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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 9th May, 2018

+ O.M.P. (COMM) 203/2018

THE DEPUTY SECRETARY (HOSPITALS), MINISTRY OF
HEALTH AND FAMILY WELFARE, NIRMAN BHAWAN, NEW
DELHI 110001 Petitioner

Through: Mr. Chetan Sharma, Sr.Adv. with
Mr.Saurabh Misra, Mr.Vivek Tyagi, Mr.Amit
Gupta, Mr.Abhishek Singh, Advs.

versus

M/S BHAYANA BUILDERS PVT LTD Respondent
Through: Mr.Saurabh Kirpal, Mr.Yash Vardhan,
Ms.Riya Singh, Ms.Shriya Misra, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 6418/2018

Exemption allowed subject to all just exceptions.

CAV 443/2018

As counsel for the respondent appears on advance notice,
caveat stands discharged.

**IA 6419/2018 (condonation of 60 days delay in re-filing of the
petition)**

This is an application seeking condonation of 60 days' delay in
re-filing the petition.

Having perused the contents of the application, the delay in re-filing of the petition is condoned.

The application stands allowed.

O.M.P. (COMM) 203/2018 & IA 6417/2018

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Interim Arbitral Award dated 15th November, 2017 passed by the Sole Arbitrator confined to claim nos.5 and 9 of the respondent.
2. The disputes between the parties are in relation to the award of work for construction of Sports Injury Centre at Safdarjung Hospital, New Delhi under Agreement dated 25th June, 2009 executed between the parties. Claim No.5 of the respondent is towards amount withheld by way of deduction for extension of completion time by the petitioner. The Arbitrator, after considering the entire evidence led before her, has concluded that it was the petitioner who was responsible for causing the delay and, therefore, was not entitled to retain the amount of Rs.50 lacs on account of grant of extension.
3. Learned senior counsel for the petitioner submits that there was an admitted delay on behalf of the respondent in achieving the revised milestone Nos.5 and 7 as mentioned in the contract. In terms of Annexure D to the tender documents, the petitioner was entitled to levy liquidated damages @Rs.10 lacs per week or part thereof in case of failure of the respondent to make each of the milestones. As the amount had been retained in terms of the Agreement, in the

submission of the learned senior counsel for the petitioner, the Arbitrator has erred in ordering refund of the same in favour of the respondent.

4. I have considered the submission of the learned senior counsel for the petitioner, however, I find no merit in the same.

5. The Arbitrator has discussed this issue in detail in paragraphs 37 and 38 of the Impugned Award and has held as under:-

“37. *He says that the Claimant failed to achieve the revised milestone no. 5 and 7. The milestone 5 was achieved on 31.08.2010 instead of 06.08.2010 and milestone no.7 was achieved on 31.08.2010 instead of 27.08.2010. However, he says that other milestones including milestones no. 6, 8 and 9 were achieved. According to his testimony a sum of Rs.40,00,000 was deducted for delay in achieving the milestone no. 5 and Rs. 10,00,000 for delay in achieving the milestone no. 7 (Exhibit RW1/3). Thus the liquidated damages are being justified on the excuse of the Claimant's failure to achieve the milestone no. 5 and 7 as stated above. For claiming liquidated damages the Respondent has to show that some damage has been suffered. Here Respondent is unable to show any damage suffered because subsequent milestone no. 6 and 8 were achieved on time.*

38. *In the statement of defence the Respondent justifies the withholding of sum of Rs.50,00,000/- as liquidate damages on account of delay in completion of the contract. As has been found in the above discussion, the Respondent was responsible for causing the delays and therefore, the respondent cannot stake any claim for liquidated damages on account of the Claimant's failure to achieve the target set by the contract. There can be no justification for claiming the sum of Rs.50,00,000/- either on account of grant of extension of time till 27.09.2010 or on account of liquidated damages for failure to achieve the milestones no. 5 and 7. The Claim no. 5,*

therefore, has to be allowed. This claim is for a sum of Rs.50,00,000/- along with interest.”

(emphasis supplied)

6. As noted by the Arbitrator, the petitioner was unable to show any damage suffered because of the respondent not achieving milestones 5 and 7. The Arbitrator further noted that the subsequent milestone Nos. 6 and 8 were achieved by the respondent on time. The Arbitrator further noted that as the delay in completion of the work was due to reasons attributable to the petitioner, the petitioner was not entitled to levy any liquidated damages on the respondent. I have no reason to disagree with such findings of fact. In ***Associate Builders vs. Delhi Development Authority***, (2015) 3 SCC 49, the Supreme Court has cautioned the Courts exercising powers under Section 34 of the Act in the following manner:-

“33. 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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your

head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

7. In view of the above, as the Arbitrator has concluded that the petitioner was in default and was responsible for the delay in completion of the work, the petitioner certainly cannot take benefit of its own wrong and impose liquidated damages on the respondent on mere allegation of the respondent not achieving milestone Nos. 5 and

7. I, therefore, find no infirmity in the Impugned Award on this aspect.

8. Learned senior counsel for the petitioner further contended that the Arbitrator has granted interest on interest on the amounts awarded for Claim nos. 5 and 9. He submits that the Arbitrator has calculated the interest till the filing of the Statement of Claim and has thereafter again granted interest on the amount arrived at. I do not find any merit in the said submission.

