the impugned award. The petitioner had paid Rs. 72,54,837/- against the invoices issued by the respondent in a sum of Rs. 1,49,57,571/-. There was an outstanding amount in the sum of Rs. 77,02,738/-.

16. The learned arbitrator framed 8 issues and considered each and every issue at great length in the impugned award. In paragraph 23 of the impugned award, the learned arbitrator has rendered a finding that in the cross-examination of the witness examined by the respondent i.e. Mr. Saurabh Bhagat, apart from general questions, there was no cross-examination as to the amount of invoices and the amounts due and payable under the said invoices. The learned

arbitrator referred to various parts of cross-examination of the said witness and also considered the evidence of the sole witness examined by the petitioner herein.

17. It is held by the learned arbitrator that the documents produced by the petitioner and sought to be proved by the witness of the petitioner could not be proved. The petitioner did not dispute the correctness of the bills in the course of contractual period, in the manner and within the time required under Clause -11 of the Letter of Intent. On interpretation of Clause-11 of the Letter of Intent, it is held by the learned arbitrator that when the contract required a dispute, if any, to be raised in a particular manner and within a time frame and if not done, any subsequent dispute was irrelevant. The petitioner in this case has not produced any evidence to show that after receipt of each of the invoices/bill for the concerned month from the respondent, they had raised the objections in terms of Clause-11 of the Letter of Intent. No such evidence has been led. Though the contract commenced in the month of November 2010 and was dated 1st November, 2010, the petitioner signed it only on 31st March, 2011. After considering the oral and documentary evidence, the learned arbitrator held that the respondent was entitled to the amount claimed in the sum of Rs. 77,02,738/- from the petitioner.

18. In so far as the submission of learned counsel for the petitioner

that though the learned arbitrator had held that even if the work of respondent was unsatisfactory, the petitioner could not have withheld the amount is concerned, a perusal of the impugned award indicates that it could not be the case of the petitioner that because in its opinion, the work was unsatisfactory, it would not pay the amount. The contract required that the wages of the employees which were fixed wages should be paid. The petitioner was the principal employer and the respondent was their contractor. The clause did not provide for deduction of 5% or 100% from the wages payable to the employees. It is held by the learned arbitrator that it could not be the case of the petitioner nor the same was pleaded in their defence statement, that the amount payable towards wages and the consumables consumed was payable at their sole discretion. The learned arbitrator accordingly rejected the interpretation sought to be given by the petitioner and held that the same was contrary to the public policy.

19. A perusal of the award indicates that the learned arbitrator rendered a finding of fact that the petitioner during the term of contract had never informed the respondent that it was withholding the amount and/or was deducting the percentage from the amount on account of not being satisfied with the work of the respondent.

20. The learned arbitrator interpreted Clause-10 and 11 of the

contract and held that the petitioner was required to raise the dispute about non-satisfactory work within 15 days of the invoice/bill being received. There was however no documentary evidence on record produced by the petitioner that within 15 days of receipt of each invoice/bill, it had raised a dispute about the non-satisfactory performance of work for the concerned month. The learned arbitrator upon interpretation of Clause-10 and 11 held that if the interpretation of the petitioner is accepted, such interpretation would render such part of the clause illegal being against the public policy.

21. The learned arbitrator on interpretation of Clause-10 and 11 held that the term “satisfactory work” cannot be at the sole discretion of the petitioner. If they were not satisfied of the work done in a particular month, the respondent ought to have been informed and after considering the views of the respondent deduction, if any, in the monthly bills if at all and if permissible under the Letter of Intent could have been made for that month which was not done. In that context, it is held by the learned arbitrator that it is possible that there were some deficiencies but that cannot result in denying to the respondent the amount that they were entitled to after performing their duties under the agreement. The petitioner had not brought any evidence on record as to what was the manpower required on each date and what was the manpower deployed and what was the deficiency in

work. In paragraph 30 (a), the learned arbitrator has held that for the reasons recorded in the earlier part of the award, the petitioner had failed to prove that the work of the respondent was unsatisfactory which entitled the petitioner not to pay the monthly invoices, consumables.

22. In so far as counter claims made by the petitioner is concerned, the learned arbitrator has dealt with the counter claim in great detail in the impugned award and after considering the oral and documentary evidence, It is held by the learned arbitrator that the petitioner has failed to prove that they had incurred any expenditure for repair of Dorma shower fittings. The petitioner failed to lead any evidence to show as to how much the respondent was responsible for the alleged loss suffered by the petitioner. No such evidence had been led by the petitioner. The learned arbitrator has rendered a finding that the petitioner has not alleged as to how the damages were occasioned by any alleged negligent act on the part of the respondent. The documentary evidence also does not co-relate the expenses alleged to have been incurred towards the alleged purported loss. The learned arbitrator accordingly rejected the entire counter claim made by the petitioner. I am not inclined to accept the submission of learned counsel for the petitioner that the learned arbitrator has rejected the counter claim without considering the

evidence led by the petitioner.

23. In so far as the submission of learned counsel for the petitioner that Clause-11 was contrary to Section 28 of Indian Contract Act, 1872 is concerned, neither any such plea was raised by the petitioner in the pleadings filed before the learned arbitrator nor any such ground is raised by the petitioner in this arbitration petition. In my view, the petitioner thus cannot be allowed to raise this issue for the first time across the bar.

24. In so far as the judgment of Delhi High Court in case of Delhi Development Authority (supra), relied upon by the learned counsel for the petitioner is concerned, there is no dispute about the prepositions of law laid down by the Delhi High Court in the said judgment. A perusal of the Clause-11 even otherwise does not indicate that the same is contrary to Section 28 of the Indian Contract Act, 1872. There is thus no merit in this submission of the learned counsel for the petitioner.

25. A perusal of the grounds of challenge raised in the arbitration petition clearly indicates that the petitioner has impugned the arbitral award basically on the ground that the learned arbitrator has rendered wrong findings of fact. In my view, this Court cannot re-appreciate the evidence produced by the parties before the learned arbitrator. The findings rendered by learned arbitrator are after

considering the oral and documentary evidence produced by both the parties and being not perverse cannot be interfered by this Court in this petition filed under Section 34 of the Arbitration Act.

26. In so far as interpretation of various clause of the agreement and more particularly Clause-10 and 11 by the learned arbitrator in the impugned award is concerned, in my view the interpretation of the learned arbitrator of those clauses is not only the possible interpretation but is correct interpretation. In my view, even if the interpretation of the learned arbitrator of those clauses is considered as a possible interpretation, the same cannot be substituted by another interpretation by this Court.

27. In my view, the learned arbitrator has rendered a reasoned award after considering all the relevant facts and the evidence. I do not find any infirmity in the impugned award. The petition is devoid of merit and is accordingly dismissed. There shall be no order as to costs.

(R.D. DHANUKA, J.)