9. The Supreme Court in *Hyder Consulting (UK) Limited vs. Governor, State of Orissa* (2015) 2 SCC 189, has clarified as under:

“13. Thus, it is apparent that vide clause (a) of sub-section (7) of Section 31 of the Act, Parliament intended that an award for payment of money may be inclusive of interest, and the “sum” of the principal amount plus interest may be directed to be paid by the Arbitral Tribunal for the pre-award period. Thereupon, the Arbitral Tribunal may direct interest to be paid on such “sum” for the post-award period vide clause (b) of sub-section (7) of Section 31 of the Act, at which stage the amount would be the sum arrived at after the merging of interest with the principal; the two components having lost their separate identities.

14. In fact this is a case where the language of sub-section (7) clauses (a) and (b) is so plain and unambiguous that no question of construction of a statutory provision arises. The language itself provides that in the sum for which an award is made, interest may be included for the pre-award period and that for the post-award period interest up to the rate of eighteen per cent per annum may be awarded on such sum directed to be paid by the arbitral award.

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21. In the result, I am of the view that S.L. Arora case is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the award on the

substantive claim does not refer to interest pendent lite awarded on the “sum directed to be paid upon award” and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by parliament in plain language.

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26. *Section 31(7)(a) of the Act deals with grant of pre-award interest while clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, the longer would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance with the award. Pre-award interest is at the discretion of the Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of the statute—the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act i.e. 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.*

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28. *Therefore, for the purposes of an award, there is no distinction between a “sum” with interest, and a “sum” without interest. Once the interest is “included in the sum” for which the award is made, the original sum and the interest component cannot be segregated and be seen independent of each other. The interest component then loses its character of an “interest” and takes the colour of “sum” for which the*

award is made.

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30. Therefore, I am inclined to hold that the amount award under Section 31(7)(a) of the Act, whether with interest or without interest, constitutes a “sum” for which the award is made.

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32. Therefore, in my view, the expression “grant of interest on interest” while exercising the power under Section 31(7) of the Act does not arise and, therefore, the Arbitral Tribunal is well empowered to grant interest even in the absence of clause in the contract for grant of interest.”

10. In view of the above, the submission made by the learned senior counsel for the petitioner cannot be accepted.

11. As far as claim no.9 is concerned, learned senior counsel for the petitioner submits that there is no clause in the Agreement which entitles the respondent/contractor to claim additional cost incurred by it during the extended period of construction and, therefore, the Arbitrator has erred in awarding claim no.9 in favour of the respondent. He further submits that the respondent had not proved any loss suffered before the Arbitrator and, therefore, could not have been awarded amounts for claim no.9.

12. I am unable to agree with the submissions made by the learned senior counsel for the petitioner. The Arbitrator, after relying upon various pronouncements of the Supreme Court on the issue of escalation, has held that as there is no clause in the agreement which prohibits grant of escalation in favour of the respondent, if the contractor is made to work beyond the period of the contract, then the Arbitral Tribunal shall have the power to grant compensation to a

contractor for the loss suffered by him for any act of the employer, in this case, the petitioner. The Arbitrator further holds that as the construction could not be completed in time due to reasons attributable to the petitioner, the respondent was entitled to the claim of escalation. I agree with the findings of the Arbitrator in this regard.

13. As far as the quantification of damages is concerned, the Arbitrator has taken into consideration cost indexes published by CPWD as on the date the bid was made and as was applicable during the extended period of the work. This cannot be said to be perverse. In *Associate Builders* (supra), the Supreme Court has held that this Court in exercise of its powers under Section 34 of the Act will not interfere merely because it would have preferred another method of calculating damages or taken another view on the calculation of the damages. I, therefore, do not find any merit in the challenge made to the Impugned Award on this ground.

14. Learned senior counsel for the petitioner further submitted that the Arbitrator has awarded interest in favour of the respondent taking the date of submission of the final bill as 22nd September, 2011 and granted interest from 1st January, 2012. He further submits that the date of the final bill, in fact, is June, 2012. The learned senior counsel for the petitioner submits that as the final bill was based on the findings of a Committee appointed in which the respondent had also participated, the date from which interest would be payable would be three months beyond June, 2012.

15. From a reading of the Award, I do not find this issue to have been raised before the Arbitrator.

16. Learned counsel for the respondent submits that the issue whether the interest is payable from June 2012 or September, 2012 was never raised before the Arbitrator, however, without prejudice to his submission, he is agreeable if this issue is reagitated before the Arbitrator and the Award only to this extent is set aside by this Court, leaving the Arbitrator free to determine this issue afresh, including whether the final bill is deemed to have been submitted only in June 2012.

17. In view of the above, the Impugned Award, only to the limited extent in so far as it directs payment of interest for the period between 1st January, 2012 to September, 2012, is set aside and the remaining award is upheld.

18. The petition is partly allowed in the above terms with no order as to costs.

NAVIN CHAWLA, J

MAY 09, 2018
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